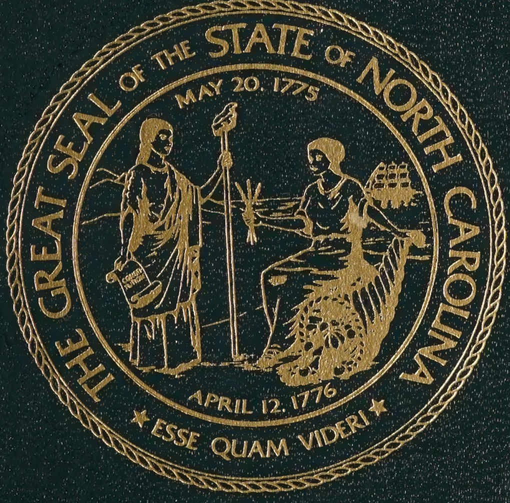
GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED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GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

Volume 8

Chapters 48A Through 55A

Prepared Under the Supervision of
The Department of Justice
of the State of North Carolina
by
the Editorial Staff of the Publisher

LexisNexis®

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4537214 (hardbound volume)
4535014 (hardbound set)
4640516 (softbound set)

ISBN 978-1-4224-5150-2 (hardbound volume)
ISBN 978-1-4224-5142-7 (hardbound set)
ISBN 978-1-4224-5140-3 (softbound set)

LexisNexis

Matthew Bender & Company, Inc.

701 East Water Street, Charlottesville, Va 22902-5389

www.lexisnexis.com

(Pub.45350) (HB)
(Pub.46405) (SB)

Preface

This volume contains the general laws of a permanent nature enacted by the General Assembly through the 2009 Regular Session that are within Chapters 48A through 55A, and brings to date the annotations included therein.

A majority of the Session Laws are made effective upon becoming law, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 60 days after the adjournment of the session" in which passed.

A ready reference index is included at the back of this volume. This index is intended to give the user a quick reference to larger bodies of statutes within this volume only. For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. For a copy of an opinion or of its headnotes, write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any suggestions they may have for improving the General Statutes to the Department, or to LexisNexis, Charlottesville, Virginia.

Roy Cooper
Attorney General

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 2009 Regular Session affecting Chapters 48A through 55A of the General Statutes.

Annotations:

This publication contains annotations taken from decisions of the North Carolina Supreme Court, decisions of the North Carolina Court of Appeals, and decisions of the appropriate federal courts posted through September 18, 2009. These cases will be printed in the following reporters:

South Eastern Reporter 2nd Series.
Federal Reporter 3rd Series.
Federal Supplement 2nd Series.
Federal Rules Decisions.
Bankruptcy Reports.
Supreme Court Reporter.

Additionally, annotations have been taken from the following sources:

North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

Abbreviations

(The abbreviations below are those found in the General Statutes that refer to prior codes.)

P.R.	Potter's Revisal (1821, 1827)
R.S.	Revised Statutes (1837)
R.C.	Revised Code (1854)
C.C.P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C.S.	Consolidated Statutes (1919, 1924)

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

December 2009

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 2009 Replacement Code to the General Statutes of North Carolina was prepared and published by LexisNexis under the supervision of the Department of Justice of the State of North Carolina.

Roy Cooper

Attorney General of North Carolina

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Chapter 48A.

Minors.

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Age of Majority.

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ARTICLE 1.

Age of Majority.

§ 48A-1. Common-law definition of "minor" abrogated.

The common-law definition of minor insofar as it pertains to the age of the minor is hereby repealed and abrogated. (1971, c. 585, s. 1; 2003-207, s. 1.)

Legal Periodicals. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

For survey of 1972 caselaw on child support and pre-Chapter 48A consent judgments, see 51 N.C.L. Rev. 1091 (1973).

CASE NOTES

"Minor" Now Refers to Age Under 18. — When this section, which repeals the common-law definition of minor, is construed with G.S. 48A-2, the effect is that wherever the term "minor," "minor child" or "minor children" is used in a statute, the statute now refers to age 18. Crouch v. Crouch, 14 N.C. App. 49, 187 S.E.2d 348, cert. denied, 281 N.C. 314, 188 S.E.2d 897 (1972).

Majority or minority is a status rather than a fixed or vested right. Shoaf v. Shoaf, 282 N.C. 287, 192 S.E.2d 299 (1972).

There is no vested property right in the personal privileges of infancy. Shoaf v. Shoaf, 282 N.C. 287, 192 S.E.2d 299 (1972).

Effect of Change from Minority to Majority. — Change from minority to majority in legal effect means that legal disabilities designed to protect the child are removed. Shoaf v. Shoaf, 282 N.C. 287, 192 S.E.2d 299 (1972).

A person who has reached his majority is entitled to the management of his own affairs and to the enjoyment of civic rights. Shoaf v. Shoaf, 282 N.C. 287, 192 S.E.2d 299 (1972).

Applied in Choate v. Choate, 15 N.C. App. 89, 189 S.E.2d 647 (1972); Taylor v. Taylor, 17 N.C. App. 720, 195 S.E.2d 355 (1973).

Cited in State v. Jackson, 280 N.C. 563, 187 S.E.2d 27 (1972); Hall v. Wake County Bd. of Elections, 280 N.C. 600, 187 S.E.2d 52 (1972); White v. White, 25 N.C. App. 150, 212 S.E.2d 511 (1975); White v. White, 289 N.C. 592, 223 S.E.2d 377 (1976); Gates v. Gates, 69 N.C. App. 421, 317 S.E.2d 402 (1984); In re Estate of Lunsford, 143 N.C. App. 646, 547 S.E.2d 483, 2001 N.C. App. LEXIS 326 (2001).

§ 48A-2. Age of minors.

A minor is any person who has not reached the age of 18 years. (1971, c. 585, s. 1; 2003-207, s. 1.)

Legal Periodicals. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

CASE NOTES

The legislature alone has power to determine the age at which one reaches his majority, becomes emancipated, and acquires the right to manage his own affairs free from parental control. Shoaf v. Shoaf, 282 N.C. 287, 192 S.E.2d 299 (1972).

"Minor" Now Refers to Age Under 18. — When G.S. 48A-1, which repeals the common-law definition of minor, is construed with this section, the effect is that wherever the term "minor," "minor child" or "minor children" is used in a statute, the statute now refers to age 18. Crouch v. Crouch, 14 N.C. App. 49, 187 S.E.2d 348, cert. denied, 281 N.C. 314, 188 S.E.2d 897 (1972).

Contract by Minor for Automobile Liability Insurance. — Under this section and by negative implication of G.S. 20-279.1, a person under the age of 18 is a minor for purposes of his contracts relating to automobile liability insurance. As such, if the contract of a minor for automobile liability insurance is not considered a necessity, it may be avoided by him at any time before he reaches his majority or within a reasonable time thereafter. Nationwide Mut. Ins. Co. v. Chantos, 25 N.C. App. 482, 214 S.E.2d 438, cert. denied, 287 N.C. 465, 215 S.E.2d 624 (1975).

Legal Obligation of Support. — After the enactment of this section, parent's legal obligation to support his child ends at age 18, absent a showing that the child is insolvent, unmarried and physically or mentally incapable of earning a livelihood. Nolan v. Nolan, 20 N.C. App. 550, 202 S.E.2d 344, cert. denied, 285 N.C. 234, 204 S.E.2d 24 (1974); Ramsey v. Todd, 25 N.C. App. 605, 214 S.E.2d 307 (1975).

Order, etc., Providing for Support Until Age of Majority, etc. — Nothing else showing, where an order of the court for support entered prior to the effective date of this section provides for support of the children until the age of majority, maturity or emancipation, it has been interpreted, in light of this section, to impose the legal obligation of support only to the child's eighteenth birthday. Harding v. Harding, 29 N.C. App. 633, 225 S.E.2d 590, cert. denied, 290 N.C. 661, 228 S.E.2d 452 (1976).

A father's legal liability for the support of his son, who was born on January 13, 1953, by reason of a consent judgment dated June 11, 1970, providing that payments for child support shall continue until such time as said minor child reaches his majority or is otherwise emancipated, does not continue until the son becomes 21 years of age. Shoaf v. Shoaf, 282 N.C. 287, 192 S.E.2d 299 (1972).

A consent judgment providing for child support payments until majority or emancipation, entered into when the common-law definition controlled, could not be enforced if the child had reached 18 after the effective date of this Chapter. Gates v. Gates, 69 N.C. App. 421, 317 S.E.2d 402 (1984), aff'd, 312 N.C. 620, 323 S.E.2d 920 (1985).

Where judgment did not specify the duration of time that plaintiff would have to support his children, it would appear that his obligation would continue for the period provided by law. Ramsey v. Todd, 25 N.C. App. 605, 214 S.E.2d 307 (1975).

A parent may by contract assume an obligation to his child greater than the law otherwise imposes, and by contract bind himself to support his child after emancipation and past majority. Carpenter v. Carpenter, 25 N.C. App. 235, 212 S.E.2d 911 (1975).

As to the right of parents to assume contractual obligations to provide more support than the law requires, see Gates v. Gates, 69 N.C. App. 421, 317 S.E.2d 402 (1984), aff'd, 312 N.C. 620, 323 S.E.2d 920 (1985).

And Court May Enforce Consent Order for Child Support Beyond Age of Majority. — A court may enforce by contempt proceedings its order, entered by consent, that child support payments be made beyond the time for which there is a duty to provide support. White v. White, 289 N.C. 592, 223 S.E.2d 377 (1976).

Procedure for Changing Support When Child Reaches Age 18. — A husband had no authority to unilaterally attempt his own modification of child support payments upon one of his children reaching the age of 18, and being no longer a "minor" under this section, even though the support order directed the husband to pay support for "his two minor children...." The proper procedure for the husband to follow would have been to apply to the trial court for relief pursuant to G.S. 50-13.7. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Applied in Shaw v. Shaw, 25 N.C. App. 53, 212 S.E.2d 222 (1975); Loer v. Loer, 31 N.C. App. 150, 228 S.E.2d 473 (1976).

Cited in State v. Jackson, 280 N.C. 563, 187 S.E.2d 27 (1972); Hall v. Wake County Bd. of Elections, 280 N.C. 600, 187 S.E.2d 52 (1972); White v. White, 25 N.C. App. 150, 212 S.E.2d 511 (1975); Shaffner v. Shaffner, 36 N.C. App. 586, 244 S.E.2d 444 (1978); Pieper v. Pieper, 90 N.C. App. 405, 368 S.E.2d 422 (1988); Williams

v. Williams, 97 N.C. App. 118, 387 S.E.2d 217 (1990); Ballard v. Weast, 121 N.C. App. 391, 465 S.E.2d 565 (1996); In re Estate of Lunsford, 143 N.C. App. 646, 547 S.E.2d 483, 2001 N.C. App. LEXIS 326 (2001).

OPINIONS OF ATTORNEY GENERAL

"Minor" Includes "Infant" Within Context of Requirement That Guardianships Be Maintained for Infants (to Age 18). — See opinion of Attorney General to Mr. Fred P. Parker, Jr., 41 N.C.A.G. 450 (1971).

Person 18 Years Old May Be Deputy or Assistant Register of Deeds. — See opinion of Attorney General to Christine William Davis, 41 N.C.A.G. 476 (1971).

§ 48A-3. Statute of limitations; applicability.

For purposes of determining the applicability of the statute of limitations which has been tolled because of minority or for purposes of determining the applicable period of time for disaffirmance of a contract of a minor upon reaching majority, because of a change in applicable law occasioned by enactment of this Chapter or Chapter 1231 of the 1971 Session Laws, the following rules shall apply:

(1) For those persons who were 21 on the effective date of applicable law, limitations shall apply as they would prior to amendment;

(2) For those persons 18 years of age but not 21 on the effective date of applicable law, any time periods for disaffirmance or application of the statute of limitations shall run from the effective date of this Chapter, to wit, July 5, 1971.

(3) For those persons not yet 18, any time periods for disaffirmance or application of the statute of limitations shall run from the person's reaching age 18. (1971, c. 1231, s. 3; 2003-207, s. 1.)

Legal Periodicals. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

§§ 48A-4 through 48A-10: Reserved for future codification purposes.

ARTICLE 2.

Certain Contracts of Minors.

§ 48A-11. Applicability.

This Article applies to any of the following contracts entered into between an unemancipated minor and any third party or parties:

(1) A contract pursuant to which a person is employed or agrees to render artistic or creative services, either directly or through a third party, including, but not limited to, a personal services corporation or loan-out company. As used in this Article, the term "artistic or creative services" includes, but is not limited to, services as an actor, actress, dancer, musician, comedian, singer, stunt person, voice-over artist, or other performer or entertainer, or as a songwriter, musical producer or arranger, writer, director, producer, production executive, choreographer, composer, conductor, or designer.

(2) A contract pursuant to which a person agrees to purchase, or otherwise secure, sell, lease, license, or otherwise dispose of literary, musical, or dramatic properties, or use of a person's likeness, voice

recording, performance, or story of or incidents in his or her life, either tangible or intangible, or any rights therein for use in motion pictures, television, the production of sound recordings in any format now known or hereafter devised, the legitimate or living stage, or otherwise in the entertainment field.

(3) A contract pursuant to which a person is employed or agrees to render services as a participant or player in a sport.

(4) Where a minor renders services as an extra, background performer, or in a similar capacity, through an agency or service that provides one or more performers for a fee, such as a casting agency, the agency or service shall be considered the minor's employer for the purposes of this Article. (2003-207, s. 2.)

§ 48A-12. No disaffirmance if approved by superior court.

(a) A contract, otherwise valid, of a type described in G.S. 48A-11, entered into during minority, cannot be disaffirmed on that ground either during the minority of the person entering into the contract, or at any time thereafter, if the contract has been approved by the superior court in any county in which the minor resides or is employed or in which any party to the contract has its principal office in this State for the transaction of business.

(b) Approval of the court may be given on petition of any party to the contract, after reasonable notice to all other parties to the contract as is fixed by the court, with opportunity to the other parties to appear and be heard.

(c) Approval of the court given under this section extends to the whole of the contract and all of its terms and provisions, including, but not limited to, any optional or conditional provisions contained in the contract for extension, prolongation, or termination of the term of the contract.

(d) For the purposes of any proceeding under this Article, a parent or legal guardian, as the case may be, entitled to the physical custody, care, and control of the minor at the time of the proceeding shall be considered the minor's guardian ad litem for the proceeding, unless the court shall determine that appointment of a different individual as guardian ad litem is required in the best interests of the minor. (2003-207, s. 2.)

§ 48A-13. Copies of certain documents to be provided.

A parent or guardian, as the case may be, entitled to the physical custody, care, and control of a minor, who enters into a contract of a type described in G.S. 48A-11 shall provide a certified copy of the minor's birth certificate indicating the minor's minority to the other party or parties to the contract and in addition, in the case of a guardian, a certified copy of the court document appointing the person as the minor's legal guardian. (2003-207, s. 2.)

Editor's Note. — This section was originally enacted as G.S. 48A-12.1. It has been renumbered as G.S. 48A-13 at the direction of the Revisor of Statutes.

§ 48A-14. Financial safeguards in court orders approving contracts.

(a) Notwithstanding any other statute, in an order approving a minor's contract of a type described in G.S. 48A-11, the court shall require that fifteen percent (15%) of the minor's gross earnings pursuant to the contract be set aside by the minor's employer in trust, in an account or other savings plan, and preserved for the benefit of the minor in accordance with G.S. 48A-14. The court may also require that more than fifteen percent (15%) of the minor's gross earnings be set aside in trust, in an account or other savings plan, and preserved for the benefit of the minor in accordance with G.S. 48A-14, upon request of the minor's parent or legal guardian, or the minor, through his or her guardian ad litem.

(b) The court shall require that at least one parent or legal guardian, as the case may be, entitled to the physical custody, care, and control of the minor at the time the order is issued be appointed as trustee of the funds ordered to be set aside in trust for the benefit of the minor, unless the court shall determine that appointment of a different individual, individuals, entity, or entities as trustee or trustees is required in the best interest of the minor.

(c) The trustee or trustees of the funds ordered to be set aside in trust shall promptly provide the minor's employer with a true and accurate photocopy of the trustee's statement pursuant to G.S. 48A-14(c).

(d) The minor's employer shall deposit or disburse the funds as required by the order within 15 business days of receiving the order and receiving the trustee's statement pursuant to G.S. 48A-14 and thereafter as funds might be received. Notwithstanding any other statute, pending receipt of the trustee's statement, the minor's employer shall hold for the benefit of the minor the percentage ordered by the court of the minor's gross earnings pursuant to the contract.

(e) When making the initial deposit of funds pursuant to the order, the minor's employer shall provide the financial institution with a copy of the order.

(f) Once the minor's employer deposits the set-aside funds pursuant to G.S. 48A-14, in trust, in an account or other savings plan, the minor's employer shall have no further obligation or duty to monitor or account for the funds. The trustee or trustees of the trust shall be the only individual, individuals, entity, or entities with the obligation or duty to monitor and account for those funds once they have been deposited by the minor's employer. The trustee or trustees shall do an annual accounting of the funds held in trust, in an account or other savings plan, in accordance with Article 21 of Chapter 28A of the General Statutes.

(g) The court shall have continuing jurisdiction over the trust established pursuant to the order and may at any time, upon petition of the parent or legal guardian, the minor, through his or her guardian ad litem, or the trustee or trustees, on good cause shown, order that the trust be amended or terminated, notwithstanding the provisions of the declaration of trust. An order amending or terminating a trust may be made only after reasonable notice to the beneficiary, to the parent or guardian, if any, and to the trustee or trustees of the funds if the beneficiary is then a minor, with opportunity for all parties to appear and be heard.

(h) The trustee or trustees of the funds ordered to be set aside shall promptly notify the minor's employer in writing of any change in facts that affect the employer's obligation or ability to set aside the funds in accordance with the order, including, but not limited to, a change of financial institution or account number, or the existence of a new or amended order issued pursuant to subsection (g) of this section amending or terminating the employer's obligations under the original order. The written notification shall include the information set forth in subsection (c) of this section and shall be accompanied by a true and accurate photocopy of the new or amended order. (2003-207, s. 2.)

Editor's Note. — This section was originally enacted as G.S. 48A-13. It has been renumbered as G.S. 48A-14 at the direction of the Revisor of Statutes.

§ 48A-15. Financial safeguards when no court order.

(a) Notwithstanding any other statute, for any minor's contract of a type described in G.S. 48A-11 that is not being submitted for approval by the court pursuant to G.S. 48A-12, or for which the court has issued a final order denying approval, fifteen percent (15%) of the minor's gross earnings pursuant to the contract shall be set aside by the minor's employer in trust, in an account or other savings plan, and preserved for the benefit of the minor in accordance with G.S. 48A-14. At least one parent or legal guardian, as the case may be, entitled to the physical custody, care, and control of the minor, shall be the trustee of the funds set aside for the benefit of the minor, unless the court, upon petition by the parent or legal guardian, the minor, through his or her guardian ad litem, or the trustee or trustees of the trust, shall determine that appointment of a different individual, individuals, entity, or entities as trustee or trustees is required in the best interest of the minor.

(b) A parent or guardian, as the case may be, entitled to the physical custody, care, and control of the minor shall promptly provide the minor's employer with a true and accurate photocopy of the trustee's statement pursuant to G.S. 48A-14(c) and in addition, in the case of a guardian, a certified copy of the court document appointing the person as the minor's legal guardian.

(c) The minor's employer shall deposit fifteen percent (15%) of the minor's gross earnings pursuant to the contract within 15 business days of receiving the trustee's statement pursuant to G.S. 48A-14(c), or if the court denies approval of the contract, within 15 business days of receiving a final order denying approval of the contract and thereafter as funds might be received. Notwithstanding any other statute, pending receipt of the trustee's statement or the final court order, the minor's employer shall hold for the benefit of the minor the fifteen percent (15%) of the minor's gross earnings pursuant to the contract.

(d) Once the minor's employer deposits the set- aside funds in trust, in an account or other savings plan pursuant to G.S. 48A-14, the minor's employer shall have no further obligation or duty to monitor or account for the funds. The trustee or trustees of the trust shall be the only individual, individuals, entity, or entities with the obligation or duty to monitor and account for those funds once they have been deposited by the minor's employer. The trustee or trustees shall do an annual accounting of the funds held in trust, in an account or other savings plan, in accordance with G.S. 28A-21-1, et seq.

(e) Upon petition of the parent or legal guardian, the minor, through his or her guardian ad litem, or the trustee or trustees of the trust, to the superior court in any county in which the minor resides or in which the trust is established, the court may at any time, on good cause shown, order that the trust be amended or terminated, notwithstanding the provisions of the declaration of trust. An order amending or terminating a trust may be made only after reasonable notice to the beneficiary, to the parent or guardian, if any, and to the trustee or trustees of the funds if the beneficiary is then a minor, with opportunity for all parties to appear and be heard.

(f) A parent or guardian, as the case may be, entitled to the physical custody, care, and control of the minor shall promptly notify the minor's employer in writing of any change in facts that affect the employer's obligation or ability to set aside funds for the benefit of the minor in accordance with this section, including, but not limited to, a change of financial institution or account number, or the existence of a new or amended order issued pursuant to subsection (e) of this section amending or terminating the employer's obligations under this section. The written notification shall be accompanied by a true and accurate photocopy of the trustee's statement and attachments pursuant to subdivision (c) of G.S. 48A-14, or a true and accurate photocopy of the new or amended order.

(g) Where a parent or guardian, as the case may be, is entitled to the physical custody, care, and control of a minor who enters into a contract of a type described in G.S. 48A-11, the relationship between the parent or guardian, as the case may be, and the minor is a fiduciary relationship that is governed by the law of trusts, whether or not a court has issued a formal order to that effect. The parent or guardian, as the case may be, acting in his or her fiduciary relationship, shall, with the earnings and accumulations of the minor under the contract, pay all liabilities incurred by the minor under the contract, including, but not limited to, payments for taxes on all earnings, including taxes on the amounts set aside under this section or G.S. 48A-13 and payments for personal or professional services rendered to the minor or the business related to the contract. Nothing in this subsection shall be construed to alter any other existing responsibilities of a parent or legal guardian to provide for the support of a minor child.

(h) With respect to contracts pursuant to which a person is employed to render services as a musician, singer, songwriter, musical producer, or arranger only, "gross earnings" for purposes of this Article means the amount paid directly to the minor pursuant to the contract, including the payment of any advances to the minor pursuant to the contract, but excluding deductions to offset those advances or other expenses incurred by the employer pursuant to the contract. (2003-207, s. 2.)

Editor's Note. — This section was originally enacted as G.S. 48A-13.1. It has been renumbered as G.S. 48A-15 at the direction of the Revisor of Statutes.

§ 48A-16. Trust to be established.

(a) The trustee or trustees shall establish a trust pursuant to this section at a bank, savings and loan institution, credit union, brokerage firm, or company registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, et seq., unless a similar trust has been previously established, for the purpose of preserving for the benefit of the minor the portion of the minor's gross earnings pursuant to G.S. 48A-13(a) or pursuant to G.S. 48A-13.1(a). The trustee or trustees shall establish the trust pursuant to this section within seven business days after the minor's contract is signed by the minor and the employer.

(b) Except as otherwise provided in this section, prior to the date on which the beneficiary of the trust attains the age of 18 years or the issuance of a declaration of emancipation of the minor under Article 35 of Chapter 7B of the General Statutes, no withdrawal by the beneficiary or any other individual, individuals, entity, or entities may be made of funds on deposit in trust without written order of the superior court pursuant to G.S. 48A-13(g) or G.S. 48A-13.1(e). Upon reaching the age of 18 years, the beneficiary may withdraw the funds on deposit in trust only after providing a certified copy of the beneficiary's birth certificate to the financial institution where the trust is located.

(c) The trustee or trustees shall, within 10 business days after the minor's contract is signed by the minor and the employer, prepare a written statement under penalty of perjury that shall include the name, address, and telephone number of the financial institution, the name of the account, the number of the account, the name of the minor beneficiary, the name of the trustee or trustees of the account, and any additional information needed by the minor's employer to deposit into the account the portion of the minor's gross earnings prescribed by G.S. 48A-13(a) or G.S. 48A-13.1(a). The trustee or trustees shall attach to the written statement a true and accurate photocopy of any information received from the financial institution confirming the creation of the account, such as an account agreement, account terms, passbook, or other similar writings.

(d) If the trust is established in the United States, it shall be established either with a financial institution that is and remains insured at all times by the Federal Deposit Insurance Corporation, the Securities Investor Protection Corporation, or the National Credit Union Share Insurance Fund or their respective successors, or with a company that is and remains registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, et seq. If the trust is established outside the United States, the financial institution shall be an international banking corporation, as defined in G.S. 53-232.2. The trustee or trustees of the trust shall be the only individual, individuals, entity, or entities with the obligation or duty to ensure that the funds remain in trust, in an account or other savings plan, in a financial institution insured in accordance with this section, or with a company that is and remains registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, et seq., as authorized by this section.

(e) Upon application by the trustee or trustees to the financial institution or company where the trust is held, the trust funds may be handled by the trustee or trustees in any of the following methods:

(1) The trustee or trustees may transfer funds to another account or other savings plan at the same financial institution or company, provided that the funds transferred shall continue to be held in trust and subject to this section.

(2) The trustee or trustees may transfer funds to another financial institution or company, provided that the funds transferred shall continue to be held in trust and subject to this Article and that the trustee or trustees have provided written notification to the financial institution or company to which the funds will be transferred that the funds are subject to this section and written notice of the requirements of this Article.

(3) The trustee or trustees may use all or a part of the funds to purchase, in the name of and for the benefit of the minor:

a. Investment funds offered by a company registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, et seq., provided that if the underlying investments are equity securities, the investment fund is a broad-based index fund or invests broadly across the domestic or a foreign regional economy, is not a sector fund, and has assets under management of at least two hundred fifty million dollars ($250,000,000); or

b. Government securities and bonds, certificates of deposit, money market instruments, money market accounts, or mutual funds investing solely in those government securities and bonds, certificates, instruments, and accounts that are available at the financial institution where the trust fund or other savings plan is held, provided that the funds remain in trust at a financial institution insured by the Federal Deposit Insurance Corporation, the Securities Investor Protection Corporation, or the National Credit Union Share Insurance Fund if within the United States or maintained in an international banking corporation, as defined in G.S. 53-232.2, if not within the United States; provided that those purchases have a maturity date on or before the date upon which the minor will attain the age of 18 years, and provided further that any proceeds accruing from those purchases be redeposited into that account or accounts or used to further purchase any of those or similar securities, bonds, certificates, instruments, funds, or accounts. (2003-207, s. 2.)

Editor's Note. — This section was originally enacted as G.S. 48A-14. It has been renumbered as G.S. 48A-16 at the direction of the Revisor of Statutes.

§ 48A-17. Talent agency contracts.

(a) As used in this Article, the term "talent agency" means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.

(b) As used in this Article, the term "artists" means actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television, and other entertainment enterprises. (2003-207, s. 2.)

Editor's Note. — This section was originally enacted as G.S. 48A-15. It has been renumbered as G.S. 48A-17 at the direction of the Revisor of Statutes.

§ 48A-18. Disaffirmance of talent agency contracts.

A minor cannot disaffirm a contract, otherwise valid, entered into during minority, either during the actual minority of the minor entering into the contract or at any time thereafter, with a talent agency as defined in G.S. 48A-15, to secure engagements to render artistic or creative services in motion pictures, television, the production of phonograph records, the legitimate or living stage, or otherwise in the entertainment field including, but without being limited to, services as an actor, actress, dancer, musician, comedian, singer, or other performer or entertainer, or as a writer, director, producer, production executive, choreographer, composer, conductor, or designer, where the contract has been approved by the superior court of the county where such minor resides or is employed. This approval may be given by the superior court on the petition of either party to the contract after reasonable notice to the other party thereto as may be fixed by said court, with opportunity to the other party to appear and be heard. (2003-207, s. 2.)

Editor's Note. — This section was originally enacted as G.S. 48A-16. It has been renumbered as G.S. 48A-18 at the direction of the Revisor of Statutes.

Chapter 49.

Bastardy.

Article 1.

Support of Illegitimate Children.

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49-2. Nonsupport of illegitimate child by parents made misdemeanor.
49-3. Place of birth of child no consideration.
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49-13.1. [Repealed.]

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49-14. Civil action to establish paternity.
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ARTICLE 1.

Support of Illegitimate Children.

§ 49-1. Title.

This Article shall be referred to as "An act concerning the support of children of parents not married to each other." (1933, c. 228, s. 11.)

Cross References. — As to the duty of special county attorneys to assist with the preparation and prosecution of proceedings authorized by this Chapter, see G.S. 108A-18(a)(5).

Legal Periodicals. — For comment on this Article, see 28 N.C.L. Rev. 119 (1950).

For note on illegitimacy in North Carolina, see 46 N.C.L. Rev. 813 (1968).

For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

For article, "Surrogate Parenthood: Finding a North Carolina Solution," see 18 N.C. Cent. L.J. 1 (1989).

For casenote: "The Established Standard for Fathers Who Have Acknowledged Paternity and Who Are Seeking Custody of Their Illegitimate Child(ren): Rosero v. Blake, 357 N.C. 193 (2003)," see 26 N.C. Cent. L.J. 116 (2003).

CASE NOTES

"Parents". — The word "parents" in this section and the word "parent" in G.S. 49-2 relate to the rights and duties of parents in respect to their children and are in pari materia. Dellinger v. Bollinger, 242 N.C. 696, 89 S.E.2d 592 (1955).

Defendants' Plea of Guilty to Criminal Charge of Nonsupport Established Paternity. — Court of Appeals determination, as to whether defendant's 1974 plea of guilty to criminal charge of nonsupport must be given collateral estoppel effect, was unnecessary; uncontroverted evidence of defendant's plea of guilty to a criminal charge of nonsupport of minor child was sufficient to establish paternity so as to bring defendant within the definition of "responsible parent" under G.S. 110-129. Wilkes County ex rel. Child Support Enforcement

Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

Cited in State v. Dill, 224 N.C. 57, 29 S.E.2d 145 (1944); State v. Sharpe, 234 N.C. 154, 66 S.E.2d 655 (1951); Wake County ex rel Estate of Lucas v. Jarrett, 55 N.C. App. 185, 284 S.E.2d 711 (1981); Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984);

Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41, 2003 N.C. LEXIS 605 (2003).

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor.

Any parent who willfully neglects or who refuses to provide adequate support and maintain his or her illegitimate child shall be guilty of a Class 2 misdemeanor. A child within the meaning of this Article shall be any person less than 18 years of age and any person whom either parent might be required under the laws of North Carolina to support and maintain if such child were the legitimate child of such parent. (1933, c. 228, s. 1; 1937, c. 432, s. 1; 1939, c. 217, ss. 1, 2; 1951, c. 154, s. 1; 1977, c. 3, s. 1; 1993, c. 539, s. 414; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to competency of blood tests in determining issue of parentage, see G.S. 8-50.1 and G.S. 49-7. As to competency of presumed father or mother to testify where paternity is at issue, see G.S. 8-57.2. For criminal provisions relating to protection of the family, see G.S. 14-322 et seq. For provision as to when the offense of failure to support one's illegitimate child is deemed committed in this State, see G.S. 14-325.1.

Legal Periodicals. — As to criminal nature of proceedings and extradition of defendant therein, see 11 N.C.L. Rev. 191 (1933).

As to application of Article to both father and mother, see 11 N.C.L. Rev. 205 (1933).

For note concerning this Chapter, see 22 N.C.L. Rev. 250 (1944).

For discussion of problems arising under this Article, see 26 N.C.L. Rev. 305 (1948).

CASE NOTES

I. In General.
II. Elements of Offense.
III. Affidavit, Warrant and Indictment.
IV. Evidence and Testimony.
V. Instructions, Submission to Jury, and Verdict.

I. IN GENERAL.

Editor's Note. *— Some of the cases cited below were decided under the bastardy law as it stood prior to its revision by Public Laws 1933, c. 228.*

Constitutionality. — This section does not violate due process of law or impose imprisonment but by the law of the land. State v. Spillman, 210 N.C. 271, 186 S.E. 322 (1936).

Limitation on Prosecutions for Failure to Support Illegitimate Children Upheld. — The three-year statute of limitations contained in G.S. 49-4(1) for prosecutions under this section does not violate the equal protection clause of the federal Constitution on grounds that it prescribes a limitations period for the prosecution of persons who willfully fail to support their illegitimate children, while there is no limitations period for the prosecution under G.S. 14-322(d) of persons who willfully fail to support their legitimate children. State v. Beasley, 57 N.C. App. 208, 290 S.E.2d 730, appeal dismissed and cert. denied, 306 N.C. 559, 294 S.E.2d 225 (1982).

For a history of this section, see State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956).

As to applicability of former law to married women, see Wilkie v. West, 5 N.C. 319 (1809); State v. Pettaway, 10 N.C. 623 (1825); State v. Wilson, 32 N.C. 131 (1849); State v. Allison, 61 N.C. 346 (1867); State v. Liles, 134 N.C. 735, 47 S.E. 750 (1904).

"Parent". — The word "parent" in this section and the word "parents" in G.S. 49-1 relate to the rights and duties of parents in respect to their children, and are in pari materia. Dellinger v. Bollinger, 242 N.C. 696, 89 S.E.2d 592 (1955).

Purpose. — The object of the Bastardy Act was to shift the burden of maintaining the child from the innocent many to the guilty one. State v. Roberts, 32 N.C. 350 (1849).

The sole aim of the proceeding is to ascertain the paternity of the child, to impose upon the father the burden of its support, such as he would incur if it were his lawful instead of his illegitimate offspring, and to save the county the expense of the child's maintenance. State v. Collins, 85 N.C. 511 (1881). See also, State v. Robeson, 24 N.C. 46 (1841); State v. Brown, 46 N.C. 129 (1853); Ward v. Bell, 52 N.C. 79 (1859); State ex rel. Clements v. Durham's Adm'rs, 52 N.C. 100 (1859).

The primary purpose of prosecution under the provisions of this section is to insure that the parent does not willfully neglect or refuse to support his or her illegitimate child. State v. Green, 8 N.C. App. 234, 174 S.E.2d 8, aff'd, 277 N.C. 188, 176 S.E.2d 756 (1970).

The purpose of this section is not to confer rights upon either the mother or the father, but to protect the child and to protect the State against the child's becoming a public charge. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

This Article is not primarily to benefit illegitimate children, but to prevent them from becoming public charges. Jolly v. Queen, 264 N.C. 711, 142 S.E.2d 592 (1965).

The duty of a putative father to support his illegitimate child was not created primarily for the benefit of the child. The legislation is social in nature and was enacted to prevent illegitimate children from becoming public charges. The benefit to the child is incidental. Such rights as it may have must be enforced under this section and in accordance with the procedure therein prescribed. Allen v. Hunnicutt, 230 N.C. 49, 52 S.E.2d 18 (1949).

Section Renders Moral Obligation Legal and Enforceable. — At common law, the father of an illegitimate child was under no legal obligation to support it. However, the father of an illegitimate child is under a natural and moral duty to support the child. This section makes this moral obligation of the father legal and enforceable, and our courts should enforce it where the father is subject to their jurisdiction. State v. Tickle, 238 N.C. 206, 77 S.E.2d 632 (1953), cert. denied, 346 U.S. 938, 74 S. Ct. 378, 98 L. Ed. 426 (1954).

The natural obligation of the father to support will be enforced under the statute recognizing the obligation and imposing the duty. Burton v. Burton, 142 N.C. 151, 55 S.E. 71 (1906); Allen v. Hunnicutt, 230 N.C. 49, 52 S.E.2d 18 (1949).

All men have a moral duty to support their children, whether legitimate or illegitimate, and this section makes this moral obligation legal and enforceable with respect to illegitimate children. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

A person may be convicted for nonsupport of his illegitimate children only under this section. State v. Caudill, 68 N.C. App. 268, 314 S.E.2d 592 (1984).

Prosecution of a parent for willful nonsupport under this section is a criminal proceeding. State v. Beasley, 57 N.C. App. 208, 290 S.E.2d 730, appeal dismissed and cert. denied, 306 N.C. 559, 294 S.E.2d 225 (1982).

This is a criminal statute. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

And the State's right to proceed under this section does not require consent of the mother or of the child, however important to its case may be the mother's cooperation as a witness. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

As to whether bastardy proceedings under the former law were criminal or civil in their nature, see State v. Roberts, 32 N.C. 350 (1849); State v. Edwards, 110 N.C. 511, 14 S.E. 741 (1892); State v. Ostwalt, 118 N.C. 1208, 24 S.E. 660 (1896); State v. Liles, 134 N.C. 735, 47 S.E. 750 (1904); State v. Addington, 143 N.C. 683, 57 S.E. 398 (1907); State v. McDonald, 152 N.C. 802, 67 S.E. 762 (1910); State v. Currie, 161 N.C. 275, 76 S.E. 694 (1912); Sanders v. Sanders, 167 N.C. 319, 83 S.E. 490 (1914); Payne v. Thomas, 176 N.C. 401, 97 S.E. 212 (1918); State v. Carnegie, 193 N.C. 467, 137 S.E. 308 (1927).

The old Bastardy Act was repealed in toto by Public Laws 1933, c. 228, the provisions of s. 2 that the act should not affect pending litigation or accrued actions being repugnant to the specific repealing clause of s. 9, and in a prosecution under the Act of 1933 a demurrer on the grounds that proceedings under the old Bastardy Act were then pending would be overruled. See State v. Morris, 208 N.C. 44, 179 S.E. 19 (1935), holding that the Act of 1933 was intended to cover the entire subject dealing with bastardy.

Proceeding Under Former Law Would Not Bar Proceeding Under Present Statute. — Bastardy proceedings against defendant under C.S., G.S. 265, et seq., repealed by Public Laws 1933, c. 228, s. 9, being civil, would not support a plea of former jeopardy in a prosecution under this and the following sections for willful failure to support an illegitimate child. State v. Mansfield, 207 N.C. 233, 176 S.E. 761 (1934).

Offense Punishable After Effective Date of Section Although Child Born Before. — A parent may be prosecuted under this section for willful failure to support his illegitimate child begotten and born before the effective date of the statute, the offense being the willful failure to support an illegitimate child, and it being sufficient if such willful failure occur after the effective date of the statute. State v. Parker, 209 N.C. 32, 182 S.E. 723 (1935).

Time Child Was Begotten Is Immaterial. — A defendant may be prosecuted under this statute for willful failure to support his illegitimate child born after the passage of the act, even though the child was begotten before the effective date of the statute, and defendant's contention that in regard to such prosecution the statute is ex post facto cannot be sustained, since the offense is the willful failure to support the child, and the time it was begotten is immaterial. State v. Mansfield, 207 N.C. 233, 176 S.E. 761 (1934), followed in State v. Morris, 208 N.C. 44, 179 S.E. 19 (1935).

This Article does not require the continued life of the child as the basis for a prosecution under this section, and the death of the child does not abate or prevent a prosecution against the father of an illegitimate for his willful failure to support and maintain the child prior to its death. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Even If Blood Test Is Made Impossible. — When the death of the child makes a blood test impossible, the situation is analogous to that which occurs when an eyewitness to events constituting the basis for an indictment dies before the accused has interviewed him or taken his deposition, and it would hardly be suggested that to try the defendant after the death of that witness would deprive him of due process and that therefore the prosecution must be dismissed. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

To hold that a prosecution under this section must be dismissed when the death of the child deprives the defendant of a blood test would be to attach to the test a significance which the legislature failed to give it. Even when a blood grouping test demonstrates nonpaternity the law does not make the test conclusive of that issue. A fortiori, the absence of a test which, if made, would provide one falsely accused only an even chance to prove his nonpaternity, should not result in a dismissal of the action. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970). But see §§ 8-50.1 and 49-7, as to competency of blood tests.

This section creates a continuing offense. State v. Robinson, 236 N.C. 408, 72 S.E.2d 857 (1952); State v. Chambers, 238 N.C. 373, 78 S.E.2d 209 (1953); State v. Perry, 241 N.C. 119, 84 S.E.2d 329 (1954); State v. Coppedge, 244 N.C. 590, 94 S.E.2d 569 (1956); State v. Smith, 246 N.C. 118, 97 S.E.2d 442 (1957); State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964); State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968); State v. Garner, 34 N.C. App. 498, 238 S.E.2d 653 (1977); State v. Killian, 61 N.C. App. 155, 300 S.E.2d 257 (1983).

And Each Day Constitutes a Separate Offense. — A continuing offense is a new violation of the law. Each day during which it is continued constitutes a separate offense and will support a separate prosecution, provided the warrant or indictment alleges separate and distinct times during which the offense was committed. State v. Killian, 61 N.C. App. 155, 300 S.E.2d 257 (1983).

Prior Prosecution Does Not Bar Prosecution for Subsequent Offense. — Defendant was convicted and served the sentence imposed for willfully failing and refusing to support his illegitimate child under this and the following sections. After completion of his term, defendant still willfully failed and refused to support the child, and this prosecution was instituted for breach of this and the following sections subsequent to his release. Defendant entered a plea of former jeopardy. It was held that the violation of the statute constituted a continuing offense, and the prior prosecution was not a bar to a prosecution for breach of the statute for the period subsequent to defendant's release from the imprisonment imposed in the first prosecution. State v. Johnson, 212 N.C. 566, 194 S.E. 319 (1937).

A new warrant may be filed charging defendant with nonsupport, if such has occurred after the issuance of the warrant on which he has been tried. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

The criminal offense of willful nonsupport of an illegitimate child by a parent of the child may be repeated, and if it is, prosecution for the subsequent offense will not be barred by the prosecution for the former offense on the theory of double jeopardy. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

A previous acquittal on a charge of willful nonsupport does not bar a subsequent prosecution, because this section creates a continuing offense. Stephens v. Worley, 51 N.C. App. 553, 277 S.E.2d 81 (1981).

Section 49-14 Compared. — The issue of paternity is the entire thrust of the civil action under G.S. 49-14, whereas the focus of the crime punishable by this section is the willful failure to pay support for an illegitimate child, not paternity, because this section does not make the mere begetting of a child a crime. Stephens v. Worley, 51 N.C. App. 553, 277 S.E.2d 81 (1981).

Effect of Prosecution upon Subsequent Civil Proceedings to Establish Paternity. — Since the parties to a previous criminal proceeding under this section and civil proceedings under G.S. 49-14 are not the same, and the State and the present plaintiff were not in privity, the defendant was not estopped in a civil action to deny paternity. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

A judgment of acquittal in a criminal prosecution under this section for willful failure to support two illegitimate children was not res judicata in county's civil action under G.S. 49-14 to establish defendant's paternity of the two children, where the criminal judgment merely stated that defendant was found not guilty and did not disclose whether an acquittal

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was entered because the judge found that defendant was not the father of the children or because he did not believe that defendant had willfully failed to provide for their reasonable support, as there was thus no showing on the record that the issue of paternity had been previously adjudicated in defendant's favor. Stephens v. Worley, 51 N.C. App. 553, 277 S.E.2d 81 (1981).

General verdict of not guilty, upon charges of willful neglect and refusal to provide adequate support of an illegitimate child, did not operate as res judicata on the issue of paternity in subsequent action to establish paternity and require support of an illegitimate child. Sampson County ex rel. Child Support Enforcement Agency ex rel. McPherson v. Stevens, 91 N.C. App. 524, 372 S.E.2d 340 (1988).

Liability of Nonresident Who Begot Child in Another State. — Where defendant, a resident of another state, begot an illegitimate child in such other state, and the mother moved to this State before the child was born, and the mother and child continued to reside in this State from the time of the birth, the offense of willful failure and refusal to support the child was committed in this State, and defendant was constructively in this State when the offense was committed, since he had voluntarily set in motion the chain of circumstances resulting in the commission of the offense here, and therefore the courts of this State had jurisdiction of the offense. State v. Tickle, 238 N.C. 206, 77 S.E.2d 632 (1953), cert. denied, 346 U.S. 938, 74 S. Ct. 378, 98 L. Ed. 426 (1954), commented on in 32 N.C.L. Rev. 435.

Jurisdiction. — Violation of this section is a misdemeanor over which the district court has exclusive original jurisdiction. Until a defendant is tried and convicted of this offense in district court and appeals to the superior court for a trial de novo, the superior court has no jurisdiction. State v. Caudill, 68 N.C. App. 268, 314 S.E.2d 592 (1984).

The district court has exclusive original jurisdiction of misdemeanors, including actions to determine liability of persons for the support of dependents in any criminal proceeding. Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

As to sufficiency of summons issued under this section, see State v. Walton, 41 N.C. App. 281, 254 S.E.2d 661 (1979).

Right to Counsel. — In a prosecution for willful failure to support an illegitimate child, the defendant had a constitutional right to be represented by counsel at his trial unless he knowingly and intelligently waived that right, since violation of this section can result in imprisonment. State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979).

For cases formerly holding that a defendant charged under this section was not entitled to appointed counsel as the charge did not involve a serious offense, see State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970); Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

Punishment. — The only punishment authorized by law for the willful failure or neglect to support an illegitimate child is found in G.S. 49-8 and is limited at most to six months in prison. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

Applied in State v. Moore, 209 N.C. 44, 182 S.E. 692 (1935); State v. Bradshaw, 214 N.C. 5, 197 S.E. 564 (1938); State v. Moore, 222 N.C. 356, 23 S.E.2d 31 (1942); State v. Wortham, 240 N.C. 132, 81 S.E.2d 254 (1954); State v. Robinson, 248 N.C. 282, 103 S.E.2d 376 (1958); State v. Little, 263 N.C. 130, 139 S.E.2d 8 (1964); State v. Cooke, 268 N.C. 201, 150 S.E.2d 226 (1966); State v. Fowler, 9 N.C. App. 64, 175 S.E.2d 331 (1970); State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970); Wright v. Gann, 27 N.C. App. 45, 217 S.E.2d 761 (1975); Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

Cited in State v. Stone, 231 N.C. 324, 56 S.E.2d 675 (1949); State v. Aldridge, 254 N.C. 297, 118 S.E.2d 766 (1961); In re Owenby, 3 N.C. App. 53, 164 S.E.2d 55 (1968); Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972); Smith v. Burden, 31 N.C. App. 145, 228 S.E.2d 662 (1976); Bell v. Martin, 299 N.C. 715, 264 S.E.2d 101 (1980); Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981); Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985); Ambrose v. Ambrose, 140 N.C. App. 545, 536 S.E.2d 855, 2000 N.C. App. LEXIS 1213 (2000).

II. ELEMENTS OF OFFENSE.

Elements of Offense, Generally. — For a defendant to be found guilty of the criminal offense created by this section, two facts must be established: first, that the defendant is a parent of the illegitimate child in question, who must be a person coming within the definition of a child as set forth in this section; and second, that the defendant has willfully neglected or refused to support and maintain such illegitimate child. In addition, if the defendant is the reputed father, it must be shown that the prosecution has been instituted within one of the time periods provided in G.S. 49-4. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

Under the provisions of this section the State must establish two facts in order for the defendant to be found guilty: (1) That the defendant is the parent of the illegitimate child in question and (2) that the defendant has willfully neglected or refused to support and maintain such illegitimate child. State v. Green, 8 N.C. App. 234, 174 S.E.2d 8, aff'd, 277 N.C. 188, 176 S.E.2d 756 (1970); State v. Lynch, 11 N.C. App.

432, 181 S.E.2d 186 (1971); State v. Soloman, 40 N.C. App. 600, 253 S.E.2d 270 (1979); State v. Lambert, 53 N.C. App. 799, 281 S.E.2d 754 (1981).

In a prosecution under this section, the State must prove two things: (1) that the defendant is indeed the parent of the child and (2) that defendant has intentionally neglected or refused to provide reasonable support for the child. Stephens v. Worley, 51 N.C. App. 553, 277 S.E.2d 81 (1981).

The requirement that a parent "support and maintain his or her illegitimate child" within the purview of this section is not restricted merely to providing food. It includes the supplying of food, clothing and other necessaries, together with medical assistance reasonably required for the preservation of the health of the child. And this obligation to the child applies even in the case of the newly born baby. State v. Love, 238 N.C. 283, 77 S.E.2d 501 (1953).

The mere begetting of an illegitimate child is not a crime. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968); State v. Ingle, 20 N.C. App. 50, 200 S.E.2d 427 (1973).

The only "prosecution" contemplated by this legislation is that grounded on the willful neglect or refusal of any parent to support and maintain his or her illegitimate child, the mere begetting of the child not being denominated a crime. State v. Dill, 224 N.C. 57, 29 S.E.2d 145 (1944); State v. Stiles, 228 N.C. 137, 44 S.E.2d 728 (1947); State v. Coppedge, 244 N.C. 590, 94 S.E.2d 569 (1956); State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956); State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

As the criminal offense is not committed by begetting but by willful nonsupport of the child. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

A man cannot be held criminally liable for failure to support an unborn illegitimate child. State v. Thompson, 233 N.C. 345, 64 S.E.2d 157 (1951); State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956).

Nor is failure of father to pay expenses of mother incident to the birth a criminal offense. State v. Thompson, 233 N.C. 345, 64 S.E.2d 157 (1951); State v. Ferguson, 243 N.C. 766, 92 S.E.2d 197 (1956); State v. Coppedge, 244 N.C. 590, 94 S.E.2d 569 (1956); State v. Ingle, 20 N.C. App. 50, 200 S.E.2d 427 (1973).

Prosecution Is Grounded on Willful Neglect or Refusal to Support Child. — The only prosecution contemplated under this section is that grounded on the willful neglect or refusal of a parent to support his or her illegitimate child. State v. Dixon, 257 N.C. 653, 127 S.E.2d 246 (1962); State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968); State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

Hence the question of paternity is incidental to the prosecution for nonsupport. State v. Bowser, 230 N.C. 330, 53 S.E.2d 282 (1949); State v. Thompson, 233 N.C. 345, 64 S.E.2d 157 (1951); State v. Robinson, 236 N.C. 408, 72 S.E.2d 857 (1952); State v. Chambers, 238 N.C. 373, 78 S.E.2d 209 (1953); State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

The question of paternity is merely incidental to the prosecution for nonsupport and involves no punishment. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

As a Preliminary Requisite. — The question of paternity is incidental to the prosecution for the crime of nonsupport — a preliminary requisite to conviction. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968); Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

Willfulness Is Essential Element of Offense. — The father of an illegitimate child may be convicted of neglecting to support such child only when it is established that such neglect was willful, that is, without just cause, excuse or justification. The willfulness of the neglect is an essential ingredient of the offense, and as such must not only be charged in the bill, but must be proven beyond a reasonable doubt. The presumption of innocence with which the defendant enters the trial includes the presumption of innocence of willfulness in any failure on his part to support his illegitimate child. The failure to support may be an evidential fact tending to show a willful neglect, but it does not raise a presumption of willfulness. State v. Cook, 207 N.C. 261, 176 S.E. 757 (1934); State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956); State v. McCoy, 304 N.C. 363, 283 S.E.2d 788 (1981).

Willfulness is an essential element in the crime of failure and refusal to support an illegitimate child. State v. McDay, 232 N.C. 388, 61 S.E.2d 86 (1950).

Which Must Be Charged in Warrant or Indictment. — Under this section, the neglect or refusal to support an illegitimate child must be willful, and it must be so charged in the warrant or bill of indictment, and the omission of such allegation is fatal. State v. Vanderlip, 225 N.C. 610, 35 S.E.2d 885 (1945); State v. Morgan, 226 N.C. 414, 38 S.E.2d 166 (1946); State v. Moore, 238 N.C. 743, 78 S.E.2d 914 (1953).

The warrant in a prosecution under this and the following sections must allege that the failure or refusal of defendant to support his illegitimate child was willful, and where it does not do so, defendant's motion in arrest of judgment should be allowed. State v. McLamb, 214 N.C. 322, 199 S.E. 81 (1938). See State v. Tarleton, 208 N.C. 734, 182 S.E. 481 (1935); State v. Clarke, 220 N.C. 392, 17 S.E.2d 468 (1941); State v. Sturdivant, 220 N.C. 535, 17 S.E.2d 661 (1941); State v. Coppedge, 244 N.C. 590, 94 S.E.2d 569 (1956); State v. Smith, 246

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N.C. 118, 97 S.E.2d 442 (1957).

And Proved Beyond Reasonable Doubt. — The willfulness of the neglect is an essential ingredient of the offense, and as such must not only be charged in the bill, but must be proved beyond a reasonable doubt. State v. Spillman, 210 N.C. 271, 186 S.E. 322 (1936); State v. Moore, 238 N.C. 743, 78 S.E.2d 914 (1953).

"Willful" Defined. — The word "willful," as used in this section, means that the act is done purposely and deliberately in violation of the law; it means an act done without any lawful justification, reason or excuse. State v. Stiles, 228 N.C. 137, 44 S.E.2d 728 (1947).

The word "willfully," as used in the statute, is used with the same import as in G.S. 14-322, relating to willful abandonment of wife (now spouse). State v. Cook, 207 N.C. 261, 176 S.E. 757 (1934).

A defendant's willful failure and refusal to support his illegitimate child means an intentional neglect or refusal. State v. McDay, 232 N.C. 388, 61 S.E.2d 86 (1950).

Willful Neglect Must Follow Demand for Support. — In order to support a finding of willful nonsupport of an illegitimate child by the father, the State must prove beyond a reasonable doubt that the mother of the child or, under certain circumstances, the director of social services has, after the child was born and before the prosecution was commenced, made demand upon the father for support, and after such demand and before prosecution, the father willfully neglected and refused to provide adequate support according to his means and condition and the necessities of the child. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Willfulness Not Presumed from Failure to Support. — Construing the word "willful" in light of the decided cases, it is clear that one cannot be brought within the meaning of the statute without proving the criminal intent, and that it is error for the court to charge the jury that if the defendant failed to support his illegitimate child "the presumption is he willfully did so." State v. Cook, 207 N.C. 261, 176 S.E. 757 (1934).

Where a father has failed to pay the child support ordered by the court, he may not be held in contempt of court and imprisoned or punished in any way until a judicial determination has been made as to whether he has failed willfully to comply; willfulness may not be presumed. State v. McCoy, 304 N.C. 363, 283 S.E.2d 788 (1981).

No Presumption of Paternity. — To impose responsibility on a man for the support of an illegitimate child, it must first be established that he is the father of the child. The Act of 1741 created a conclusive presumption from the oath of the mother. This was modified in 1814 to make a prima facie case by the affidavit or oath of the woman. There is now no presumption from the affidavit or testimony of the mother. State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956).

Burden Is on State to Prove Paternity of Child and Willful Neglect. — It is not necessary that defendant's paternity of the child should first be judicially determined, but the State must prove on the trial, first, defendant's paternity of the child, and then his willful neglect or refusal to support the child. State v. Spillman, 210 N.C. 271, 186 S.E. 322 (1936).

Since the statute raises no presumption against a person accused, the State must overcome the presumption of innocence both as to the willfulness of the neglect to support the illegitimate child and defendant's paternity of the child. State v. Spillman, 210 N.C. 271, 186 S.E. 322 (1936).

In order to convict defendant under this section, the burden is on the State to show not only that he is the father of the child and that he had refused or neglected to support and maintain it, but further, that his refusal or neglect was willful, that is, intentionally done, "without just cause, excuse or justification," after notice and request for support. State v. Hayden, 224 N.C. 779, 32 S.E.2d 333 (1944); State v. Stiles, 228 N.C. 137, 44 S.E.2d 728 (1947); State v. Ellison, 230 N.C. 59, 52 S.E.2d 9 (1949); State v. Thompson, 233 N.C. 345, 64 S.E.2d 157 (1951); State v. Sharpe, 234 N.C. 154, 66 S.E.2d 655 (1951); State v. Chambers, 238 N.C. 373, 78 S.E.2d 209 (1953); State v. Dixon, 257 N.C. 653, 127 S.E.2d 246 (1962).

It is as much the duty of the State to establish willful failure to support by evidence showing that fact beyond a reasonable doubt as it is to so establish paternity. State v. Dixon, 257 N.C. 653, 127 S.E.2d 246 (1962).

In a prosecution under this section, the burden is upon the State upon defendant's plea of not guilty to prove not only that defendant is the father of the child and had refused or neglected to support the child, but further that his refusal or neglect was willful. State v. Mason, 268 N.C. 423, 150 S.E.2d 753 (1966).

But Paternity Need Not Be Relitigated on Subsequent Prosecution. — Upon a prosecution for a subsequent willful neglect or refusal to support, the accused is not entitled to have the question of paternity relitigated. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964); State v. Garner, 34 N.C. App. 498, 238 S.E.2d 653 (1977), cert. denied, 294 N.C. 184, 241 S.E.2d 519 (1978).

Once the question of paternity has been determined, the accused is not entitled to have the question of paternity relitigated upon a subsequent prosecution for later willful neglect or refusal to support his illegitimate children. State v. Green, 8 N.C. App. 234, 174 S.E.2d 8, aff'd, 277 N.C. 188, 176 S.E.2d 756 (1970).

Upon a subsequent prosecution of an alleged

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father, the question of paternity, necessarily determined against him in the previous criminal action, need not be relitigated, that question being res judicata. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

Guilty Verdict as Finding of Paternity. — A general verdict of "guilty" or "guilty as charged" to a valid charge of violation of this section is adequate as a finding of paternity. State v. Golden, 40 N.C. App. 37, 251 S.E.2d 875 (1979).

A judgment as of nonsuit in a prosecution under this section does not constitute an adjudication on the issue of paternity and will not support a plea of former acquittal in a subsequent prosecution under the statute, the offense being a continuing one. State v. Robinson, 236 N.C. 408, 72 S.E.2d 857 (1952). See also, State v. Perry, 241 N.C. 119, 84 S.E.2d 329 (1954); State v. Ferguson, 243 N.C. 766, 92 S.E.2d 197 (1956).

III. AFFIDAVIT, WARRANT AND INDICTMENT.

Affidavit Supporting Warrant Must Name Defendant. — Where, in the affidavit upon which a warrant charging unlawful failure to support an illegitimate child is based, the name of the defendant does not appear, then the warrant does not charge the defendant with a crime, and judgment must be arrested. State v. Satterfield, 8 N.C. App. 597, 174 S.E.2d 640 (1970).

And Warrant Must Charge Him with Refusal to Support Child. — The begetting of an illegitimate child is not of itself a crime, and a warrant charging defendant with being the putative father of an unborn, illegitimate child is insufficient to support a prosecution under this statute, nor is such insufficiency cured by an amendment allowing the word "willful" to be inserted therein, in the absence of an amendment alleging the birth of the child and defendant's refusal to support the child. State v. Tyson, 208 N.C. 231, 180 S.E. 85 (1935). See also, State v. Thompson, 233 N.C. 345, 64 S.E.2d 157 (1951); State v. Robinson, 236 N.C. 408, 72 S.E.2d 857 (1952); State v. Chambers, 238 N.C. 373, 78 S.E.2d 209 (1953).

Where the warrant upon which defendant was tried was insufficient to charge any crime, defendant's motion in arrest of judgment should have been allowed, since the defect was one appearing on the face of the record. Thus the failure of the warrant to charge defendant with willful failure to support his illegitimate child was not cured by the charge or verdict, where the warrant failed to charge any criminal offense. State v. Tyson, 208 N.C. 231, 180 S.E. 85 (1935).

The charge must be supported by the facts as they existed at the time it was formally laid in the court, and cannot be supported by evidence of willful failure supervening between the time the charge was made and time of trial, at least when the trial is had upon the original warrant. State v. Sharpe, 234 N.C. 154, 66 S.E.2d 655 (1951); State v. Chambers, 238 N.C. 373, 78 S.E.2d 209 (1953); State v. Ingle, 20 N.C. App. 50, 200 S.E.2d 427 (1973); State v. Killian, 61 N.C. App. 155, 300 S.E.2d 257 (1983).

Demand for Support Must Have Been Made Before Warrant Was Drawn. — Where, in a prosecution for willful neglect and refusal to support an illegitimate child, the evidence discloses that no demand for support of the child was made upon defendant until after the warrant was drawn, nonsuit must be entered, since the warrant must be supported by the facts as they existed at the time it was formally laid and cannot be supported by evidence of willful failure thereafter. State v. Perry, 241 N.C. 119, 84 S.E.2d 329 (1954); State v. Ingle, 20 N.C. App. 50, 200 S.E.2d 427 (1973).

Amendment of Warrant. — The trial court has authority to permit the prosecuting attorney to amend a warrant charging defendant with willful failure to support his illegitimate child by inserting the word "maintain," so as to charge his willful failure to support and maintain his illegitimate child. State v. Bowser, 230 N.C. 330, 53 S.E.2d 282 (1949).

Charging of Specific Date in Indictment. — In a prosecution for willful failure and refusal to support an illegitimate child under this and the following sections, an exception on the ground that the indictment failed to charge the specific date in the month in which the offense was alleged to have been committed cannot be sustained. State v. Oliver, 213 N.C. 386, 196 S.E. 325 (1938).

IV. EVIDENCE AND TESTIMONY.

Testimony of Prosecutrix That She Wrote Defendant Demanding Support for Child. — In a prosecution under this section, testimony of prosecutrix that she wrote defendant after the baby was born demanding support for it was sufficient upon that question, without introduction of the letter in evidence, since the testimony was sufficient to support the inference that the letter was written before the bill of indictment was laid. State v. Chambers, 238 N.C. 373, 78 S.E.2d 209 (1953).

As to nonadmissibility of testimony of prosecutrix as to nonaccess of husband prior to enactment of § 8-27.2, see State v. Bowman, 230 N.C. 203, 52 S.E.2d 345 (1949).

Cross-Examination as to Failure to Make Blood Test. — It was held competent upon the trial of a prosecution under this section for the prosecuting attorney to ask defendant upon cross-examination if the reason blood test was not made was because defendant knew the baby was his, the matter being within the bounds of a fair cross-examination. The legal principles relating to the purpose and value of a blood test were not relevant upon objection to the cross-examination. State v. Chambers, 238 N.C. 373, 78 S.E.2d 209 (1953).

Evidence Held Sufficient. — Evidence in prosecution of defendant for willful neglect or refusal to support his illegitimate child held sufficient to overrule motions to nonsuit. State v. Bowser, 230 N.C. 330, 53 S.E.2d 282 (1949).

In a prosecution under this section, the evidence was held sufficient to carry the case to the jury. State v. Humphrey, 236 N.C. 608, 73 S.E.2d 479 (1952).

Evidence held sufficient to show failure to support at time warrant was issued. State v. Sharpe, 234 N.C. 154, 66 S.E.2d 655 (1951).

Admission into evidence of a motel guest registration card purportedly bearing the defendant's signature was error requiring a new trial where there was no evidence identifying the handwriting or identifying defendant as either the man who registered under the name appearing on the card or the man to whom a room was assigned, and where it was the only direct evidence, other than the prosecuting witness' testimony, bearing on whether defendant had had intercourse with her. State v. Smith, 59 N.C. App. 732, 297 S.E.2d 771 (1982).

V. INSTRUCTIONS, SUBMISSION TO JURY, AND VERDICT.

Instruction as to Willfulness. — Willfulness in refusal to support one's illegitimate child is an essential ingredient of the offense denounced by this section, which must be proven beyond a reasonable doubt; and instructions which fail to so charge deprive defendant of his right to have the jury consider his willfulness as an issuable fact. State v. Hayden, 224 N.C. 779, 32 S.E.2d 333 (1944).

In a prosecution under this section, an instruction defining the term "willfully" as "wrongfully and unjustifiably, without valid and good excuse," instead of as an intentional neglect or refusal, would be held for reversible error. State v. McDay, 232 N.C. 388, 61 S.E.2d 86 (1950).

In a prosecution under this section, an instruction that the jury was to find defendant guilty if it found from the evidence beyond a reasonable doubt that defendant was the father of the child, without submitting the question of whether defendant willfully refused to support the child, constituted prejudicial error. State v. Mason, 268 N.C. 423, 150 S.E.2d 753 (1966).

Failure to Charge as to Necessity of Notice and Demand for Support. — Failure of the court to charge that there was no obligation upon defendant to support the child in question until he had been given notice that he was the father and demand was made upon him for support could not be held prejudicial where there was evidence of notice and demand prior to issuance of the warrant and the court categorically charged that the jury had to be satisfied beyond a reasonable doubt that defendant was the father of the child and that he knowingly, intentionally and with stubborn and willful purpose refused to support the child before they could return a verdict of guilty. State v. Humphrey, 236 N.C. 608, 73 S.E.2d 479 (1952).

Submission of Interrogatories or Issues Is Virtually Necessary. — The submission of issues in prosecutions under this section is, as a practical matter, almost a necessity. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Because of the nature and effect of the elements involved in this section, it would be difficult to properly try a case pursuant to this statute without submitting to the jury either oral interrogatories or written issues. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Unless Paternity Has Previously Been Determined. — If the question of paternity has been previously determined adversely to the accused, the case could well be tried solely upon the general issue of guilt. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

And Submission of Interrogatories or Issues Is Approved. — The submission of interrogatories or issues in criminal prosecutions under this section is now the approved practice, the questions and answers being treated as a special verdict. State v. McKee, 269 N.C. 280, 152 S.E.2d 204 (1967).

The practice of submitting written issues in cases charging violation of this section is strongly commended. State v. Lynch, 11 N.C. App. 432, 181 S.E.2d 186 (1971).

Although a general verdict of "guilty" or "guilty as charged" may be proper, it is not required. Indeed, the preferred practice in cases charging a violation of this section calls for the submission of written issues to the jury. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

A jury's verdict based on issues submitted to it should include an individual determination of four issues. First, is defendant a parent of the illegitimate child in question? Second, did defendant receive notice and demand for support? Third, did defendant willfully neglect or refuse to provide adequate support for the child? Lastly, if the answers to the preceding are yes, is defendant guilty of willful neglect or refusal to maintain and provide adequate support for his illegitimate child? Such a verdict of the jury is in the nature of a special verdict and, when attempted, must reveal that all issues of ultimate material fact have been resolved against defendant. State v.

Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

Verdict upon Proper Issues Is Sufficient Without General Verdict of Guilty. — A verdict upon the issues of paternity and nonsupport, if resolved in favor of the State, is sufficient to support a judgment against defendant without a general verdict by the jury of guilty. This does not contravene the provisions of the North Carolina Constitution requiring trial and verdict by jury in criminal cases. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964), holding findings in special verdict deficient and granting a new trial.

A jury verdict must unambiguously state that defendant has been found guilty of a crime. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

A general verdict of "guilty" or "guilty as charged" is sufficient when a defendant is properly charged under this section. However, when the jury undertakes to spell out its verdict without specific reference to the charge, it is essential that the spelling be correct. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

Verdict Must Find Willful Nonsupport. — Willfulness is an essential element of the offense denounced by this section, and a verdict "guilty of failure to support and maintain his bastard child" was insufficient to support a judgment. State v. Allen, 224 N.C. 530, 31 S.E.2d 530 (1944).

If a jury finds that the accused is a parent of the child but that he has not willfully failed or refused to support the child, there can be no conviction, for no crime has been committed. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Verdict Held Insufficient. — A verdict of "guilty of willful nonsupport of illegitimate child" was insufficient in that it failed to fix the paternity of the child. State v. Ellison, 230 N.C. 59, 52 S.E.2d 9 (1949).

A verdict of "guilty of the charge of bastardy" would not support a judgment in a prosecution under this section. State v. Dixon, 257 N.C. 653, 127 S.E.2d 246 (1962).

Where the nonsupport issue submitted was, "Has the defendant . . . willfully neglected and refused to support and maintain said illegitimate child?", an affirmative answer did not supply the information as to whether demand was made, or, if made, whether it was before or after the prosecution was commenced. Because of the deficiency of the findings in the special verdict, there had to be a new trial. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

A verdict of "guilty of non-support of illegitimate child" was held improper and was set aside where it neither alluded generally to the warrant nor used specific language sufficient to show a conviction of the offense charged. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

§ 49-3. Place of birth of child no consideration.

The provisions of this Article shall apply whether such child shall have been begotten or shall have been born within or without the State of North Carolina: Provided, that the child to be supported is a bona fide resident of this State at the time of the institution of any proceedings under this Article. (1933, c. 228, s. 2.)

CASE NOTES

Applied in State v. Tickle, 238 N.C. 206, 77 S.E.2d 632 (1953); Tickle v. North Carolina, 346 U.S. 938, 74 S. Ct. 378, 98 L. Ed. 426 (1954).

§ 49-4. When prosecution may be commenced.

The prosecution of the reputed father of an illegitimate child may be instituted under this Chapter within any of the following periods, and not thereafter:

(1) Three years next after the birth of the child; or

(2) Where the paternity of the child has been judicially determined within three years next after its birth, at any time before the child attains the age of 18 years; or

(3) Where the reputed father has acknowledged paternity of the child by payments for the support thereof within three years next after the birth of such child, three years from the date of the last payment

whether such last payment was made within three years of the birth of such child or thereafter: Provided, the action is instituted before the child attains the age of 18 years.

The prosecution of the mother of an illegitimate child may be instituted under this Chapter at any time before the child attains the age of 18 years. (1933, c. 228, s. 3; 1939, c. 217, s. 3; 1945, c. 1053; 1951, c. 154, s. 2.)

Legal Periodicals. — As to the effect of the 1945 amendment to this section, see 23 N.C.L. Rev. 331 (1945).

For survey of constitutional law in 1982, see 61 N.C.L. Rev. 1052 (1983).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former statutory provisions.*

Constitutionality. — The three-year statute of limitations contained in subdivision (1) of this section for prosecutions under G.S. 49-2 does not violate the equal protection clause of the federal Constitution on grounds that it prescribes a limitations period for the prosecution of persons who willfully fail to support their illegitimate children, whereas there is no limitations period for the prosecution under G.S. 14-322(d) of persons who willfully fail to support their legitimate children. State v. Beasley, 57 N.C. App. 208, 290 S.E.2d 730, appeal dismissed and cert. denied, 306 N.C. 559, 294 S.E.2d 225 (1982).

There is no statute of limitations as such affecting a father's duty to support his illegitimate children. That duty continues throughout the child's minority. Bertie-Hertford Child Support Enforcement Agency ex rel. Souza v. Barnes, 80 N.C. App. 552, 342 S.E.2d 579 (1986).

As to the inapplicability of statute limiting criminal prosecutions for misdemeanors to two years to proceedings under the former statute, see State v. Hedgepeth, 122 N.C. 1039, 30 S.E. 140 (1898); State v. Perry, 122 N.C. 1043, 30 S.E. 139 (1898).

This section cannot be limited to proceedings to establish paternity. Its language is clear, positive and unbending. It seems to have been taken from C.S., G.S. 274, of the old law, which was held to supersede the general statute of limitations on the subject. State v. Bradshaw, 214 N.C. 5, 197 S.E. 564 (1938).

Maximum time for prosecution was formerly six years from birth. State v. Killian, 217 N.C. 339, 7 S.E.2d 702 (1940).

The failure to support an illegitimate child is a continuing offense, and the date such child was born is immaterial, provided the action is instituted within the time prescribed by this section and that demand for the support of such child was made a reasonable time before the action was instituted. State v. Womack, 251 N.C. 342, 111 S.E.2d 332 (1959).

A proceeding to establish paternity of an illegitimate child and to prosecute father who willfully neglects or refuses to support and maintain the same may be instituted at any time within three years after the birth of the child. State v. Moore, 222 N.C. 356, 23 S.E.2d 31 (1942).

Where the question of paternity is judicially determined within three years after the birth of the illegitimate child, the defendant may thereafter be prosecuted for his willful neglect and refusal to support the child. State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956).

Acknowledgment Made More Than Three Years from Birth Does Not Prevent Running of Statute. — Where acknowledgment of the paternity of a child has been made by payments for its support within three years from the date of its birth, prosecution for nonsupport may be brought within three years thereafter, but a later acknowledgment, made more than three years from the birth, will not avail to prevent the running of the statute. State v. Hodges, 217 N.C. 625, 9 S.E.2d 24 (1940).

Proof Required Under Subdivision (3). — Where prosecution was not begun within three years after the birth, and paternity was not judicially determined within that time, the State had to meet the requirements of subdivision (3) of this section and prove not only that defendant made payments for the child's support within the three years after its birth, but also that the warrant was issued within three years from the date of the last payment. State v. McKee, 269 N.C. 280, 152 S.E.2d 204 (1967).

Applied in State v. Caudill, 68 N.C. App. 268, 314 S.E.2d 592 (1984).

Cited in State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968); Durham County Dep't of Social Servs. v. Williams, 52 N.C. App. 112, 277 S.E.2d 865 (1981).

§ 49-5. Prosecution; death of mother no bar; determination of fatherhood.

Proceedings under this Article may be brought by the mother or her personal representative or, if the child is likely to become a public charge, the director of social services or such person as by law performs the duties of such official in said county where the mother resides or the child is found. Proceedings under this Article may be brought in the county where the mother resides or is found, or in the county where the putative father resides or is found, or in the county where the child is found. The fact that the child was born outside of the State of North Carolina shall not be a bar to proceedings against the putative father in any county where he resides or is found, or in the county where the mother resides or the child is found. The death of the mother shall in no wise affect any proceedings under this Article. Preliminary proceedings under this Article to determine the paternity of the child may be instituted prior to the birth of the child but when the judge or court trying the issue of paternity deems it proper, he may continue the case until the woman is delivered of the child. When a continuance is granted, the courts shall recognize the person accused of being the father of the child with surety for his appearance, either at the next session of the court or at a time to be fixed by the judge or court granting a continuance, which shall be after the delivery of the child. (1933, c. 228, s. 4; 1961, c. 186; 1969, c. 982; 1971, c. 1185, s. 18; 1981, c. 599, s. 13.)

CASE NOTES

Editor's Note. *— Some of the cases cited below were decided under former statutory provisions.*

Institution of Proceedings. — The provision that proceedings under this section can only be instituted by the mother or her personal representative or by the director of social services is applicable both to preliminary proceedings to determine paternity and to proceedings involving the completed crime. State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956).

The affidavit initiating the prosecution may be made by the mother or the director of social services. State v. Dixon, 257 N.C. 653, 127 S.E.2d 246 (1962).

Mother may decide whether to call upon father for assistance. In the event that she elects not to make the demand, her election will be respected unless the child is likely to become a public charge, in which case the director of social services may proceed. State v. Dixon, 257 N.C. 653, 127 S.E.2d 246 (1962).

Joining of Mother in Prosecution Is Not Required. — Prosecution of the alleged father for violation of G.S. 49-2 may be initiated by the mother, but her joining therein is not a prerequisite to the validity of the prosecution. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

Continuance Until After Birth of Child. — By express statutory language preliminary proceedings to determine the paternity of a child may be initiated and determined before the birth of the child. A continuance of the proceedings until after the birth of the child rests in the sound discretion of the trial court. State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956).

It would seem that in a preliminary proceeding under this section a continuance until the birth of the child would be required when a defendant requests a blood-grouping test under G.S. 49-7. State v. Morgan, 31 N.C. App. 128, 228 S.E.2d 523 (1976).

Rights of Surety. — The surety on the appearance bond of the defendant, who, in bastardy proceedings under the former law, appealed from a justice of the peace to the county court, which remanded the cause for want of jurisdiction, could insist upon the exact terms of his bond; and where the defendant had been legally convicted and had served his term as the law provided on failing to pay the allowance made to the prosecutrix, costs, etc., the provisions in the appearance bond as to the surety's liability had been discharged. State v. Carnegie, 193 N.C. 467, 137 S.E. 308 (1927).

Death of Child. — What kind of order should be entered where the child dies pending trial is in the discretion of the judge. The former statute seemed to require an order in every case. State v. Beatty, 66 N.C. 648 (1872).

Consideration for Promise of Father to Support Child. — Where the mother of an illegitimate child had refrained from enforcing maintenance thereof under the former statute, this was held to constitute consideration to support an action on a promise of the father to support and educate the child. Thyer v. Thyer, 189 N.C. 502, 127 S.E. 553 (1925).

§ 49-6. Mother not excused on ground of self-incrimination; not subject to penalty.

No mother of an illegitimate child shall be excused, on the ground that it may tend to incriminate her or subject her to a penalty or a forfeiture, from attending and testifying, in obedience to a subpoena of any court, in any suit or proceeding based upon or growing out of the provisions of this Article, but no such mother shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, she may so testify. (1933, c. 228, s. 5; 1939, c. 217, s. 5.)

§ 49-7. Issues and orders.

The court before which the matter may be brought shall determine whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted. After this matter has been determined in the affirmative, the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to provide adequate support and maintain the child who is the subject of the proceeding. After this matter shall have been determined in the affirmative, the court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the child, subject to the limitations of G.S. 50-13.10. The amount of child support shall be determined as provided in G.S. 50-13.4(c). The order fixing the sum shall require the defendant to pay it either as a lump sum or in periodic payments as the circumstances of the case may appear to the court. The social security number, if known, of the minor child's parents shall be placed in the record of the proceeding. Compliance by the defendant with any or all of the further provisions of this Article or the order or orders of the court requiring additional acts to be performed by the defendant shall not be construed to relieve the defendant of his or her responsibility to pay the sum fixed or any modification or increase thereof.

The court before whom the matter may be brought, on motion of the State or the defendant, shall order that the alleged-parent defendant, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged-parent defendant, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist or other duly qualified person. The evidentiary effect of those blood tests and comparisons and the manner in which the expenses therefor are to be taxed as costs shall be as prescribed in G.S. 8-50.1. In addition, if a jury tries the issue of parentage, they shall be instructed as set out in G.S. 8-50.1. From a finding on the issue of parentage against the alleged-parent defendant, the alleged-parent defendant has the same right of appeal as though he or she had been found guilty of the crime of willful failure to support an illegitimate child. (1933, c. 228, s. 6; 1937, c. 432, s. 2; 1939, c. 217, ss. 1, 4; 1944, c. 40; 1947, c. 1014; 1971, c. 1185, s. 19; 1975, c. 449, s. 3; 1977, c. 3, s. 2; 1979, c. 576, s. 2; 1987, c. 739, s. 1; 1989, c. 529, s. 6; 1997-433, s. 4.1; 1998-17, s. 1.)

Legal Periodicals. — For comment on the 1937 amendment to this section, see 15 N.C.L. Rev. 347 (1937).

For comment on the 1939 amendment, see 17 N.C.L. Rev. 351 (1939).

For comment on the 1945 amendment, see 23 N.C.L. Rev. 343 (1945).

For comment on the 1947 amendment, see 25 N.C.L. Rev. 412 (1947).

As to effect of G.S. 8-50.1 on the provision of this section as to blood-grouping tests, see 27 N.C.L. Rev. 456 (1949).

For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

As to the construction together of this section and § 7A-290, see State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

Continuing Duty to Support. — The payment of the lump sum amount ordered pursuant to this section as a result of a conviction for non-support of an illegitimate child does not relieve defendant of responsibility for future support. Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

This section, read together with G.S. 50-13.7, clearly contemplates a continuing obligation on the part of the parents of an illegitimate child to provide support, including when necessary the modification or increase of payments ordered to satisfy this obligation. Having been conclusively determined a "responsible parent," as that term is defined in G.S. 110-129, the father of an illegitimate child must necessarily remain liable for the future support of his minor child. Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

Right to Blood Test. — A defendant's right to a blood test to determine parentage is a substantial right, and upon defendant's motion the court must order the test when it is possible to do so. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970); State v. Morgan, 31 N.C. App. 128, 228 S.E.2d 523 (1976).

The 1975 amendment to G.S. 8-50.1 amplifies the importance of the right to a blood-grouping test under this section. State v. Morgan, 31 N.C. App. 128, 228 S.E.2d 523 (1976).

The value of serological blood tests, when made and interpreted by specifically qualified technicians using approved testing procedures and reagents of standard strength, is now generally recognized. Such tests, however, can never prove the paternity of any individual, and they cannot always exclude the possibility. Nevertheless, in a significant number of cases, they can disprove it. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

The result of a blood test to determine parentage will be either "exclusion of paternity demonstrated" or "exclusion of paternity not possible." It has been estimated that by tests based upon each of three blood-type classifications, A-B-O, M-N, and Rh-hr, a man falsely accused has a 50-55% chance of proving his nonpaternity. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

The blood-grouping test results are conclusive only in excluding the putative father. The results might show him to have a blood type which the father of the child must have had; but this only indicates that of all the people of that blood type or group, he, as well as anyone else with that blood type or group, could have been the father of the child. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Attacking Results of Blood Tests. — The only areas in which the results of blood-grouping tests should be open to attack are in the method of testing or in the qualifications of the persons performing the tests. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

It is for the General Assembly to decide the weight to be given blood-grouping tests. State v. Camp, 286 N.C. 148, 209 S.E.2d 754 (1974).

As to the use of blood tests as evidence of nonpaternity prior to the 1975 amendments to this section and G.S. 8-50.1, see State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970); State v. Camp, 286 N.C. 148, 209 S.E.2d 754 (1974).

Death of Child Making Blood Test Impossible. — When the death of the child makes a blood test impossible the situation is analogous to that which occurs when an eyewitness to events constituting the basis for an indictment dies before the accused has interviewed him or taken his deposition. It would hardly be suggested that to try the defendant after the death of that witness would deprive him of due process and that therefore the prosecution must be dismissed. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970), decided prior to the 1975 amendments to § 8-50.1 and this section.

To hold that a prosecution under G.S. 49-2 must be dismissed when the death of the child deprives the defendant of a blood test would be to attach to the test a significance which the legislature failed to give it. Even when a blood-grouping test demonstrates nonpaternity, the law does not make the test conclusive of that issue. A fortiori, the absence of a test, which, if made, would provide one falsely accused only an even chance to prove his nonpaternity, should not result in a dismissal of the action. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970), decided prior to the 1975 amendments to § 8-50.1 and this section.

An infant's blood group cannot always be established immediately after birth, but by the age of six months, an accurate determination can always be had. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

This section seems to contemplate the submission of issues. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Issue of Paternity Must Be Determined First. — In a prosecution for willful neglect or refusal of alleged father to support his illegitimate child, the issue of paternity must first be determined before and separate from the determination of the issue of guilt or innocence of the offense charged. State v. Robinson, 236 N.C. 408, 72 S.E.2d 857 (1952).

The court is expressly commanded by this section to first determine the paternity of the child. State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956).

Domestic relations court was entitled to determine paternity of child, even though when the affidavit was filed and the warrant was issued the defendant had not committed the offense of willfully neglecting same, and even though the court exceeded its power in ordering the defendant to make payments, its determination of the facts as to paternity was in effect a jury verdict, and constituted a judicial declaration of the paternity of the child. State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956).

As an affirmative answer to question of paternity is an indispensable prerequisite to defendant's conviction on the criminal charge. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976); Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 63 N.C. App. 432, 305 S.E.2d 207 (1983), modified and aff'd, 311 N.C. 580, 319 S.E.2d 224 (1984).

Paternity Must Be Established Beyond a Reasonable Doubt. — The paternity of a child cannot be established by a mere preponderance of the evidence, but must be established beyond a reasonable doubt. State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956).

Form of Verdict. — This section requires the court to determine, in the affirmative, first, whether or not the defendant is the parent, before it proceeds to determine whether or not defendant has willfully failed to support his or her child. For this reason, the verdict in a bastardy action should ordinarily be rendered in a special form, upon the submission of separate written issues or interrogatories, or alternatively, if a general verdict is returned, it should be accompanied by appropriate findings of fact to clarify the precise effect of the judgment. Stephens v. Worley, 51 N.C. App. 553, 277 S.E.2d 81 (1981).

Appeal on Issue of Parentage Where Defendant Is Acquitted on Charge of Nonsupport. — Under this section, a defendant in a prosecution for nonsupport of his illegitimate child may appeal from a verdict establishing his paternity of the child, notwithstanding the fact that the verdict finds him not guilty of nonsupport. State v. Clement, 230 N.C. 614, 54 S.E.2d 919 (1949).

Even if defendant is found not guilty of willfully neglecting or refusing to support his illegitimate child, he may nevertheless appeal an adverse finding and conclusion that he is the parent of such illegitimate child. State v. Lambert, 53 N.C. App. 799, 281 S.E.2d 754 (1981).

Before the 1947 amendment, which added the proviso at the end of this section, it was held that where the jury found the defendant to be the father of the bastard child, but not guilty of nonsupport, this was an acquittal. The defendant therefore was not entitled to an appeal. State v. Hiatt, 211 N.C. 116, 189 S.E. 124 (1937).

Modification of Orders. — Where defendant pleaded guilty and orders were made for the support of the child, the court had no authority to strike out a plea of guilty or a judgment at a former term; but, under this section, the court could modify the conditions of the former judgment, or increase from time to time the amount necessary for the child's support. State v. Duncan, 222 N.C. 11, 21 S.E.2d 822 (1942).

This section and G.S. 49-8 contemplate initial findings and an order of support, subject to modification or increase from time to time, to be enforced by such prescribed supplemental orders as the exigencies of the case may require. State v. Dill, 224 N.C. 57, 29 S.E.2d 145 (1944).

As to jurisdiction over defendant who was over 16 years of age during the time he was charged with willfully neglecting or refusing to support his illegitimate child, but was under 16 when conception of the child occurred, see State v. Bowser, 230 N.C. 330, 53 S.E.2d 282 (1949).

Applied in State v. Dixon, 257 N.C. 653, 127 S.E.2d 246 (1962); State v. Fowler, 9 N.C. App. 64, 175 S.E.2d 331 (1970); State v. White, 42 N.C. App. 320, 256 S.E.2d 505 (1979).

Cited in State v. Black, 216 N.C. 448, 5 S.E.2d 313 (1939); State v. Robinson, 248 N.C. 282, 103 S.E.2d 376 (1958); State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970); State v. Garner, 34 N.C. App. 498, 238 S.E.2d 653 (1977); State v. Walton, 41 N.C. App. 281, 254 S.E.2d 661 (1979); State v. Camp, 299 N.C. 524, 263 S.E.2d 592 (1980).

§ 49-8. Power of court to modify orders, suspend sentence, etc.

Upon the determination of the issues set out in G.S. 49-7 and for the purpose of enforcing the payment of the sum fixed, the court is hereby given discretion, having regard for the circumstances of the case and the financial ability and earning capacity of the defendant and his or her willingness to cooperate, to make an order or orders upon the defendant and to modify such order or orders from time to time as the circumstances of the case may in the judgment of the court require subject to the limitations of G.S. 50-13.10. The order or orders made in this regard may include any or all of the following alternatives:

(1) Repealed by Session Laws 1994, Extra Session, c. 14, s. 35.
(2) Suspend sentence and continue the case from term to term;
(3) Release the defendant from custody on probation conditioned upon the defendant's compliance with the terms of the probation and the payment of the sum fixed for the support and maintenance of the child;
(4) Order the defendant to pay to the mother of the said child the necessary expenses of birth of the child and suitable medical attention for her;
(5) Require the defendant to sign a recognizance with good and sufficient security, for compliance with any order which the court may make in proceedings under this Article. (1933, c. 228, s. 7; 1939, c. 217, s. 6; 1987, c. 739, s. 2; 1994, Ex. Sess., c. 14, s. 35.)

Local Modification. — Person: 1967, c. 848, s. 1.

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under former statutory provisions.*

Constitutionality. — Proceedings in bastardy under the former law, C.S., G.S. 273, for an allowance to be made to the woman were civil and not criminal, for the enforcement of police regulations, and that section was held not to be contrary to the provisions of Art. IV, § 27, of the Constitution of 1868, relating to jurisdiction of justices. Richardson v. Egerton, 186 N.C. 291, 119 S.E. 487 (1923).

A judgment for an allowance for the mother of an illegitimate child is not a debt arising out of contract, to which the protection afforded by the inhibition of the constitutional provision against imprisonment for debt extends, but is rendered as a means of enforcing a legal obligation and duty imposed by the legislature under the police power of the State upon one who is responsible for bringing into existence a child that may become a burden to society. State v. Manuel, 20 N.C. 144 (1838); State v. Cannady, 78 N.C. 539 (1878); State v. Parsons, 115 N.C. 730, 20 S.E. 511 (1894); State v. Wynne, 116 N.C. 981, 21 S.E. 35 (1895); State v. Nelson, 119 N.C. 797, 25 S.E. 863 (1896).

Imprisonment of the putative father for failure to obey an order of maintenance or give the bond is a matter of legislative discretion, and is not imprisonment for debt. State v. Green, 71 N.C. 172 (1874); State v. Wynne, 116 N.C. 981, 21 S.E. 35 (1895); State v. Morgan, 141 N.C. 726, 53 S.E. 142 (1906).

Punishment for Failure to Support. — The only punishment authorized by law for the willful failure or neglect to support an illegitimate child is found in this section and is limited at most to six months in prison. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

Six months is the maximum sentence permitted by this section. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Work on Roads. — Under former law, when there was no house of correction in the county, the court could only commit the putative father to jail until the performance of the order of support. He could not be put to work on roads. State v. Addington, 143 N.C. 683, 57 S.E. 398 (1907).

For case in which sentence was held excessive, see State v. Nelson, 119 N.C. 797, 25 S.E. 863 (1896).

Suspension of Execution of Sentence. — Upon defendant's conviction of willful failure to support his illegitimate child, the trial court has plenary power to suspend execution of sentence on condition that defendant pay specified sums of money into court for support of his child. State v. Bowser, 232 N.C. 414, 61 S.E.2d 98 (1950). See also, State v. Robinson, 248 N.C. 282, 103 S.E.2d 376 (1958).

Effect of Discharge. — After the defendant, who had served a 20-day sentence for failure to pay under former law, had been discharged, he could not be resentenced to the house of correction at a subsequent term. State v. Burton, 113 N.C. 655, 18 S.E. 657 (1893).

Support Payments Are Not a Fine. — The support payments ordered by a court are to be paid for the support of the defendant's minor children and are not in the nature of a fine. State v. Green, 8 N.C. App. 234, 174 S.E.2d 8, aff'd, 277 N.C. 188, 176 S.E.2d 756 (1970).

Application of Money Paid into Court. — This section does not contemplate that money paid into court to discharge past due obligations should be paid to a person to whom it was not due. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

When, without compensation, doctors and hospitals have performed immediately necessary services incident to the birth of a child and its subsequent welfare, public policy and simple justice require that money paid into court for them be disbursed directly to them; in no other way can their interests be protected. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Effect of Death of Child. — Under the former law, C.S. G.S. 273, the intention was to secure to the mother either her probable expenses or to reimburse her actual outlay, and the death of the child when born did not affect the right of the mother to "support"; among other things, she was entitled to payment for medical attention and medicine for herself and the burial expenses of the child, consequent upon the defendant's unlawful act. State v. Addington, 143 N.C. 683, 57 S.E. 398 (1907).

Mother as Creditor of Father. — The mother of an illegitimate child, to whom an allowance has been made in bastardy proceedings, is such a creditor of the father of her child as to permit her to oppose the insolvent's discharge by suggesting fraud in answer to his petition. State v. Parsons, 115 N.C. 730, 20 S.E. 511 (1894).

Cited in State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970); State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979); Bell v. Martin, 299 N.C. 715, 264 S.E.2d 101 (1980); Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

§ 49-9. Bond for future appearance of defendant.

At the preliminary hearing of any case arising under this Article it shall be the duty of the court, if it finds reasonable cause for holding the accused for a further hearing, to require a bond in the sum of not less than one hundred dollars ($100.00), conditioned upon the reappearance of the accused at the further hearing under this Article. This bond and all other bonds provided for in this Article shall be justified before, and approved by, the court or the clerk thereof. (1933, c. 228, s. 8.)

ARTICLE 2.

Legitimation of Illegitimate Children.

§ 49-10. Legitimation.

The putative father of any child born out of wedlock, whether such father resides in North Carolina or not, may apply by a verified written petition, filed in a special proceeding in the superior court of the county in which the putative father resides or in the superior court of the county in which the child resides, praying that such child be declared legitimate. The mother, if living, and the child shall be necessary parties to the proceeding, and the full names of the father, mother and the child shall be set out in the petition. A certified copy of a certificate of birth of the child shall be attached to the petition. If it appears to the court that the petitioner is the father of the child, the court may thereupon declare and pronounce the child legitimated; and the full names of the father, mother and the child shall be set out in the court order decreeing legitimation of the child. The clerk of the court shall record the order in the record of orders and decrees and it shall be cross-indexed under the name of the father as plaintiff or petitioner on the plaintiff's side of the cross-index, and under the name of the mother, and the child as defendants or respondents on the defendants' side of the cross-index. (Code, s. 39; Rev., s. 263; C.S., s. 277; 1947, c. 663, s. 1; 1971, c. 154; 1977, c. 83, s. 1.)

Cross References. — For constitutional prohibition against private laws legitimating persons not born in lawful wedlock, see N.C. Const., Art. II, § 24(1)(n). As to legitimation procedure when mother is married, see G.S. 49-12.1.

Legal Periodicals. — For a brief account of the 1947 amendments to this Article, see 25 N.C.L. Rev. 414 (1947).

For article, "The Parental Rights of Unwed Fathers: A Developmental Perspective," see 20 N.C. Cent. L.J. 45 (1992).

For casenote: "The Established Standard for Fathers Who Have Acknowledged Paternity and Who Are Seeking Custody of Their Illegitimate Child(ren): Rosero v. Blake, 357 N.C. 193 (2003)," see 26 N.C. Cent. L.J. 116 (2003).

CASE NOTES

Sections 29-19, 49-10 through 49-12 and 49-14 through 49-16, construed together, do not violate the equal protection clause of the United States Constitution. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

But Requirement That Child's Surname Be Changed Is Invalid. — The valid purpose served by this section and G.S. 49-13 of establishing the filial relationship between illegitimate children and their fathers is not enhanced, advanced or served in any useful or justifiable way by the additional requirement that the child's surname be changed to that of the father; such a requirement denies the mother of an illegitimate child the equal protection of the laws, and because it requires arbitrary action on the part of an agency of the State, it denies such mothers a protected liberty interest without due process of law. Jones v. McDowell, 53 N.C. App. 434, 281 S.E.2d 192 (1981).

Inquiry in G.S. 49-10 and 49-12.1 is whether a putative father is the biological father of a minor child such that the rights and responsibilities inherent in the relationship between father and child may be acknowledged. In re Papathanassiou, — N.C. App. —, 671 S.E.2d 572, 2009 N.C. App. LEXIS 108 (2009).

Section Read in Conjunction with Statutes Applicable to Special Proceedings. — This section, as a special proceeding, should provide procedural mechanisms for the full and fair resolution of cases. To ensure the parties' right to a trial by jury, this section can and should be read in conjunction with the procedural statutes that apply to all special proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Legitimation Procedure Within Jurisdiction of Superior Court Clerk. — The legitimation procedure, which is identified in this section as a special proceeding in the superior court of the county in which the putative father resides, is within the jurisdictional purview of the clerk of superior court. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

The clerks of superior court have authority, pursuant to this section, to enter an order legitimating a minor child of a man who alleges that he is the child's natural father, where the child is presumed to be legitimate because he was born to his mother while she was lawfully married to another man, provided that the issue of paternity must be submitted to and decided by a jury after the child and the husband have been properly made parties to the proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Purpose of Procedure for Legitimation. — By specifying the manner and time in which an illegitimate child may establish his paternity, this State has sought (1) to mitigate the hardships created by former law (which permitted illegitimate children to inherit only from the mother and from each other); (2) to equalize, insofar as practical, the inheritance rights of legitimate and illegitimate children; and (3) at the same time, to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

There are several ways to legitimate children in North Carolina: 1) verified petition filed with the superior court by the putative father, 2) subsequent marriage of the parents, or 3) civil action to establish paternity. Helms v. Young-Woodard, 104 N.C. App. 746, 411 S.E.2d 184 (1991), cert. denied, 331 N.C. 117, 414 S.E.2d 756, 506 U.S. 829, 113 S. Ct. 91, 121 L. Ed. 2d 53 (1992).

Phrase "born out of wedlock" should refer to the status of the parents of the child in relation to each other. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

A child born to a married woman, but begotten by one other than her husband, is a child "born out of wedlock." In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Effect of Legitimation on Prior Consent

to Adoption. — A legitimation proceeding brought under this section by the putative father of a child born out of wedlock, wherein the child was declared legitimate, had no effect upon the prior written consent to adoption given by the unwed mother under G.S. 48-6. In re Doe, 11 N.C. App. 560, 181 S.E.2d 760, cert. denied and appeal dismissed, 279 N.C. 394, 183 S.E.2d 244 (1971). See G.S. 49-13.1.

Statute Inoperative After Death of Father. — Both the North Carolina legitimation and paternity statutes are inoperative after the death of the father. Tucker v. City of Clinton, 120 N.C. App. 776, 463 S.E.2d 806 (1995).

No Standing to Bring Legitimation Action After Termination of Parental Rights. — Where father's parental rights had been terminated under G.S. 7B-1112 in 1999, he lacked standing to bring an action under G. S. 49-10, G.S. 49-11 to legitimate the same child to whom his parental rights had been terminated. Gorsuch v. Dees, 173 N.C. App. 223, 618 S.E.2d 747, 2005 N.C. App. LEXIS 1914 (2005).

Petition to Be Filed by Father Only. — This statute unambiguously limits the person who may file a legitimation petition to the putative father of any child born out of wedlock; thus, the putative grandfather lacked standing to attempt legitimation. Tucker v. City of Clinton, 120 N.C. App. 776, 463 S.E.2d 806 (1995).

Subsequently Filed Affidavit Did Not Relate Back to Original Filing Date. — Where termination order, later held to be invalid for failure to use due diligence in ascertaining putative father's address, was filed with adoption petition in lieu of affidavit required by G.S. 48-13, a subsequently filed affidavit did not relate back to original filing date of petition so as to cut off rights of putative father who filed legitimation petition to this section before affidavit was filed. In re Adoption of Clark, 327 N.C. 61, 393 S.E.2d 791 (1990).

Petition Addressed Directly to Judge. — A decree of legitimation was not void upon the ground that the petition should have been originally addressed to the clerk of the court, instead of directly to the judge. Dunn v. Dunn, 199 N.C. 535, 155 S.E. 165 (1930).

Child Is Necessary Party. — Under this section, the child is a necessary party to the proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

"Best Interest of the Child" Inquiry Not Required. — North Carolina's General Assembly has not required a best interest of the child inquiry in the context of a legitimation proceeding. While the General Assembly has specifically required such an inquiry under G.S. 50-13.2 and G.S. 7B-1110, and Chapter 48, its failure to mandate a best interest inquiry in connection with G.S. 49-10 and G.S. 49-12.1 is clear evidence of its intent that no such inquiry is required in this context. In re Papathanassiou, — N.C. App. —, 671 S.E.2d 572, 2009 N.C. App. LEXIS 108 (2009).

G.S. 49-10 specifies the procedures to be followed in a proceeding pursuant to G.S. 49-12.1, and provides that a child is a necessary party to a legitimation proceeding. G.S. 49-12.1(a) states specifically that if the child is a minor, a guardian ad litem must be appointed to represent the child; however, regardless of whether G.S. 49-12.1 required this, appointment of a guardian ad litem for the minor child is mandated by G.S. 1A-1, N.C. R. Civ. P. 17. In re Papathanassiou, — N.C. App. —, 671 S.E.2d 572, 2009 N.C. App. LEXIS 108 (2009).

Married Woman's Husband Should Be Summoned. — As a potentially adverse party in a special proceeding under this section brought by natural father of child whose mother was married to another man at the time of his conception and birth, the married woman's husband should be construed as one of the respondents on whom summons must be served. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985). See also § 49-12.1.

Summons Procedure Governed by § 1-393. — The requirement that a summons be served upon the man to whom the child's mother was married when the child was conceived and born would be governed by G.S. 1-393. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Standard of Proof. — This section, just as G.S. 49-14, requires proof beyond a reasonable doubt to establish paternity in rebuttal of the presumption of legitimacy arising from the lawful marriage of child's mother to man other than its natural father. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985). But see now § 49-12.1(c).

Presumption of Legitimacy Where Child's Mother Is Married. — Because of the strong presumption of legitimacy involved where mother of child is married, the lawful husband of the mother has an obvious interest in a legitimation proceeding involving a child born to his wife while the two were married. The rebuttal of this presumption should be presented to and resolved by a jury to ensure that the parties' rights are adequately protected. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Man Living with Mother for Five Years Preceding Child's Birth Was Putative Father. — Petitioner, who had lived openly and notoriously in an adulterous relationship with the mother of child (born in 1965) since 1960, continuing to maintain and care for the child born of that relationship, was the "putative father" of the child, rather than the mother's husband, who discontinued living with the mother in 1960, years before the child was born. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Transfer to Civil Docket for Jury Deter-

mination of Paternity. — Resolution by a jury of the factual issue of paternity, when a presumption of legitimacy is involved, may be accomplished by transferring the case to the civil issue docket for trial at the next ensuing session of the superior court pursuant to G.S. 1-273 [see now G.S. 1-301.1 et seq.]. Therefore, it is not necessary to require that the putative father first file a paternity action under G.S. 49-14 before proceeding under this section to have child legitimated. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Relationship to Actions for Custody. — Father of a child born out of wedlock who sought custody of the child under G.S. 50-13.1(a) was treated as a third party as he had not legitimated the child pursuant to G.S. 49-10, 49-12, or 49-12.1 or had his paternity adjudicated under G.S. 49-14. Smith v. Barbour, 154 N.C. App. 402, 571 S.E.2d 872, 2002 N.C. App. LEXIS 1450 (2002), cert. denied, — N.C. —, 599 S.E.2d 408 (2004).

Priority over Paternity Action. — When a putative father filed both an action for custody in the district court, which was converted into a paternity action, and a legitimation action in the superior court, the legitimation action took priority, as legitimation vested greater rights in the parent and child than an order adjudicating paternity; therefore, the court in which the custody action was filed was divested of jurisdiction. Smith v. Barbour, 154 N.C. App. 402, 571 S.E.2d 872, 2002 N.C. App. LEXIS 1450 (2002), cert. denied, — N.C. —, 599 S.E.2d 408 (2004).

In a termination of parental rights proceeding, because a trial court improperly interpreted a stipulation regarding legitimacy under G.S. 49-10, it erroneously found that the four factors in G.S. 7B-1111(a)(5) were satisfied; because there was insufficient evidence on the elements outside of the stipulation, a reversal was required. In re I.S., 170 N.C. App. 78, 611 S.E.2d 467, 2005 N.C. App. LEXIS 888 (2005).

Termination of a father's parental rights was upheld on appeal since the father failed to challenge any of the findings of fact made by the trial court, namely that prior to the date the motion to terminate his parental rights was filed, he never established paternity over the minor child at issue, never legitimated the child by statute or marriage, nor had he provided any financial support. In re A.R.H.B., 186 N.C. App. 211, 651 S.E.2d 247, 2007 N.C. App. LEXIS 2086 (2007).

Applied in Gilliard v. Craig, 331 F. Supp. 587 (W.D.N.C. 1971); Craid v. Gilliard, 409 U.S. 807, 93 S. Ct. 39, 34 L. Ed. 2d 66 (1972); David v. Ferguson, 153 N.C. App. 482, 571 S.E.2d 230, 2002 N.C. App. LEXIS 1176 (2002); Helms v. Landry, — N.C. App. —, 671 S.E.2d 347, 2009 N.C. App. LEXIS 7 (2009).

Cited in Williamson v. Cox, 218 N.C. 177, 10 S.E.2d 662 (1940); Conley v. Johnson, 24 N.C. App. 122, 210 S.E.2d 88 (1974); Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994); In re Baby Girl Dockery, 128 N.C. App. 631, 495 S.E.2d 417 (1998); Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41, 2003 N.C. LEXIS 605 (2003); In re T.L.B., 167 N.C. App. 298, 605 S.E.2d 249, 2004 N.C. App. LEXIS 2165 (2004); In re Z.T.B., 170 N.C. App. 564, 613 S.E.2d 298, 2005 N.C. App. LEXIS 1093 (2005); Yurek v. Shaffer, — N.C. App. —, 678 S.E.2d 738, 2009 N.C. App. LEXIS 1079 (July 7, 2009).

§ 49-11. Effects of legitimation.

The effect of legitimation under G.S. 49-10 shall be to impose upon the father and mother all of the lawful parental privileges and rights, as well as all of the obligations which parents owe to their lawful issue, and to the same extent as if said child had been born in wedlock, and to entitle such child by succession, inheritance or distribution, to take real and personal property by, through, and from his or her father and mother as if such child had been born in lawful wedlock. In case of death and intestacy, the real and personal estate of such child shall descend and be distributed according to the Intestate Succession Act as if he had been born in lawful wedlock. (Code, s. 40; Rev., s. 264; C.S., s. 278; 1955, c. 540, s. 2; 1959, c. 879, s. 10; 1963, c. 1131.)

CASE NOTES

Constitutionality. — Sections 29-19, 49-10 through 49-12 and 49-14 through 49-16, construed together, do not violate the equal protection clause of the United States Constitution. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

Purpose of Procedure for Legitimation. — By specifying the manner and time in which an illegitimate child may establish his paternity, this State has sought (1) to mitigate the hardships created by former law (which permitted illegitimate children to inherit only from the mother and from each other); (2) to equalize, insofar as practical, the inheritance rights of legitimate and illegitimate children; and (3) at the same time, to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

Legitimated Child May Inherit By, Through and From Parents. — A legitimated child shall have the same right to inherit by, through and from his father and mother as if such child had been born in lawful wedlock. Greenlee v. Quinn, 255 N.C. 601, 122 S.E.2d 409 (1961).

The plain intent and language of this section is that a legitimated child shall inherit his father's real estate and be entitled to the personal estate of his father in the same manner as if it had been born in lawful wedlock. Love v. Love, 179 N.C. 115, 101 S.E. 562 (1919).

Effect of Legitimation on Prior Consent to Adoption. — A legitimation proceeding brought under G.S. 49-10 by the putative father of a child born out of wedlock, wherein the child was declared legitimate, had no effect upon the prior written consent to adoption given by the unwed mother under G.S. 48-6. In re Doe, 11 N.C. App. 560, 181 S.E.2d 760, cert. denied and appeal dismissed, 279 N.C. 394, 183 S.E.2d 244 (1971). See G.S. 49-13.1.

Standing to Bring Action After Termination of Parental Rights. — Where father's parental rights had been terminated under G.S. 7B-1112 in 1999, he lacked standing to bring an action under G.S. 49-10, G.S. 49-11 to legitimate the same child to whom his parental rights had been terminated. Gorsuch v. Dees, 173 N.C. App. 223, 618 S.E.2d 747, 2005 N.C. App. LEXIS 1914 (2005).

Priority over Paternity Action. — When a putative father filed both an action for custody in the district court, which was converted into a paternity action, and a legitimation action in the superior court, the legitimation action took priority, as legitimation vested greater rights in the parent and child than an order adjudicating paternity; therefore, the court in which the custody action was filed was divested of jurisdiction. Smith v. Barbour, 154 N.C. App. 402, 571 S.E.2d 872, 2002 N.C. App. LEXIS 1450 (2002), cert. denied, — N.C. —, 599 S.E.2d 408 (2004).

Transfer of Rights and Duties to Biological Father. — Husband of the mother of a child born during the parties' marriage is presumed to be the father of that child and, thus, enjoys all the parental rights and privileges, as well as obligations, to that child. A determination that a petitioner in a legitimation action, and not the husband, is the biological father of the child terminates the husband's rights to the child, conferring them onto petitioner pursuant to G.S. 49-11; thus, unless the husband has previously been determined not to be the child's father, he is a necessary party to the proceeding pursuant to G.S. 1A-1, N.C. R. Civ. P. 19(b). In re Papathanassiou, — N.C. App. —, 671 S.E.2d 572, 2009 N.C. App. LEXIS 108 (2009).

Applied in Jones v. McDowell, 53 N.C. App. 434, 281 S.E.2d 192 (1981).

Cited in Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

§ 49-12. Legitimation by subsequent marriage.

When the mother of any child born out of wedlock and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall, in all respects after such intermarriage be deemed and held to be legitimate and the child shall be entitled, by succession, inheritance or distribution, to real and personal property by, through, and from his father and mother as if such child had been born in lawful wedlock. In case of death and intestacy, the real and personal estate of such child shall descend and be distributed according to the Intestate Succession Act as if he had been born in lawful wedlock. (1917, c. 219, s. 1; C.S., s. 279; 1947, c. 663, s. 2; 1955, c. 540, s. 3; 1959, c. 879, s. 11.)

Legal Periodicals. — For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

For casenote: "The Established Standard for Fathers Who Have Acknowledged Paternity and Who Are Seeking Custody of Their Illegitimate Child(ren): Rosero v. Blake, 357 N.C. 193 (2003)," see 26 N.C. Cent. L.J. 116 (2003).

CASE NOTES

Constitutionality. — Sections 29-19, 49-10 through 49-12 and 49-14 through 49-16, construed together, do not violate the equal protection clause of the United States Constitution. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

Upon the evidence in the case, and the theory of the defense, the defendant could not invoke the doctrine of vested rights so as to contest the constitutionality of this section. Bowman v. Howard, 182 N.C. 662, 110 S.E. 98 (1921).

Purpose of Procedure for Legitimation. — By specifying the manner and time in which an illegitimate child may establish his paternity, this State has sought (1) to mitigate the hardships created by former law (which permitted illegitimate children to inherit only from the mother and from each other); (2) to equalize, insofar as practical, the inheritance rights of legitimate and illegitimate children; and (3) at the same time, to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

Section 49-13 in Pari Materia. — This section and G.S. 49-13 regulate the family circle and define the rights and responsibilities of members of the circle, and must be construed in pari materia. Chambers v. Chambers, 43 N.C. App. 361, 258 S.E.2d 822 (1979).

Action Under § 49-14 Prohibited When Child Is Legitimated. — If child is legitimated by virtue of this section, an action under G.S. 49-14 cannot be maintained, as G.S. 49-14 establishes a means of support for illegitimate children. Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987).

Strict Construction. — This section is strictly construed as being in derogation of the common law. In re Estate of Wallace, 197 N.C. 334, 148 S.E. 456 (1929).

Retroactivity of Section. — This section, by its express terms, is retroactive as well as prospective in effect. Stewart v. Stewart, 195 N.C. 476, 142 S.E. 577 (1928); Greenlee v. Quinn, 255 N.C. 601, 122 S.E.2d 409 (1961).

The provisions of this section are retroactive as well as prospective in effect, and a child born out of wedlock whose mother married his reputed father prior to the enactment of the statute is the heir of his parents who die subsequent to its enactment. In re Estate of Wallace, 197 N.C. 334, 148 S.E. 456 (1929).

The legislature has given a new or additional meaning to the word "legitimate" as used in this section. Although this meaning is not strictly within its ordinary definition, the courts will adopt the meaning impressed upon the word by legislative enactment. Carter v. Carter, 232 N.C. 614, 61 S.E.2d 711 (1950).

"Reputed Father". — The word "reputed" means considered, or generally supposed, or accepted by general or public opinion. Bowman v. Howard, 182 N.C. 662, 110 S.E. 98 (1921).

The use of the word "reputed" rather than "putative" in this section was intended merely to dispense with the absolute proof of paternity, so that, if the child is "regarded," "deemed," "considered," or "held in thought" by the parents themselves as their child, either before or after marriage, it is legitimate. Carter v. Carter, 232 N.C. 614, 61 S.E.2d 711 (1950); Chambers v. Chambers, 43 N.C. App. 361, 258 S.E.2d 822 (1979).

DNA sampling results may be used to rebut the presumption that a child born to a married woman is her husband's child and to simultaneously offer evidence that a person was "born out of wedlock" within the meaning of this section. Batcheldor v. Boyd, 108 N.C. App. 275, 423 S.E.2d 810 (1992), cert. denied, 333 N.C. 254, 426 S.E.2d 700 (1993).

Irregularity in divorce proceedings is not a ground for declaring children who would otherwise be legitimated by a subsequent marriage illegitimate. Reed v. Blair, 202 N.C. 745, 164 S.E. 118 (1932).

Rights and Duties as to Custody and Support. — In declaring in this section that "the child shall in all respects after such intermarriage be deemed and held to be legitimate," the General Assembly clearly intended that the child should be treated as a child born in lawful wedlock in determining the rights and duties of parent and child as to custody and support. In re Doe, 231 N.C. 1, 56 S.E.2d 8 (1949).

Where the reputed father of a child marries the child's mother after its birth, such child is deemed legitimate, just as if it had been born in lawful wedlock, and such child is a minor child of the marriage within the purview of the statute relating to custody and support of children in divorce; thus, the father may be required to furnish support for such child upon motion made either before or after decree of divorce. Carter v. Carter, 232 N.C. 614, 61 S.E.2d 711 (1950).

Child Has Same Right to Inherit As If Born in Lawful Wedlock. — A legitimated child shall have the same right to inherit by, through and from his father and mother as if such child had been born in lawful wedlock. Greenlee v. Quinn, 255 N.C. 601, 122 S.E.2d 409 (1961).

Including Right to Inherit from Collateral Relations. — The legislature intended to confer upon the legitimated child the same right to inherit from collateral relations as it would have had if it had been born in lawful wedlock. Greenlee v. Quinn, 255 N.C. 601, 122 S.E.2d 409 (1961).

As to inheritance from collateral relations under former law, see In re Estate of Wallace, 197 N.C. 334, 148 S.E. 456 (1929).

Effect of Marriage on Child's Legitimacy under Former Law. — Prior to the passage of this section in 1917, marriage of the parents did not legitimate the previous offspring. Ashe v. Camp Mfg. Co., 154 N.C. 241, 70 S.E. 295 (1911).

Prior to the passage of this section, where, by the laws of the domicile of the parents at the time of the birth of their illegitimate child and of their marriage, their marriage legitimated him, the legitimacy attached at the time of the marriage, he being a minor, and followed him wherever he goes. Fowler v. Fowler, 131 N.C. 169, 42 S.E. 563 (1902).

Relationship to Actions for Custody. — Father of a child born out of wedlock who sought custody of the child under G.S. 50-13.1(a) was treated as a third party as he had not legitimated the child pursuant to G.S. 49-10, 49-12, or 49-12.1 or had his paternity adjudicated under G.S. 49-14. Smith v. Barbour, 154 N.C. App. 402, 571 S.E.2d 872, 2002 N.C. App. LEXIS 1450 (2002), cert. denied, — N.C. —, 599 S.E.2d 408 (2004).

Applied in Myers v. Myers, 39 N.C. App. 201, 249 S.E.2d 853 (1978); DOT v. Fuller, 76 N.C. App. 138, 332 S.E.2d 87 (1985); Batcheldor v. Boyd, 119 N.C. App. 204, 458 S.E.2d 1 (1995).

Cited in Williamson v. Cox, 218 N.C. 177, 10 S.E.2d 662 (1940); Herndon v. Robinson, 57 N.C. App. 318, 291 S.E.2d 305 (1982); Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41, 2003 N.C. LEXIS 605 (2003); In re R.R., 180 N.C. App. 628, 638 S.E.2d 502, 2006 N.C. App. LEXIS 2506 (2006).

§ 49-12.1. Legitimation when mother married.

(a) The putative father of a child born to a mother who is married to another man may file a special proceeding to legitimate the child. The procedures shall be the same as those specified by G.S. 49-10, except that the spouse of the mother of the child shall be a necessary party to the proceeding and shall be properly served. A guardian ad litem shall be appointed to represent the child if the child is a minor.

(b) The presumption of legitimacy can be overcome by clear and convincing evidence.

(c) The parties may enter a consent order with the approval of the clerk of superior court. The order entered by the clerk shall find the facts and declare the proper person the father of the child and may change the surname of the child.

(d) The effect of legitimation under this section shall be the same as provided by G.S. 49-11.

(e) A certified copy of the order of legitimation under this section shall be sent by the clerk of superior court under his official seal to the State Registrar of Vital Statistics who shall make a new birth certificate bearing the full name of the father of the child and, if ordered by the clerk, changing the surname of the child. (1991, c. 667, s. 2; 1991 (Reg. Sess., 1992), c. 1030, s. 15; 1997-433, s. 4.9; 1998-17, s. 1.)

Legal Periodicals. — For casenote: "The Established Standard for Fathers Who Have Acknowledged Paternity and Who Are Seeking Custody of Their Illegitimate Child(ren): Rosero v. Blake, 357 N.C. 193 (2003)," see 26 N.C. Cent. L.J. 116 (2003).

CASE NOTES

Inquiry in G.S. 49-10 and G.S. 49-12.1 is whether a putative father is the biological father of a minor child such that the rights and responsibilities inherent in the relationship between father and child may be acknowledged. In re Papathanassiou, — N.C. App. —, 671 S.E.2d 572, 2009 N.C. App. LEXIS 108 (2009).

"Best Interest of the Child" Inquiry Not Required. — North Carolina's General Assembly has not required a best interest of the child inquiry in the context of a legitimation proceeding. While the General Assembly has specifically required such an inquiry under G.S. 50-13.2 and G.S. 7B-1110, and Chapter 48, its failure to mandate a best interest inquiry in connection with G.S. 49-10 and G.S. 49-12.1 is clear evidence of its intent that no such inquiry is required in this context. In re Papathanassiou, — N.C. App. —, 671 S.E.2d 572, 2009 N.C. App. LEXIS 108 (2009).

Marital Presumption Rebuttable. — In the context of a custody dispute between the mother and her husband or former spouse, concerning a child born during their lawful marriage, the marital presumption is rebuttable only upon a showing that another man has formally acknowledged paternity, or has been adjudicated to be the father of the child. Jones v. Patience, 121 N.C. App. 434, 466 S.E.2d 720 (1996).

Relationship to Actions for Custody. — Father of a child born out of wedlock who sought custody of the child under G.S. 50-13.1(a) was treated as a third party as he had not legitimated the child pursuant to G.S. 49-10, 49-12, or 49-12.1 or had his paternity adjudicated under G.S. 49-14. Smith v. Barbour, 154 N.C. App. 402, 571 S.E.2d 872, 2002 N.C. App. LEXIS 1450 (2002), cert. denied, — N.C. —, 599 S.E.2d 408 (2004).

Guardian Ad Litem Must be Appointed for Minor Child in Legitimacy Proceeding. — G.S. 49-10 specifies the procedures to be followed in a proceeding pursuant to G.S. 49-12.1, and provides that a child is a necessary party to a legitimation proceeding. G.S. 49-12.1(a) states specifically that if the child is a minor, a guardian ad litem must be appointed to represent the child; however, regardless of whether G.S. 49-12.1 required this, appointment of a guardian ad litem for the minor child is mandated by G.S. 1A-1, N.C. R. Civ. P. 17. In re Papathanassiou, — N.C. App. —, 671 S.E.2d 572, 2009 N.C. App. LEXIS 108 (2009).

Cited in Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41, 2003 N.C. LEXIS 605 (2003).

§ 49-13. New birth certificate on legitimation.

A certified copy of the order of legitimation when issued under the provisions of G.S. 49-10 shall be sent by the clerk of the superior court under his official seal to the State Registrar of Vital Statistics who shall then make the new birth certificate bearing the full name of the father, and change the surname of the child so that it will be the same as the surname of the father.

When a child is legitimated under the provisions of G.S. 49-12, the State Registrar of Vital Statistics shall make a new birth certificate bearing the full name of the father upon presentation of a certified copy of the certificate of marriage of the father and mother and change the surname of the child so that it will be the same as the surname of the father. (1947, c. 663, s. 3; 1955, c. 951, s. 2.)

Cross References. — As to new birth certificate, see also G.S. 49-12.1. As to amendment of birth certificates by State Registrar on proof of marriage of unwed parents, see G.S. 130A-118.

Legal Periodicals. — For article, "'We Are Family': Valuing Associationalism in Disputes Over Children's Surnames," see 75 N.C.L. Rev. 1625 (1997).

CASE NOTES

The name change requirement of this section is invalid. Jones v. McDowell, 53 N.C. App. 434, 281 S.E.2d 192 (1981).

The valid purpose served by G.S. 49-10 and this section of establishing the filial relationship between illegitimate children and their fathers is not enhanced, advanced or served in any useful or justifiable way by the additional requirement that the child's surname be changed to that of the father; such a requirement denies the mother of an illegitimate child the equal protection of the laws, and because it requires arbitrary action on the part of an agency of the State, it denies such mothers a protected liberty interest without due process of law. Jones v. McDowell, 53 N.C. App. 434, 281 S.E.2d 192 (1981).

Section 49-12 in Pari Materia. — Section 49-12 and this section regulate the family circle and define the rights and responsibilities of members of the circle, and must be construed in pari materia. Chambers v. Chambers, 43 N.C. App. 361, 258 S.E.2d 822 (1979).

Defendant Estopped from Collateral Attack on Own Admission of Paternity. — Despite the fact that defendant-husband apparently made a false affidavit of paternity in obtaining a new birth certificate for the child under this section, he was estopped from collaterally attacking his admission of paternity in a later proceeding for support. Chambers v. Chambers, 43 N.C. App. 361, 258 S.E.2d 822 (1979).

Applied in Myers v. Myers, 39 N.C. App. 201, 249 S.E.2d 853 (1978).

Cited in Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987); Smith v. Barbour, 154 N.C. App. 402, 571 S.E.2d 872, 2002 N.C. App. LEXIS 1450 (2002).

§ 49-13.1: Repealed by Session Laws 2004-203, s. 3, effective August 17, 2004.

ARTICLE 3.

Civil Actions Regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.

(a) The paternity of a child born out of wedlock may be established by civil action at any time prior to such child's eighteenth birthday. A copy of a certificate of birth of the child shall be attached to the complaint. The establishment of paternity shall not have the effect of legitimation. The social security numbers, if known, of the minor child's parents shall be placed in the record of the proceeding.

(b) Proof of paternity pursuant to this section shall be by clear, cogent, and convincing evidence.

(c) No such action shall be commenced nor judgment entered after the death of the putative father, unless the action is commenced either:

(1) Prior to the death of the putative father;

(2) Within one year after the date of death of the putative father, if a proceeding for administration of the estate of the putative father has not been commenced within one year of his death; or

(3) Within the period specified in G.S. 28A-19-3(a) for presentation of claims against an estate, if a proceeding for administration of the estate of the putative father has been commenced within one year of his death.

Any judgment under this subsection establishing a decedent to be the father of a child shall be entered nunc pro tunc to the day preceding the date of death of the father.

(d) If the action to establish paternity is brought more than three years after birth of a child or is brought after the death of the putative father, paternity shall not be established in a contested case without evidence from a blood or genetic marker test.

(e) Either party to an action to establish paternity may request that the case be tried at the first session of the court after the case is docketed, but the presiding judge, in his discretion, may first try any pending case in which the rights of the parties or the public demand it.

(f) When a determination of paternity is pending in a IV-D case, the court shall enter a temporary order for child support upon motion and showing of clear, cogent, and convincing evidence of paternity. For purposes of this subsection, the results of blood or genetic tests shall constitute clear, cogent, and convincing evidence of paternity if the tests show that the probability of the alleged parent's parentage is ninety-seven percent (97%) or higher. If paternity is not thereafter established, then the putative father shall be reimbursed the full amount of temporary support paid under the order.

(g) Invoices for services rendered for pregnancy, childbirth, and blood or genetic testing are admissible as evidence without requiring third party foundation testimony and shall constitute prima facie evidence of the amounts incurred for the services or for testing on behalf of the child. (1967, c. 993, s. 1; 1973, c. 1062, s. 3; 1977, c. 83, s. 2; 1981, c. 599, s. 14; 1985, c. 208, ss. 1, 2; 1993, c. 333, s. 3; 1995, c. 424, ss. 1, 2; 1997-154, s. 1; 1997-433, ss. 4.2, 4.10; 1998-17, s. 1; 2005-389, s. 3.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For note on constitutional law and an illegitimate child's paternal inheritance rights, see 16 Wake Forest L. Rev. 205 (1980).

For survey of 1980 family law, see 59 N.C.L. Rev. 1194 (1981).

For note on a default not constituting an admission of facts for purposes of summary judgment, see 17 Wake Forest L. Rev. 49 (1981).

For survey of 1981 family law, see 60 N.C.L. Rev. 1379 (1982).

For survey of constitutional law in 1982, see 61 N.C.L. Rev. 1052 (1983).

For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

For casenote: "The Established Standard for Fathers Who Have Acknowledged Paternity and Who Are Seeking Custody of Their Illegitimate Child(ren): Rosero v. Blake, 357 N.C. 193 (2003)," see 26 N.C. Cent. L.J. 116 (2003).

CASE NOTES

Editor's Note. — *Some of the cases annotated below were decided prior to the 1993 amendment to G.S. 49-14, which, inter alia, changed the evidentiary standard from beyond a reasonable doubt to clear, cogent and convincing evidence.*

Constitutionality. — Sections 29-19, 49-10 through 49-12 and 49-14 through 49-16, construed together, do not violate the equal protection clause of the United States Constitution. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

The statutory scheme established by G.S. 29-19 and G.S. 49-14 through 49-16 does not discriminate against illegitimate children in such a manner as to violate the equal protection clause of U.S. Const., Amend. XIV. Outlaw v. Planters Nat'l Bank & Trust Co., 41 N.C. App. 571, 255 S.E.2d 189 (1979).

For case holding the former statute of limitations under this section unconstitutional, see County of Lenoir ex rel. Cogdell v. Johnson, 46 N.C. App. 182, 264 S.E.2d 816 (1980).

Purpose. — The legislature, by enacting this section, intended to establish a means of support for illegitimate children. Wright v. Gann, 27 N.C. App. 45, 217 S.E.2d 761, cert. denied, 288 N.C. 513, 219 S.E.2d 348 (1975).

By specifying the manner and time in which an illegitimate child may establish his paternity, this State has sought (1) to mitigate the hardships created by former law (which permitted illegitimate children to inherit only from the mother and from each other); (2) to equalize, insofar as practical, the inheritance rights of legitimate and illegitimate children; and (3) at the same time, to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

The purposes of this Article are to enable an illegitimate child to receive support from its biological father and to prevent it from becoming a public charge. County of Lenoir ex rel. Cogdell v. Johnson, 46 N.C. App. 182, 264 S.E.2d 816 (1980).

The purpose of an action under this section is to establish the identity of the biological father of an illegitimate child so that the child's right to support may be enforced and the child will not become a public charge. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986); Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

The legislative purpose underlying this section's paternity actions is to provide the basis or means of establishing the identity of the putative father in order to allow the courts to impose an obligation of support. Becton v. George, 90 N.C. App. 607, 369 S.E.2d 366 (1988).

Statute Inoperative After Death of Father. — Both the North Carolina legitimation and paternity statutes are inoperative after the death of the father. Tucker v. City of Clinton, 120 N.C. App. 776, 463 S.E.2d 806 (1995).

There are several ways to legitimate children in North Carolina: 1) verified petition filed with the superior court by the putative father, 2) subsequent marriage of the parents, or 3) civil action to establish paternity. Helms v. Young-Woodard, 104 N.C. App. 746, 411 S.E.2d 184 (1991), cert. denied, 331 N.C. 117, 414 S.E.2d 756, 506 U.S. 829, 113 S. Ct. 91, 121 L. Ed. 2d 53 (1992).

Section 49-2 Compared. — The issue of paternity is the entire thrust of the civil action under this section, whereas the focus of the crime punishable by G.S. 49-2 is the willful failure to pay support for an illegitimate child, not paternity, because that section does not make the mere begetting of a child a crime. Stephens v. Worley, 51 N.C. App. 553, 277 S.E.2d 81 (1981).

This section and §§ 49-15 and 49-16 abrogate the common law. Conley v. Johnson, 24 N.C. App. 122, 210 S.E.2d 88 (1974).

Applicability of § 50-13.6. — Section 50-13.6 does not apply to civil actions to establish paternity under this section, but would authorize an award of reasonable attorney fees for custody and support actions involving an illegitimate child whose paternity had been determined. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Effect of Acknowledgment of Paternity Under G.S. 110-132. — There are significant differences between an acknowledgment of paternity under G.S. 110-132 in an agreement to provide child support and the procedures governing the legitimation of a child; where father had not taken any steps to legitimate the child, by statute or judicial determination, his execution of an acknowledgment of paternity under G.S. 110-132 did not erase the common law presumption in favor of mother's custody. Rosero v. Blake, 150 N.C. App. 250, 563 S.E.2d 248, 2002 N.C. App. LEXIS 509 (2002), cert. granted, 356 N.C. 166, 568 S.E.2d 610 (2002).

Action Under This Section Prohibited When Child Is Legitimated. — If child is legitimated by virtue of G.S. 49-12, an action under this section cannot be maintained, as this section establishes a means of support for illegitimate children. Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987).

"Out of wedlock" refers to the status of the child and not to the status of the mother. Wright v. Gann, 27 N.C. App. 45, 217 S.E.2d 761, cert. denied, 288 N.C. 513, 219 S.E.2d 348 (1975).

This section is applicable to all illegitimate children, and therefore does not preclude an illegitimate child of a married woman from instituting a suit for support. Wright v. Gann, 27 N.C. App. 45, 217 S.E.2d 761, cert. denied, 288 N.C. 513, 219 S.E.2d 348 (1975).

Enforcement of Child's Right to Support. — The illegitimate child has no statutory right to parental support through criminal proceedings; rather, such child's right to parental support is enforced by an action under this section and G.S. 49-15, which impose a support obligation on persons determined to be the parents of an illegitimate child. The function of a criminal prosecution of a parent who willfully fails to support his illegitimate child is not to compensate the illegitimate child, but to promote society's interest in preventing the parents of children from willfully leaving those children without parental support. State v. Beasley, 57 N.C. App. 208, 290 S.E.2d 730, appeal dismissed and cert. denied, 306 N.C. 559, 294 S.E.2d 225 (1982).

Only Designated Persons Have Standing. — If the North Carolina Legislature wanted others to have the capacity to be parties in a G.S. 49-14 paternity it could have also designated those others, but it did not when it consciously changed the existing common law. Stockton v. Estate of Thompson, 165 N.C. App. 899, 600 S.E.2d 13, 2004 N.C. App. LEXIS 1515 (2004).

Only Parent Who Has Custody of Child May Bring Action for Support. — Although plaintiff alleged that he was the father of the child, he did not allege that he had custody, therefore under the provisions of G.S. 50-13.4, only a parent who has custody of a minor child may bring an action for its support. Becton v. George, 90 N.C. App. 607, 369 S.E.2d 366 (1988).

Siblings Do Not Have Standing. — Trial court properly disallowed intervention by child's two siblings in mother's paternity action against putative father's estate; in G.S. 49-16, the designation of who had standing to participate in a G.S. 49-14 paternity proceeding was intended to be construed as written. Stockton v. Estate of Thompson, 165 N.C. App. 899, 600 S.E.2d 13, 2004 N.C. App. LEXIS 1515 (2004).

A paternity suit under this section is a civil action, even though the "beyond a reasonable doubt" standard is employed. County of Lenoir ex rel. Dudley v. Dawson, 60 N.C. App. 122, 298 S.E.2d 418 (1982).

Actions to enforce the child's right to support under this section and G.S. 49-15 are civil actions. State v. Beasley, 57 N.C. App. 208, 290 S.E.2d 730, appeal dismissed and cert. denied, 306 N.C. 559, 294 S.E.2d 225 (1982).

A suit brought for the sole purpose of establishing paternity pursuant to this section is not a criminal prosecution and cannot be considered criminal in nature simply because plaintiff must meet a higher burden of proof and establish such paternity beyond a reasonable doubt. Bell v. Martin, 299 N.C. 715, 264 S.E.2d 101 (1980).

And Confers No Per Se Right to Counsel. — The mere begetting of a child, standing alone, is not a crime in this state. It is true that a related threat of actual imprisonment, based partially upon a prior determination of paternity, may arise in subsequent criminal or civil enforcement proceedings if such becomes necessary to secure a defendant-father's support obligation to his child. However, it is plain that this uncertain "web of possibilities" concerning future sanctions or ramifications does not constitute an immediate threat of imprisonment in the initial civil paternity action itself, especially since the defendant may, in fact, prevail on the critical issue of fatherhood. Thus, there is no per se constitutional right to appointed counsel for an indigent defendant in a civil paternity suit under this section, by whomever instituted, because the necessary menace to personal liberty is clearly absent at that legal stage. Wake County ex rel. Carrington v. Townes, 306 N.C. 333, 293 S.E.2d 95 (1982), cert. denied, 459 U.S. 1113, 103 S. Ct. 745, 74 L. Ed. 2d 965 (1983).

Since Only One Issue Is Presented. — Representation by legal counsel is not invariably an essential component of fairness in all child support enforcement proceedings. There is but one factual issue in a paternity action, i.e., whether the defendant is the father of the child, and practically speaking, this is not an especially complex matter. The crux of most cases is credibility: simply deciding whom to believe. Wake County ex rel. Carrington v. Townes, 306 N.C. 333, 293 S.E.2d 95 (1982), cert. denied, 459 U.S. 1113, 103 S. Ct. 745, 74 L. Ed. 2d 965 (1983).

But Absent Counsel, Indigent May Not

Later Be Incarcerated to Enforce Support Order. — An indigent person cannot be sent to jail in any later proceeding to enforce a child support order, unless he had the benefit of legal assistance and advocacy at the proceeding in which paternity was determined. Wake County ex rel. Carrington v. Townes, 306 N.C. 333, 293 S.E.2d 95 (1982), cert. denied, 459 U.S. 1113, 103 S. Ct. 745, 74 L. Ed. 2d 965 (1983).

Failure to Join Child Does Not Require Dismissal. — In a civil action to establish paternity of an alleged illegitimate child the failure to properly join that child does not justify dismissal of the action. Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

If the legislature had intended to require the child to be joined as a necessary party in an action under G.S. 49-14, then it would have specifically stated such, as it did in G.S. 49-10. Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

Trial Judge to Determine Necessity for Appointed Counsel. — The trial judge shall determine, in the first instance, what true fairness requires, in light of all of the circumstances, when an indigent makes a motion for the appointment of counsel in a civil paternity suit. The trial court should proceed with an evaluation of the vital interests at stake on both sides and a determination of the degree of actual complexity involved in the given case and the corresponding nature of defendant's peculiar problems, if any, in presenting his own defense without appointed legal assistance. The judge must then weigh the foregoing factors against the overall and strong presumption that the defendant is not entitled to the appointment of counsel in a proceeding which does not present an immediate threat to personal liberty. Wake County ex rel. Carrington v. Townes, 306 N.C. 333, 293 S.E.2d 95 (1982), cert. denied, 459 U.S. 1113, 103 S. Ct. 745, 74 L. Ed. 2d 965 (1983).

Effect of Criminal Proceedings Under § 49-2 upon Proceedings under This Section. — Since the parties to a previous criminal proceeding under G.S. 49-2 and civil proceedings under this section were not the same, and the State and the present plaintiff were not in privity, the defendant was not estopped in the civil action to deny paternity. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

A judgment of acquittal in a criminal prosecution under G.S. 49-2 for willful failure to support two illegitimate children was not res judicata in a county's civil action under this section to establish defendant's paternity of the two children, where the criminal judgment merely stated that defendant was found not guilty, and did not disclose whether an acquittal was entered because the judge found that defendant was not the father of the children or because he did not believe that defendant had willfully failed to provide for their reasonable support, as there was thus no showing on the record that the issue of paternity had been previously adjudicated in defendant's favor. Stephens v. Worley, 51 N.C. App. 553, 277 S.E.2d 81 (1981).

Where a criminal action has been dismissed on grounds that the statute of limitations has run, and there is an identity of interest between the plaintiffs in the criminal and civil actions so that the parties are in privity, plaintiffs in the civil action are estopped by the judgment in the criminal action, even where the law has changed since the criminal action so as to allow proof of paternity by blood test. Settle ex rel. Sullivan v. Beasley, 59 N.C. App. 735, 298 S.E.2d 62 (1982), rev'd on other grounds, 309 N.C. 616, 308 S.E.2d 288 (1983).

General verdict of not guilty, upon charges of willful neglect and refusal to provide adequate support of an illegitimate child, did not operate as res judicata on the issue of paternity in subsequent action to establish paternity and require support of an illegitimate child. Sampson County ex rel. Child Support Enforcement Agency ex rel. McPherson v. Stevens, 91 N.C. App. 524, 372 S.E.2d 340 (1988).

Effect of Prior Determination in Action by County to Recover Support from Father. — Child's interests in having his paternity determined were not so identified with a county's interest in a prior action to recover from the father amounts paid by the county for child support that they were determinable in that action. The interest of the county, the real party in interest in the prior suit, was solely economic, as it was only interested in requiring the responsible parent to support the child and to recoup the amounts that it had paid for such support. The child, on the other hand, had more at stake in the later suit seeking support from his father, as the paternity adjudication would dramatically affect his personal interests. Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

No Certified Copies of Birth Certificates Attached to Petition. — In action under Uniform Reciprocal Enforcement of Support Act, where the record disclosed that no certified copies of the birth certificates of the alleged children-obligees were attached to plaintiffs' petition, court was without subject matter jurisdiction to adjudicate defendant's paternity. Reynolds v. Motley, 96 N.C. App. 299, 385 S.E.2d 548 (1989), (decided under prior law).

In actions under this section, the jury decides only the factual issue of paternity, and the court decides what payments should be awarded for the support of the child. Searcy v. Justice, 20 N.C. App. 559, 202 S.E.2d 314 (1974).

Claim of Being Tricked into Fathering

Child Not Appropriate as Defense. — Argument of defendant in paternity proceeding in which he counterclaimed against plaintiff for fraud that he was tricked into fathering a child and should not bear the financial responsibility for it was not appropriate in a civil action to establish paternity, either as a defense or a counterclaim. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Clear, Cogent & Convincing Standard. — The plaintiff's testimony at trial that she had sexual contact with no man other than defendant either in 1990 or 1991, expert testimony regarding the likelihood of conception given the number of sexual encounters between the two, and exhibits indicating that the child bears a strong resemblance to the defendant were sufficient to support the trial court's conclusion that defendant was the child's biological parent. Brown v. Smith, 137 N.C. App. 160, 526 S.E.2d 686, 2000 N.C. App. LEXIS 253 (2000).

In a paternity action under this section, plaintiff must prove beyond a reasonable doubt that defendant is the father of the child whose paternity is in issue. Thus, in a paternity case, in order to affirm a JNOV, the court must conclude as a matter of law that the jury could have had no reasonable doubt that defendant was the biological father of plaintiff's son. Smith v. Price, 74 N.C. 413, 340 S.E.2d 408 (1986).

Testimony by Expert Concerning Paternity. — Although it may be proper for a qualified physician to testify concerning the result of a defendant's blood test and concerning the use and application of the paternity index, it is not proper to allow the expert to state his opinion concerning paternity, as such an opinion is of no assistance to the trier of fact. The jury is equally capable of weighing the genetic factors along with the nongenetic circumstances to determine the ultimate probability of paternity. Lombroia v. Peek, 107 N.C. App. 745, 421 S.E.2d 784 (1992).

Assertion by Court as to Paternity of Child Held Prejudicial Error. — In flatly asserting that the person who had had intercourse with plaintiff 10 lunar months before the birth of her child would be the father of her child, the court ignored the possibility of a premature birth or an unusually long pregnancy, and thus committed prejudicial error. Searcy v. Justice, 20 N.C. App. 559, 202 S.E.2d 314 (1974).

Visitation Rights of Father. — The principle that the father of an illegitimate child is not entitled to visitation privileges absent consent of the mother has been abrogated by statutes as well as case law. Conley v. Johnson, 24 N.C. App. 122, 210 S.E.2d 88 (1974), (decided under prior law).

Transfer to Civil Docket for Jury Determination of Paternity. — Resolution by a jury of the factual issue of paternity, when a presumption of legitimacy is involved, may be accomplished by transferring the case to the civil issue docket for trial at the next ensuing session of the superior court pursuant to G.S. 1-273 [see now G.S. 1-301.1 et seq.]. Therefore, it is not necessary to require that the putative father first file a paternity action under this section before proceeding under G.S. 49-10 to have child legitimated. In re Locklear ex rel. Jones, 314 N.C. 412, 334 S.E.2d 46 (1985), (decided under prior law).

DNA or Gene Testing. — Trial court erred in ordering DNA or gene testing subsequent to an adjudication of paternity. State ex rel. Hill v. Manning, 110 N.C. App. 770, 431 S.E.2d 207 (1993).

Relationship to Actions for Custody. — Father of a child born out of wedlock who sought custody of the child under G.S. 50-13.1(a) was treated as a third party as he had not legitimated the child pursuant to G.S. 49-10, 49-12, or 49-12.1 or had his paternity adjudicated under G.S. 49-14. Smith v. Barbour, 154 N.C. App. 402, 571 S.E.2d 872, 2002 N.C. App. LEXIS 1450 (2002), cert. denied, — N.C. —, 599 S.E.2d 408 (2004).

Priority of Legitimation Action over Paternity Action. — When a putative father filed both an action for custody in the district court, which was converted into a paternity action, and a legitimation action in the superior court, the legitimation action took priority, as legitimation vested greater rights in the parent and child than an order adjudicating paternity; therefore, the court in which the custody action was filed was divested of jurisdiction. Smith v. Barbour, 154 N.C. App. 402, 571 S.E.2d 872, 2002 N.C. App. LEXIS 1450 (2002), cert. denied, — N.C. —, 599 S.E.2d 408 (2004).

Award of Attorney's Fees to the Putative Father. — Trial court erred by awarding a putative father attorney's fees under G.S. 50-13.6, once the putative father was proven not to be the biological father of a child because G.S. 50-13.6 did not apply to civil actions to establish paternity under G.S. 49-14. Instead, costs, including attorney's fees, involved in prosecuting a paternity action were to be awarded under G.S. 6-21(10). Guilford County ex rel. Holt v. Puckett, 191 N.C. App. 693, 664 S.E.2d 362, 2008 N.C. App. LEXIS 1471 (2008).

Paternity Not Required for Child to Inherit Under Life Insurance Policy. — While paternity had to be established for an illegitimate child to inherit from a father who died intestate, North Carolina had no statute requiring that paternity be established for an illegitimate child to benefit from a life insurance policy, and the policy at issue in defendant claimant's case did not exclude illegitimate children unless paternity had been judicially established. Fort Dearborn Life Ins. Co. v. Turner, 521 F. Supp. 2d 499, 2007 U.S. Dist. LEXIS 84333 (E.D.N.C. Oct. 3, 2007).

Applied in In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984); Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984); Helms v. Landry, — N.C. App. —, 671 S.E.2d 347, 2009 N.C. App. LEXIS 7 (2009).

Cited in Durham County Dep't of Social Servs. v. Williams, 52 N.C. App. 112, 277 S.E.2d 865 (1981); Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 63 N.C. App. 432, 305 S.E.2d 207 (1983); State v. Caudill, 68 N.C. App. 268, 314 S.E.2d 592 (1984); In re Locklear ex rel. Jones, 66 N.C. App. 722, 311 S.E.2d 691 (1984); Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985); State ex rel. Pender County Child Support Enforcement Agency ex rel. Crews v. Parker, 82 N.C. App. 419, 346 S.E.2d 270 (1986); Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41, 2003 N.C. LEXIS 605 (2003).

§ 49-15. Custody and support of illegitimate children when paternity established.

Upon and after the establishment of paternity of an illegitimate child pursuant to G.S. 49-14, the rights, duties, and obligations of the mother and the father so established, with regard to support and custody of the child, shall be the same, and may be determined and enforced in the same manner, as if the child were the legitimate child of such father and mother. When paternity has been established, the father becomes responsible for medical expenses incident to the pregnancy and the birth of the child. (1967, c. 993, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For survey of 1980 family law, see 59 N.C.L. Rev. 1194 (1981).

For survey of constitutional law in 1982, see 61 N.C.L. Rev. 1052 (1983).

For article, "Custody of the Illegitimate Child," see 18 N.C. Cent. L.J. 18 (1989).

For casenote: "The Established Standard for Fathers Who Have Acknowledged Paternity and Who Are Seeking Custody of Their Illegitimate Child(ren): Rosero v. Blake, 357 N.C. 193 (2003)," see 26 N.C. Cent. L.J. 116 (2003).

CASE NOTES

Constitutionality. — Sections 29-19, 49-10 through 49-12 and 49-14 through 49-16, construed together, do not violate the equal protection clause of the United States Constitution. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

The statutory scheme established by G.S. 29-19 and G.S. 49-14 through 49-16 does not discriminate against illegitimate children in such a manner as to violate the equal protection clause of U.S. Const., Amend. XIV. Outlaw v. Planters Nat'l Bank & Trust Co., 41 N.C. App. 571, 255 S.E.2d 189 (1979).

Purpose of Procedure for Legitimation. — By specifying the manner and time in which an illegitimate child may establish his paternity, this State has sought (1) to mitigate the hardships created by former law (which permitted illegitimate children to inherit only from the mother and from each other); (2) to equalize, insofar as practical, the inheritance rights of legitimate and illegitimate children; and (3) at the same time, to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

This section and §§ 49-14 and 49-16 abrogate the common law. Conley v. Johnson, 24 N.C. App. 122, 210 S.E.2d 88 (1974).

Effect of Acknowledgment of Paternity Under G.S. 110-132. — There are significant differences between an acknowledgment of paternity under G.S. 110-132 in an agreement to provide child support and the procedures governing the legitimation of a child; where father had not taken any steps to legitimate the child, by statute or judicial determination, his execution of an acknowledgment of paternity under G.S. 110-132 did not erase the common law presumption in favor of mother's custody. Rosero v. Blake, 150 N.C. App. 250, 563 S.E.2d 248, 2002 N.C. App. LEXIS 509 (2002), cert. granted, 356 N.C. 166, 568 S.E.2d 610 (2002).

Priority of Legitimation Action over Paternity Action. — When a putative father filed both an action for custody in the district court, which was converted into a paternity action, and a legitimation action in the superior court, the legitimation action took priority, as legitimation vested greater rights in the parent and child than an order adjudicating paternity; therefore, the court in which the custody action was filed was divested of jurisdiction. Smith v.

Barbour, 154 N.C. App. 402, 571 S.E.2d 872, 2002 N.C. App. LEXIS 1450 (2002), cert. denied, — N.C. —, 599 S.E.2d 408 (2004).

How Rights Determined and Enforced. — This section contemplates that parents' rights may be determined and enforced in an action brought pursuant to G.S. 49-14, and does not contemplate the bringing of a separate action for that purpose pursuant to G.S. 50-13.1 et seq., which relates to the custody and support of legitimate children. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

Child's Welfare Is Primary Consideration. — Once paternity is established, the proper custody and amount of support are determined in the same manner as for a legitimate child. In making this determination, the court has considerable discretion, but the welfare of the child is the primary consideration. To determine the rights of an illegitimate child any differently would violate the illegitimate child's constitutional right to equal protection of the law. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

The illegitimate child has no statutory right to parental support through criminal proceedings; rather, such child's right to parental support is enforced by an action under this section and G.S. 49-14, which impose a support obligation on persons determined to be the parents of an illegitimate child. The function of a criminal prosecution of a parent who willfully fails to support his illegitimate child is not to compensate the illegitimate child, but to promote society's interest in preventing the parents of children from willfully leaving those children without parental support. State v. Beasley, 57 N.C. App. 208, 290 S.E.2d 730, appeal dismissed and cert. denied, 306 N.C. 559, 294 S.E.2d 225 (1982).

Actions to enforce the child's right to support under this section and § 49-14 are civil actions. State v. Beasley, 57 N.C. App. 208, 290 S.E.2d 730, appeal dismissed and cert. denied, 306 N.C. 559, 294 S.E.2d 225 (1982).

Retroactive Child Support Awards Authorized. — Trial court was not precluded as a matter of law from awarding retroactive child support under this section. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

An action to enforce liability under this section is barred after three years under § 1-52(2). Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

Statute of Limitation Applies to Each Expenditure. — Each time a mother makes an expenditure reasonably incurred for the support of a child, such expenditure creates in her a new right to reimbursement, so that the statute of limitation applicable to proceedings hereunder, G.S. 1-52(2), begins to run against each expenditure on the date when the expenditure was made. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

The doctrine of laches is not applicable to an action for retroactive child support since the public policy concerns about stale claims are already adequately served by the three-year statute of limitations set forth in G.S. 1-52(2). Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Extent of Recovery for Past Expenditures. — Assuming adequate proof of the expenditures under G.S. 50-13.4(c), the plaintiff-mother could recover reimbursement for her past support expenditures (1) to the extent she paid the father's share of such expenditures, and (2) to the extent the expenditures occurred three years or less before August 8, 1986, the date she filed her claim for child support. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Failure to Attach Certified Copies of Birth Certificates to Petition. — In action under Uniform Reciprocal Enforcement of Support Act, where the record disclosed that no certified copies of the birth certificates of the alleged children-obligees were attached to plaintiff's petition, court was without subject matter jurisdiction to adjudicate defendants' paternity. Reynolds v. Motley, 96 N.C. App. 299, 385 S.E.2d 548 (1989).

Court Decides Payments to Be Awarded. — In actions under G.S. 49-14, the jury decides only the factual issue of paternity, and the court decides what payments should be awarded for the support of the child. Searcy v. Justice, 20 N.C. App. 559, 202 S.E.2d 314 (1974).

Effect of Criminal Proceedings upon Proceedings to Establish Paternity. — General verdict of not guilty, upon charges of willful neglect and refusal to provide adequate support of an illegitimate child, did not operate as res judicata on the issue of paternity in subsequent action to establish paternity and require support of an illegitimate child. Sampson County ex rel. Child Support Enforcement Agency ex rel. McPherson v. Stevens, 91 N.C. App. 524, 372 S.E.2d 340 (1988).

Visitation Rights of Father. — The principle that the father of an illegitimate child is not entitled to visitation privileges absent consent of the mother has been abrogated by statutes as well as case law. Conley v. Johnson, 24 N.C. App. 122, 210 S.E.2d 88 (1974).

The district court was authorized to grant visitation privileges to father and to punish the mother for refusing to allow father to visit his illegitimate child. Conley v. Johnson, 24 N.C. App. 122, 210 S.E.2d 88 (1974).

Reimbursement by State upon Receipt

of Test Results. — Conclusion that defendant was not child's father and that the State was obligated to reimburse defendant for the monies it illegally garnished from his pay arose as a matter of law from paternity test results, which plaintiff and the court accepted as binding when order was entered, and stating those conclusions and ending the case properly in compliance with the law was the court's duty. State ex rel. Blossom v. Murray, 103 N.C. App. 653, 406 S.E.2d 302 (1991).

Applied in Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

Cited in Joyner v. Lucas, 42 N.C. App. 541, 257 S.E.2d 105 (1979); Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 63 N.C. App. 432, 305 S.E.2d 207 (1983); State ex rel. Terry v. Marrow, 71 N.C. App. 170, 321 S.E.2d 575 (1984); In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985); Smith v. Davis, 88 N.C. App. 557, 364 S.E.2d 156 (1988); Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41, 2003 N.C. LEXIS 605 (2003).

§ 49-16. Parties to proceeding.

Proceedings under this Article may be brought by:

(1) The mother, the father, the child, or the personal representative of the mother or the child.

(2) When the child, or the mother in case of medical expenses, is likely to become a public charge, the director of social services or such person as by law performs the duties of such official,

- a. In the county where the mother resides or is found,
- b. In the county where the putative father resides or is found, or
- c. In the county where the child resides or is found. (1967, c. 993, s. 1; 1969, c. 982; 1975, c. 54, s. 2.)

Legal Periodicals. — For casenote: "The Established Standard for Fathers Who Have Acknowledged Paternity and Who Are Seeking Custody of Their Illegitimate Child(ren): Rosero v. Blake, 357 N.C. 193 (2003)," see 26 N.C. Cent. L.J. 116 (2003).

CASE NOTES

Constitutionality. — Sections 29-19, 49-10 through 49-12 and 49-14 through 49-16, construed together, do not violate the equal protection clause of the United States Constitution. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

The statutory scheme established by G.S. 29-19 and G.S. 49-14 through 49-16 does not discriminate against illegitimate children in such a manner as to violate the equal protection clause of U.S. Const., Amend. XIV. Outlaw v. Planter's Nat'l Bank & Trust Co., 41 N.C. App. 571, 255 S.E.2d 189 (1979).

Purpose of Procedure for Legitimation. — By specifying the manner and time in which an illegitimate child may establish his paternity, this State has sought (1) to mitigate the hardships created by former law (which permitted illegitimate children to inherit only from the mother and from each other); (2) to equalize, insofar as practical, the inheritance rights of legitimate and illegitimate children; and (3) at the same time, to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

This section and §§ 49-14 and 49-15 abrogate the common law. Conley v. Johnson, 24 N.C. App. 122, 210 S.E.2d 88 (1974).

Only Designated Persons Have Standing. — If the North Carolina Legislature wanted others to have the capacity to be parties in a G.S. 49-14 paternity it could have also designated those others, but it did not when it consciously changed the existing common law. Stockton v. Estate of Thompson, 165 N.C. App. 899, 600 S.E.2d 13, 2004 N.C. App. LEXIS 1515 (2004).

Siblings Do Not Have Standing. — Trial court properly disallowed intervention by child's two siblings in mother's paternity action against putative father's estate; in G.S. 49-16, the designation of who had standing to participate in a G.S. 49-14 paternity proceeding was intended to be construed as written. Stockton v. Estate of Thompson, 165 N.C. App. 899, 600 S.E.2d 13, 2004 N.C. App. LEXIS 1515 (2004).

Visitation Rights of Father. — The principle that the father of an illegitimate child is not entitled to visitation privileges absent consent of the mother has been abrogated by statutes as well as case law. Conley v. Johnson, 24 N.C. App. 122, 210 S.E.2d 88 (1974).

Cited in Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976); Joyner v. Lucas, 42 N.C.

App. 541, 257 S.E.2d 105 (1979); Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994); Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41, 2003 N.C. LEXIS 605 (2003).

§ 49-17. Jurisdiction over nonresident or nonpresent persons.

(a) The act of sexual intercourse within this State constitutes sufficient minimum contact with this forum for purposes of subjecting the person or persons participating therein to the jurisdiction of the courts of this State for actions brought under this Article for paternity and support of any child who may have been conceived as a result of such act.

(b) The jurisdictional basis in subsection (a) of this section shall be construed in addition to, and not in lieu of, any basis or bases for jurisdiction within G.S. 1-75.4. (1979, c. 542.)

CASE NOTES

Constitutionality. — This section satisfies the first prong of the test set out in Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977) by creating special jurisdiction under very limited circumstances; on its face, this statute is constitutionally sound and although the language in this section which refers to "minimum contacts" is misleading and confusing in the context of the Dillon requirements, the intent of the statute is not to abrogate the second prong of the Dillon test; rather, the statute simply creates special jurisdiction in certain situations. Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

Due Process Requirements Satisfied. — In paternity suit, where the trial court adequately inquired into the defendant's contacts with this State and so set those findings out in its order without objection of the defendant, the hearing which was held on defendant's motion to dismiss for lack of personal jurisdiction comported with all due process requirements. Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

North Carolina courts have a legitimate interest in protecting our citizens under circumstances such as those enumerated in this section. Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

Chapter 49A.
Rights of Children.

Article 1.
Children Conceived by Artificial Insemination.

Sec.
49A-1. Status of child born as a result of artificial insemination.

ARTICLE 1.
Children Conceived by Artificial Insemination.

§ 49A-1. Status of child born as a result of artificial insemination.

Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique. (1971, c. 260.)

Legal Periodicals. — For article, "Surrogate Parenthood: Finding a North Carolina Solution," see 18 N.C. Cent. L.J. 1 (1989).

Chapter 50.

Divorce and Alimony.

Article 1.

Divorce, Alimony, and Child Support, Generally.

Sec.
50-1. [Repealed.]
50-2. Bond for costs unnecessary.
50-3. Venue; removal of action.
50-4. What marriages may be declared void on application of either party.
50-5. [Repealed.]
50-5.1. Grounds for absolute divorce in cases of incurable insanity.
50-6. Divorce after separation of one year on application of either party.
50-7. Grounds for divorce from bed and board.
50-8. Contents of complaint; verification; venue and service in action by nonresident; certain divorces validated.
50-9. Effect of answer of summons by defendant.
50-10. Material facts found by judge or jury in divorce or annulment proceedings; when notice of trial not required; procedure same as ordinary civil actions.
50-11. Effects of absolute divorce.
50-11.1. Children born of voidable marriage legitimate.
50-11.2. Judgment provisions pertaining to care, custody, tuition and maintenance of minor children.
50-11.3. Certain judgments entered prior to January 1, 1981, validated.
50-11.4. Certain judgments of divorce validated.
50-12. Resumption of maiden or premarriage surname.
50-13. [Repealed.]
50-13.1. Action or proceeding for custody of minor child.
50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.
50-13.2A. Action for visitation of an adopted grandchild.
50-13.3. Enforcement of order for custody.
50-13.4. Action for support of minor child.
50-13.5. Procedure in actions for custody or support of minor children.
50-13.6. Counsel fees in actions for custody and support of minor children.
50-13.7. Modification of order for child support or custody.
50-13.7A. Custody and visitation upon military temporary duty, deployment, or mobilization.
Sec.
50-13.8. Custody of persons incapable of self-support upon reaching majority.
50-13.9. Procedure to insure payment of child support.
50-13.10. Past due child support vested; not subject to retroactive modification; entitled to full faith and credit.
50-13.11. Orders and agreements regarding medical support and health insurance coverage for minor children.
50-13.12. Forfeiture of licensing privileges for failure to pay child support or for failure to comply with subpoena issued pursuant to child support or paternity establishment proceedings.
50-14 through 50-16.1. [Repealed.]
50-16.1A. Definitions.
50-16.2. [Repealed.]
50-16.2A. Postseparation support.
50-16.3. [Repealed.]
50-16.3A. Alimony.
50-16.4. Counsel fees in actions for alimony, postseparation support.
50-16.5. [Repealed.]
50-16.6. When alimony, postseparation support, counsel fees not payable.
50-16.7. How alimony and postseparation support paid; enforcement of decree.
50-16.8. Procedure in actions for postseparation support.
50-16.9. Modification of order.
50-16.10. Alimony without action.
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Article 2.

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ARTICLE 1.

Divorce, Alimony, and Child Support, Generally.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 993, which added Article 2 of this Chapter, designated the existing provisions of this Chapter as Article 1.

§ 50-1: Repealed by Session Laws 1971, c. 1185, s. 20.

§ 50-2. Bond for costs unnecessary.

It shall not be necessary for either party to a proceeding for divorce or alimony to give any undertaking to the other party to secure such costs as such other party may recover. (1871-2, c. 193, s. 41; Code, s. 1294; Rev., s. 1558; C.S., s. 1656.)

Cross References. — As to prosecution bonds generally, see G.S. 1-109 et seq. As to costs generally, see G.S. 6-21, 7A-305 et seq.

Legal Periodicals. — For note on consent judgments in family law in light of Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983), see 6 Campbell L. Rev. 125 (1984).

CASE NOTES

As to liability of husband for own costs, see Broom v. Broom, 130 N.C. 562, 41 S.E. 673 (1902).

Applied in Mayer v. Mayer, 66 N.C. App. 522, 311 S.E.2d 659 (1984).

§ 50-3. Venue; removal of action.

In all proceedings for divorce, the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides.

[In] any action brought under Chapter 50 for alimony or divorce filed in a county where the plaintiff resides but the defendant does not reside, where both parties are residents of the State of North Carolina, and where the plaintiff removes from the State and ceases to be a resident, the action may be removed upon motion of the defendant, for trial or for any motion in the cause, either before or after judgment, to the county in which the defendant resides. The judge, upon such motion, shall order the removal of the action, and the procedures of G.S. 1-87 shall be followed. (1871-2, c. 193, s. 40; Code, s. 1289; Rev., s. 1559; 1915, c. 229, s. 1; C.S., s. 1657; 1977, 2nd Sess., c. 1223.)

Legal Periodicals. — On the general question of jurisdiction in divorce, see 1 N.C.L. Rev. 95 (1923).

For note on domicile of military personnel for purpose of divorce, see 31 N.C.L. Rev. 304 (1953).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

For comment, "Conflicts of Law in Divorce Litigation: A Looking-Glass World?," see 10 Campbell L. Rev. 145 (1987).

CASE NOTES

Change in Common-Law Rule. — The common-law rule that the wife should bring her action for divorce in the domicile of her husband was changed by this section, as amended by Laws 1915, c. 229, making the summons returnable to the county in which either the plaintiff or defendant resides. Wood v. Wood, 181 N.C. 227, 106 S.E. 753 (1921).

Any Superior Court Has Jurisdiction If Either Party Is Domiciled in State. — In the absence of fraud, the superior court of any county in this State has jurisdiction over divorce action if either of the parties is domiciled in this State. Stokes v. Stokes, 260 N.C. 203, 132 S.E.2d 315 (1963).

But If Plaintiff Conceals Action and Whereabouts of Defendant, Jurisdiction Is Lacking. — If a plaintiff should fraudulently conceal his action for a divorce from the defendant and the whereabouts of the defendant from the court, jurisdiction would be lacking and a divorce obtained upon service of summons by publication would be a nullity. Stokes v. Stokes, 260 N.C. 203, 132 S.E.2d 315 (1963).

Venue Provisions of This Section Are Not Jurisdictional. — The provisions of this section that in divorce proceedings the summons shall be returnable to the court of the county in which either the plaintiff or the defendant resides are not jurisdictional; they relate only to venue. Stokes v. Stokes, 260 N.C. 203, 132 S.E.2d 315 (1963).

And May Be Waived. — The provisions of this section are not jurisdictional, but relate to venue, and they may be waived. Nelms v.

Nelms, 250 N.C. 237, 108 S.E.2d 529 (1959).

The provision of this section that summons shall be returnable to the court of the county in which either plaintiff or defendant resides is not jurisdictional, but relates to venue, and may be waived; and if an action for divorce is instituted in any other county, it may be tried there, unless defendant before the time of answering expires demands in writing that trial be had in the proper county. Smith v. Smith, 226 N.C. 506, 39 S.E.2d 391 (1946); Denson v. Denson, 255 N.C. 703, 122 S.E.2d 507 (1961); Smith v. Smith, 56 N.C. App. 812, 290 S.E.2d 390 (1982).

But Removal Provisions Are Mandatory. — The language of this section, as amended by Session Laws 1977, 2nd Sess., c. 1223, which added the second paragraph, is mandatory. If the defendant makes a motion for change of venue, the judge shall grant it. Gardner v. Gardner, 43 N.C. App. 678, 260 S.E.2d 116 (1979), aff'd, 300 N.C. 715, 268 S.E.2d 468 (1980).

And Apply Retroactively to Causes Which Have Accrued. — The retroactive application of this section to causes of action which accrued prior to the effective date of the statute is proper. No vested right is destroyed, nor does a question of construction arise, where a venue statute, by its own provisions, is declared to apply to transactions entered into prior to the passage of the statute. Gardner v. Gardner, 43 N.C. App. 678, 260 S.E.2d 116 (1979), aff'd, 300 N.C. 715, 268 S.E.2d 468 (1980).

But Not to Actions Settling Venue Before Effective Date. — The amendment of this section providing for removal of an action for divorce or alimony, upon motion of defendant, to the county in which defendant resides, where plaintiff has ceased to be a resident of this State, is mandatory and may be applied retroactively and even to actions pending on its effective date. However, the amendment would not be applicable to an action for divorce from bed and board where it became effective after the trial court made a decision settling the question of venue. Gardner v. Gardner, 43 N.C. App. 678, 260 S.E.2d 116 (1979), aff'd, 300 N.C. 715, 268 S.E.2d 468 (1980).

As Right to Venue as Adjudicated Is Substantial. — Although the question of venue is a procedural one, a right to venue established by statute is a substantial right. Its status is secure when finally adjudicated by a court of competent jurisdiction, and neither the courts nor the legislature can thereafter invalidate the right's exercise or annul the judgment which fixes its investiture. Gardner v. Gardner, 300 N.C. 715, 268 S.E.2d 468 (1980).

Limitation on Retroactive Application of Section. — This statute may be applied retroactively only insofar as it does not impinge upon a right which is otherwise secured, established, and immune from further legal metamorphosis. Gardner v. Gardner, 300 N.C. 715, 268 S.E.2d 468 (1980).

Propriety of Motion to Remove. — This section is not jurisdictional and may be waived, and the failure therein must be taken advantage of by motion to remove the cause to the proper venue, and not by motion to dismiss. Davis v. Davis, 179 N.C. 185, 102 S.E. 270 (1920).

Failure to Make Motion as Waiver. — Any action brought in the wrong county may be removed instead of being dismissed, and a failure to make the motion for removal is a waiver of objection to the county in which it is brought. Denson v. Denson, 255 N.C. 703, 122 S.E.2d 507 (1961).

Applied in Bass v. Bass, 43 N.C. App. 212, 258 S.E.2d 391 (1979).

Cited in Wood v. Wood, 181 N.C. 227, 106 S.E. 753 (1921); Batts v. United States, 120 F. Supp. 26 (E.D.N.C. 1954); Miller v. Miller, 38 N.C. App. 95, 247 S.E.2d 278 (1978); Gardner v. Gardner, 48 N.C. App. 38, 269 S.E.2d 630 (1980).

§ 50-4. What marriages may be declared void on application of either party.

The district court, during a session of court, on application made as by law provided, by either party to a marriage contracted contrary to the prohibitions contained in the Chapter entitled Marriage, or declared void by said Chapter, may declare such marriage void from the beginning, subject, nevertheless, to G.S. 51-3. (1871-2, c. 193, s. 33; Code, s. 1283; Rev., s. 1560; C.S., s. 1658; 1945, c. 635; 1971, c. 1185, s. 21; 1973, c. 1; 1979, c. 525, s. 10.)

Cross References. — As to marriage generally, see G.S. 51-1 et seq. As to void and voidable marriages, see G.S. 51-3.

CASE NOTES

Void and Voidable Marriages Compared. — A voidable marriage is valid for all civil purposes until it is annulled by a competent tribunal in a direct proceeding, but a void marriage is a nullity and may be impeached at any time. Geitner ex rel. First Nat'l Bank v. Townsend, 67 N.C. App. 159, 312 S.E.2d 236, cert. denied, 310 N.C. 744, 315 S.E.2d 702 (1984).

Formal Decree When Marriage Is Absolutely Void. — Even though a marriage may be absolutely void, without being so declared, yet the court will formally decree its nullity, for the sake of the good order of society as well as for the quiet and relief of the party seeking the relief. Johnson v. Kincade, 37 N.C. 470 (1843); Lea v. Lea, 104 N.C. 603, 10 S.E. 488 (1889).

Marriage Induced by Duress. — A former marriage which has been decreed to be void because it was induced by duress was void ab initio, and hence did not afford ground for annulment of a later marriage between one of the parties and a third person, though such decree was rendered after the second marriage. Taylor v. White, 160 N.C. 38, 75 S.E. 941 (1912).

Test of Mental Capacity to Contract Marriage. — As to what constitutes mental capacity or incapacity to enter into a contract to marry, the general rule is that the test is the capacity of the person to understand the special nature of the contract of marriage and the duties and responsibilities which it entails, which is to be determined from the facts and circumstances of each case. Geitner ex rel. First Nat'l Bank v. Townsend, 67 N.C. App. 159, 312 S.E.2d 236, cert. denied, 310 N.C. 744, 315 S.E.2d 702 (1984).

Test of Incompetency in Guardianship Matters Compared. — Tests judicially applied for a determination of incompetency in guardianship matters differ markedly from those applied for the determination of mental capacity to contract a marriage, for even though he may be under guardianship as an incompetent, a person may have in fact sufficient mental capacity to validly contract marriage. Geitner ex rel. First Nat'l Bank v. Townsend, 67 N.C. App. 159, 312 S.E.2d 236, cert. denied, 310 N.C. 744, 315 S.E.2d 702 (1984).

Capacity to Marry as Affected by Guardianship. — Unlike other transactions, an insane person's capacity to marry is not necessarily affected by guardianship. Geitner ex rel. First Nat'l Bank v. Townsend, 67 N.C. App. 159, 312 S.E.2d 236, cert. denied, 310 N.C. 744, 315 S.E.2d 702 (1984).

Mental capacity at the precise time when marriage is celebrated controls. Geitner ex rel. First Nat'l Bank v. Townsend, 67 N.C. App. 159, 312 S.E.2d 236, cert. denied, 310 N.C. 744, 315 S.E.2d 702 (1984).

Prior adjudication of incompetency is not conclusive on the issue of later capacity to marry and does not bar a party from entering a contract to marry. Geitner ex rel. First Nat'l Bank v. Townsend, 67 N.C. App. 159, 312 S.E.2d 236, cert. denied, 310 N.C. 744, 315 S.E.2d 702 (1984).

Marriage of Person Incapable of Contracting for Want of Understanding Voidable. — Under the common law as modified by G.S. 51-3 and this section, a marriage of a person incapable of contracting for want of understanding is not void, but voidable. Geitner ex rel. First Nat'l Bank v. Townsend, 67 N.C. App. 159, 312 S.E.2d 236, cert. denied, 310 N.C. 744, 315 S.E.2d 702 (1984).

Same — Void Ab Initio When So Declared. — Under the rule of the common law as modified by statute, the marriage of a person incapable of contracting for want of understanding is not void ipso facto, but if and when it is declared void in a legally constituted action, such marriage is void ab initio. Ivery v. Ivery, 258 N.C. 721, 129 S.E.2d 457 (1963).

The court has jurisdiction to declare marriages in proper cases void ab initio, but the marriage of a lunatic is not so ipso facto, and must be so declared by a decree of the court. Watters v. Watters, 168 N.C. 411, 84 S.E. 703 (1915). See also, State ex rel. Setzer v. Setzer, 97 N.C. 252, 1 S.E. 558 (1887).

Same — Standing to Institute Action. — An action to declare void a marriage of a person incapable of contracting for want of understanding may be instituted in the lifetime of the parties thereto by a guardian for the alleged mentally incompetent person or by such mentally incompetent person if and when he or she becomes mentally competent to do so; and unless such marriage is followed by cohabitation and the birth of issue, such action may be instituted after the death of such mentally incompetent person by a person or persons whose legal rights depend upon whether such marriage is valid or void. Ivery v. Ivery, 258 N.C. 721, 129 S.E.2d 457 (1963).

A suit for nullity of marriage on the ground of insanity may be brought either in the name of the lunatic, by her guardian, or in the name of the guardian, though the former is, for some reasons, the preferable course. Crump v. Morgan, 38 N.C. 91, 40 Am. Dec. 447 (1843).

Same — Burden of Persuasion as to Invalidity. — When the fact of marriage has been established by evidence, the burden of persuasion on the issue of invalidity is on the party asserting such. And even if a party's insanity is proved to be of such a chronic nature that it is presumed to continue, it does not shift the burden on the issue. Geitner ex rel. First Nat'l Bank v. Townsend, 67 N.C. App. 159, 312 S.E.2d 236, cert. denied, 310 N.C. 744, 315 S.E.2d 702 (1984).

Same — Death of Party After Birth of Issue. — A marriage of a person incapable of contracting for want of understanding, when followed by cohabitation and the birth of issue, may not be declared void after the death of either of the parties. Ivery v. Ivery, 258 N.C. 721, 129 S.E.2d 457 (1963).

Subsequent Insanity Not Ground for Annulment. — Insanity afterwards afflicting a party to a contract of marriage is not a ground for annulment. Watters v. Watters, 168 N.C. 411, 84 S.E. 703 (1915).

Death of Party to Incestuous Marriage After Birth of Issue. — In Baity v. Cranfill, 91 N.C. 293 (1884), it was held that the authority conferred upon the court by this section was so limited by G.S. 51-3 as to deprive the court of the power to declare void the marriage of uncle and niece, "nearer of kin than first cousins, " after the husband's death, when their marriage was followed by cohabitation and the birth of issue. Ivery v. Ivery, 258 N.C. 721, 129 S.E.2d 457 (1963).

License Issued upon Fraudulent Representations as to Age — How Voided. — Prior to the 1939 amendment to G.S. 51-2, which made parents proper parties plaintiff, where a register of deeds was induced by fraudulent representations to issue a license for the marriage of a female between the ages of 14 and 16 without conforming with G.S. 51-2 as to the written consent of her parent, the marriage was voidable only at the suit of the female, and the register of deeds could not maintain a suit to declare the marriage void; the register of deeds could at most maintain an action to revoke and cancel the license issued by him before the solemnization of the marriage. Sawyer v. Slack, 196 N.C. 697, 146 S.E. 864 (1929).

Same — Effect of 20 Years' Ratification. — Where a marriage is entered into by one under the legal age, but is followed by a cohabitation of 20 years, the parties acknowledging each other and being recognized as husband and wife, although such marriage in its inception was invalid, by reason of such ratification by the parties it would not be declared void. State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890).

Suit by Nonresident. — Under this section, the courts of this State have jurisdiction of a suit to annul a marriage performed here, even though the plaintiff was a nonresident of this State at the time of commencement of the suit. Sawyer v. Slack, 196 N.C. 697, 146 S.E. 864 (1929).

Procedure Similar to Divorce Action. — An action, under this section, to have a marriage declared void, so far as procedure is concerned, is an action for divorce. Lea v. Lea, 104 N.C. 603, 10 S.E. 488 (1889); Johnson v. Johnson, 141 N.C. 91, 53 S.E. 623 (1906).

In Johnson v. Kincade, 37 N.C. 470, (1843), the marriage of the parties was declared a nullity because of the mental incapacity of one of the parties at the time of the marriage. In that decision the court declared that the "plaintiff ought to be, and is divorced from the defendant." See Lea v. Lea, 104 N.C. 603, 10 S.E. 488 (1889); Taylor v. White, 160 N.C. 38, 75 S.E. 941 (1912).

Affidavit Not Necessary. — Action for annulment under this section would not be dismissed because of failure to make the affidavit formerly prescribed in G.S. 50-8 for actions for divorce or alimony. Taylor v. White, 160 N.C. 38, 75 S.E. 941 (1912).

Allowance of Alimony Pendente Lite. — While not technically actions for divorce, actions for annulment come under that heading, in a general way, in that alimony pendente lite may be allowed. Taylor v. White, 160 N.C. 38, 75 S.E. 941 (1912). See also, Lea v. Lea, 104 N.C. 603, 10 S.E. 488 (1889).

Effect of Annulment Decree. — A decree annulling a marriage is final and conclusive and not open to collateral impeachment, although it may be vacated or set aside for good cause on proper application. Its effect is to make the supposed or pretended marriage as if it had never existed, and hence it restores both parties to their former status and to all rights of property as before the marriage. Taylor v. White, 160 N.C. 38, 75 S.E. 941 (1912).

Legitimacy of Children of Annulled Marriage. — The children of a marriage which is subsequently annulled are made legitimate by G.S. 50-11. Taylor v. White, 160 N.C. 38, 75 S.E. 941 (1912). See also § 50-11.1.

Setting Aside Judgment — Adversary Proceeding. — If either party to an action to annul a marriage contract desires to move to set aside the judgment rendered, it must be done in an adversary proceeding after due notice is served upon the other party; notice to counsel of record in the original action is not sufficient. Johnson v. Johnson, 141 N.C. 91, 53 S.E. 623 (1906).

Same — Counsel Cannot Represent Both Parties Jointly. — A proceeding to set aside a judgment in an action of annulment will be dismissed where the same counsel jointly makes the motion representing both parties to the action. Johnson v. Johnson, 141 N.C. 91, 53 S.E. 623 (1906).

Collateral Attack by Second Husband on Wife's Former Divorce Decree Not Authorized. — Where a divorce decree obtained by defendant wife from her former husband on the ground of separation for one year was in all respects regular on the face of the record, the divorce decree was not void but merely voidable even though there was proof that defendant and her former husband had not lived separate and apart for one year as of the time of the divorce; therefore, plaintiff husband had no standing collaterally to attack the divorce decree as to show that his subsequent marriage to defendant was void ab initio. Maxwell v. Woods, 47 N.C. App. 495, 267 S.E.2d 516, cert. denied, 301 N.C. 236, 283 S.E.2d 132 (1980).

Applied in Dees v. McKenna, 261 N.C. 373, 134 S.E.2d 644 (1964); Fulton v. Vickery, 73 N.C. App. 382, 326 S.E.2d 354 (1985).

Cited in Armstrong v. Armstrong, 41 N.C. App. 168, 254 S.E.2d 209 (1979); Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993).

§ 50-5: Repealed by Session Laws 1983, c. 613, s. 1.

Editor's Note. — Session Laws 1983, c. 613, s. 1, repealed this section, except for subdivision (6) thereof, which it recodified as G.S. 50-5.1.

§ 50-5.1. Grounds for absolute divorce in cases of incurable insanity.

In all cases where a husband and wife have lived separate and apart for three consecutive years, without cohabitation, and are still so living separate and apart by reason of the incurable insanity of one of them, the court may grant a decree of absolute divorce upon the petition of the sane spouse: Provided, if the insane spouse has been released on a trial basis to the custody of his or her respective spouse such shall not be considered as terminating the status of living "separate and apart" nor shall it be considered as constituting "cohabitation" for the purpose of this section nor shall it prevent the granting of a divorce as provided by this section. Provided further, the evidence shall show that the insane spouse is suffering from incurable insanity, and has been confined or examined for three consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered or, if not so confined, has been examined at least three years preceding the institution of the action for divorce and then found to be incurably insane as hereinafter provided. Provided further, that proof of incurable insanity be supported by the testimony of two reputable physicians, one of whom shall be a staff member or the superintendent of the institution where the insane spouse is confined, and one regularly practicing physician in the community wherein such husband and wife reside, who has no connection with the institution in which said insane spouse is confined; and provided further that a sworn statement signed by said staff member or said superintendent of the institution wherein the insane spouse is confined or was examined shall be admissible as evidence of the facts and opinions therein stated as to the mental status of said insane spouse and as to whether or not said insane spouse is suffering from incurable insanity, or the parties according to the laws governing depositions may take the deposition of said staff member or superintendent of the institution wherein the insane spouse is confined; and provided further that incurable insanity may be proved by the testimony of one or more licensed physicians who are members of the staff of one of this State's accredited four-year medical schools or a state-supported mental institution, supported by the testimony of one or more other physicians licensed by the State of North Carolina, that each of them examined the allegedly incurable insane spouse at least three years preceding the institution of the action for divorce and then determined that said spouse was suffering from incurable insanity and that one or more of them examined the allegedly insane spouse subsequent to the institution of the action and that in his or their opinion the said allegedly insane spouse was continuously incurably insane throughout the full period of three years prior to the institution of the said action.

In lieu of proof of incurable insanity and confinement for three consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered prescribed in the preceding paragraph, it shall be sufficient if the evidence shall show that the allegedly insane spouse was adjudicated to be insane more than three years preceding the institution of the action for divorce, that such insanity has continued without interruption since such adjudication and that such person has not been adjudicated to be sane since such adjudication of insanity; provided, further, proof of incurable insanity existing after the institution of the action for divorce shall be furnished by the testimony of two reputable, regularly practicing physicians, one of whom shall be a psychiatrist.

In lieu of proof of incurable insanity and confinement for three consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered, or the adjudication of insanity, as prescribed in the preceding paragraphs, it shall be sufficient if the evidence shall show that the insane spouse was examined by two or more members of the staff of one of this State's accredited four-year medical schools, both of whom are medical doctors, at least three years preceding the institution of the action for divorce with a determination at that time by said staff members that said spouse is suffering from incurable insanity, that such insanity has continued without interruption since such determination; provided, further, that sworn statements signed by the staff members of the accredited medical school who examined the insane spouse at least three years preceding the commencement of the action shall be admissible as evidence of the facts and opinions therein stated as to the mental status of said insane spouse as to whether or not said insane spouse was suffering from incurable insanity; provided, further, that proof of incurable insanity under this section existing after the institution of the action for divorce shall be furnished by the testimony of two reputable physicians, one of whom shall be a psychiatrist on the staff of one of the State's accredited four-year medical schools, and one a physician practicing regularly in the community wherein such insane person resides.

In all decrees granted under this subdivision in actions in which the insane defendant has insufficient income and property to provide for his or her own care and maintenance, the court shall require the plaintiff to provide for the care and maintenance of the insane defendant for the defendant's lifetime, based upon the standards set out in G.S. 50-16.5(a). The trial court will retain jurisdiction of the parties and the cause, from term to term, for the purpose of making such orders as equity may require to enforce the provisions of the decree requiring plaintiff to furnish the necessary funds for such care and maintenance.

Service of process shall be held upon the regular guardian for said defendant spouse, if any, and if no regular guardian, upon a duly appointed guardian ad litem and also upon the superintendent or physician in charge of the institution wherein the insane spouse is confined. Such guardian or guardian ad litem shall make an investigation of the circumstances and notify the next of kin of the insane spouse or the superintendent of the institution of the action and whenever practical confer with said next of kin before filing appropriate pleadings in behalf of the defendant.

In all actions brought under this subdivision, if the jury finds as a fact that the plaintiff has been guilty of such conduct as has conduced to the unsoundness of mind of the insane defendant, the relief prayed for shall be denied.

The plaintiff or defendant must have resided in this State for six months next preceding institution of any action under this section. (1945, c. 755; 1949, c. 264, s. 5; 1953, c. 1087; 1955, c. 887, s. 15; 1963, c. 1173; 1971, c. 1173, ss. 1, 2; 1975, c. 771; 1977, c. 501, s. 1; 1983, c. 613, s. 1.)

Cross References. — As to the maintenance of actions for alimony, alimony pendente lite, and custody and support as in dependent actions during the pendency of an action for divorce, and vice versa, and the effect of a divorce on a pending action for alimony or alimony pendente lite, see G.S. 50-19.

Editor's Note. — This section was subdivision (6) of former G.S. 50-5. It has been recodified as G.S. 50-5.1 by Session Laws 1983, c. 613, s. 1.

Legal Periodicals. — For comment on the 1945 amendment to this section, which was formerly G.S. 50-5(6), see 23 N.C.L. Rev. 340 (1945).

For summary of the 1949 amendments to former G.S. 50-5 and G.S. 50-6 and 50-8, see 27 N.C.L. Rev. 453 (1949).

For comment on contingent fees in domestic relations actions, see 62 N.C.L. Rev. 381 (1984).

For 1984 survey, "The Brief Death of Alienation of Affections and Criminal Conversation in North Carolina," see 63 N.C.L. Rev. 1317 (1985).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former G.S. 50-5(6).*

Purpose. — The purpose of former G.S. 50-5(6), as amended (recodified as this section) is to require that a person alleged to be incurably insane shall not have his or her marital status altered until such person has been committed to an institution for the care and treatment of the mentally disordered for a period of five (now three) successive years in order that it may be ascertained whether or not the inmate's insanity is incurable. Mere confinement for a period of five (now three) successive years in such an institution would fulfill the literal meaning of the statute but it would not be in compliance with its spirit or purpose. Mabry v. Mabry, 243 N.C. 126, 90 S.E.2d 221 (1955).

Exclusive Remedy. — The remedy provided in former G.S. 50-5(6) (recodified as this section) is exclusive. Lawson v. Bennett, 240 N.C. 52, 81 S.E.2d 162 (1954).

Section Not Ambiguous. — Former G.S. 50-5(6), recodified as this section, is not ambiguous. Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

The words "next preceding" in former G.S. 50-5(6) (recodified as this section) have been held to mean the time nearest to the bringing of the action. Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

It is not sufficient under former G.S. 50-5(6) (recodified as this section) that the insane spouse was confined to an institution for five (now three) consecutive years at some time prior to the commencement of the action; the statute requires that confinement must be for five (now three) consecutive years "next preceding" the bringing of the action, which means the time nearest the bringing of the action. Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

"Confined." — By the use of the word "confined" in former G.S. 50-5(6) (recodified as this section), the legislature did not contemplate such confinement as would require an inmate to be at all times under lock and key. Mabry v. Mabry, 243 N.C. 126, 90 S.E.2d 221 (1955); Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

Release on Probation. — In a proceeding by wife for divorce on the ground of husband's insanity, where doctors testified that the husband was incurably insane, the fact that the husband during the five-year (now three-year) period of confinement had been released on probation to his relatives on separate occasions, once for 10 days and once for six months, did not bar divorce of wife on the ground of insanity, since release on probation did not constitute such acts on the part of the hospital authorities as to terminate the period of confinement within the meaning of former G.S. 50-5(6) (recodified as this section). Mabry v. Mabry, 243 N.C. 126, 90 S.E.2d 221 (1955).

Periods of probation are permissible under former G.S. 50-5(6) (recodified as this section) and may be deemed not to have constituted an interruption of the confinement or a discharge from the hospital within the meaning of the statute. Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

Defendant's discharge under former § 122-67 terminated his confinement and he was, therefore, not confined for five years (now three years) next preceding the institution of the action as required by former G.S. 50-5(6) (recodified as this section). Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

Proof of Separation. — In a suit for divorce on the statutory ground of insanity, the insanity must be the reason for the separation of the parties, but no greater proof of separation and its continuance during the five-year (now three-year) period is required than in a proceeding for divorce based on a two-year (now one-year) separation period. Mabry v. Mabry, 243 N.C. 126, 90 S.E.2d 221 (1955).

Separation Occasioned by Mental Incompetency Other Than Incurable Insanity. — Separation occasioned by insanity is cause for divorce in North Carolina only in cases of incurable insanity. And in these cases the requirements of this section must be met.

In all other instances of separation arising by reason of mental incompetency, such separation is not a ground for divorce. But to bar an action for divorce based on two (now one) years' separation under G.S. 50-6, the mental impairment must be to such extent that defendant does not understand what he or she is engaged in doing, and the nature and consequences of the act. Moody v. Moody, 253 N.C. 752, 117 S.E.2d 724 (1961).

Expert Testimony Insufficient. — Defendant's expert testimony did not satisfy the requirements of this section where only one of defendant's medical experts associated with a four-year North Carolina medical school made any determination of defendant's condition three years prior to the institution of the action for divorce. Scott v. Scott, 336 N.C. 284, 442 S.E.2d 493 (1994).

Sufficient Evidence. — In action for divorce based on one year's separation, where defendant wife asserted incurable mental illness as a defense, although plaintiff offered no expert evidence concerning the diagnosis of defendant's condition, plaintiff's own testimony showed defendant's ability to perform usual daily tasks when her illness was controlled with medication; moreover, the testimony of defendant's treating psychiatrist and the person most familiar with her condition over an extended period of time corroborated certain of plaintiff's evidence. Scott v. Scott, 336 N.C. 284, 442 S.E.2d 493 (1994).

Extent of Impairment. — To bar an action for divorce based on one year's separation, the mental impairment must be to such extent that defendant does not understand what he or she is engaged in doing and the nature and consequences of the act. Scott v. Scott, 336 N.C. 284, 442 S.E.2d 493 (1994).

Burden of Persuasion. — To bar an action for divorce based on one year's separation, the defendant bears the burden of persuasion that he or she is incurably insane within the meaning and purpose of this section. Scott v. Scott, 336 N.C. 284, 442 S.E.2d 493 (1994).

Cited in Melton ex rel. Madry v. Madry, 106 N.C. App. 83, 415 S.E.2d 72 (1992); Stark v. Ratashara, 177 N.C. App. 449, 628 S.E.2d 471, 2006 N.C. App. LEXIS 962 (2006); Coleman v. Coleman, 182 N.C. App. 25, 641 S.E.2d 332, 2007 N.C. App. LEXIS 475 (2007).

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Separation Prior to Onset of Incompetence. — The provisions of this section are not available to a plaintiff to obtain a divorce from an incompetent spouse where the separation occurred prior to the onset of the incompetence. See opinion of Attorney General to Mr. James Lee Knight, Clerk of Superior Court, Guilford County, 55 N.C.A.G. 82 (1986).

§ 50-6. Divorce after separation of one year on application of either party.

Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months. A divorce under this section shall not be barred to either party by any defense or plea based upon any provision of G.S. 50-7, a plea of res judicata, or a plea of recrimination. Notwithstanding the provisions of G.S. 50-11, or of the common law, a divorce under this section shall not affect the rights of a dependent spouse with respect to alimony which have been asserted in the action or any other pending action.

Whether there has been a resumption of marital relations during the period of separation shall be determined pursuant to G.S. 52-10.2. Isolated incidents of sexual intercourse between the parties shall not toll the statutory period required for divorce predicated on separation of one year. (1931, c. 72; 1933, c. 163; 1937, c. 100, ss. 1, 2; 1943, c. 448, s. 3; 1949, c. 264, s. 3; 1965, c. 636, s. 2; 1977, c. 817, s. 1; 1977, 2nd Sess., c. 1190, s. 1; 1979, c. 709, s. 1; 1981, c. 182; 1983, c. 613, s. 2; c. 923, s. 217; 1987, c. 664, s. 2.)

Cross References. — For provision that in an action pursuant to this section, if either or both parties have sought and obtained marital counselling by a licensed physician, licensed psychologist, or certified marital family therapist, the person rendering such counselling shall not be competent to testify in the action concerning information acquired while rendering such counselling, see G.S. 8-53.6. As to contents and verification of complaint, see G.S. 50-8. As to the maintenance of actions for alimony, alimony pendente lite, and custody and support as independent actions during the pendency of an action for divorce, and vice versa, and the effect of a divorce on a pending action for alimony or alimony pendente lite, see G.S. 50-19.

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1190, s. 2, provided: "In an action initiated after August 1, 1977, a judgment of divorce under G.S. 50-6, entered before the effective date of this act [June 11, 1978] and when there was no pending action for support or alimony, shall be valid even though the court did not make a determination that there was no such pending action or a determination that all claims for support or alimony had been fully and finally adjudicated."

Legal Periodicals. — For comment on the 1943 amendment to this section, see 21 N.C.L. Rev. 347 (1921).

As to effect of this section on former G.S. 50-5, see 9 N.C.L. Rev. 368 (1931).

For note on "living apart" where both parties live in the same house, see 18 N.C.L. Rev. 247 (1940).

For note discussing cases decided under this section, see 40 N.C.L. Rev. 808 (1962).

For note on early statutory and common law of divorce in North Carolina, see 41 N.C.L. Rev. 604 (1963).

For article, "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

For note discussing the application of the compulsory counterclaim provision of G.S. 1A-1, Rule 13 in divorce suits, see 57 N.C.L. Rev. 439 (1979).

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For note on the effect of resumed marital relations on separation agreements, see 1 Campbell L. Rev. 131 (1979).

For article, "Mediation and Arbitration of Separation and Divorce Agreements," see 15 Wake Forest L. Rev. 467 (1979).

For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For note on voiding separation agreements by isolated acts of sexual intercourse, see 16 Wake Forest L. Rev. 137 (1980).

For survey of 1981 family law, see 60 N.C.L. Rev. 1379 (1982).

For comment on contingent fees in domestic relations actions, see 62 N.C.L. Rev. 381 (1984).

For domestic relations note, "The Validity of Foreign Divorce Decrees in North Carolina," see 20 Wake Forest L. Rev. 765 (1984).

For 1984 survey, "Estoppel and Foreign Divorce," see 63 N.C.L. Rev. 1189 (1985).

For 1984 survey, "Equitable Distribution Without Consideration of Marital Fault," see 63 N.C.L. Rev. 1204 (1985).

For 1984 survey, "The Brief Death of Alienation of Affections and Criminal Conversation in North Carolina," 63 N.C.L. Rev. 1317 (1985).

For note on post-separation sexual intercourse precluding enforcement of agreement requiring parties to live separate and apart, see 11 Campbell L. Rev. 73 (1988).

For article, "Bromhal v. Stott: Revisiting the Court's Role in Separation Agreements in the Context of Attorneys' Fees," see 74 N.C.L. Rev. 2151 (1996).

CASE NOTES

I. In General.
II. Separation.
III. Fault.
IV. Domicile or Residence.

I. IN GENERAL.

Constitutionality. — This section, as amended, is not unconstitutional on grounds that it violates equal protection by preserving a dependent spouse's right to alimony without at the same time preserving all other property rights incident to continuation of the marital status, as the equal protection clauses of the State and federal Constitutions prohibit denial of the equal protection of the laws to persons, not to rights. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

Abolition of the defense of recrimination in a divorce action based on a year's separation does not deprive a spouse who was married before such abolition of a vested property right under the due process clause of the federal Constitution or the "law of the land clause" of N.C. Const., Art. I, § 19. Nor does it deprive defendant husband of a vested property right as a tenant by the entirety without due process of law on grounds that it permits plaintiff wife to obtain a divorce from defendant and defeat defendant's right upon wife's death to become the sole owner of property held by the parties as tenants by the entirety. Sawyer v. Sawyer, 54 N.C. App. 141, 282 S.E.2d 527 (1981).

This section is an indication of this State's policy, as exhibited by legislation, that if the parties have lived separate and apart for one year, the marriage is no longer viable and is not worth saving. Bruce v. Bruce, 79 N.C. App. 579, 339 S.E.2d 855, cert. denied, 317 N.C. 701, 347 S.E.2d 36 (1986).

Purpose of Section. — This section was enacted in order to enable a husband and wife to terminate their marriage without the sensationalism and public airing of dirty linen which necessarily accompany a divorce based on fault. Harrington v. Harrington, 22 N.C. App. 419, 206 S.E.2d 742, rev'd on other grounds, 286 N.C. 260, 210 S.E.2d 190 (1974).

This section creates an independent cause of divorce. Pickens v. Pickens, 258 N.C. 84, 127 S.E.2d 889 (1962); Gray v. Gray, 16 N.C. App. 730, 193 S.E.2d 492 (1972).

And Provides for "No Fault" Divorce. — As to divorces grounded on a one-year separation of the parties, this State is a "no fault" jurisdiction; that is, a showing that the parties have achieved the required periods of residency and separation is all that is necessary to obtain a divorce in this State under this section. Morris v. Morris, 45 N.C. App. 69, 262 S.E.2d 359 (1980).

Jurisdictional Requirements. — Under this section, in order to maintain an action for divorce, the husband and wife shall have (1) lived separate and apart for two years (now one year), and (2) the plaintiff, husband or wife, shall have resided in this State for a period of one year (now six months). These two requirements are jurisdictional, and if either one or the other of these elements does not exist, the court would not have jurisdiction to try the action and any decree rendered would be void. Henderson v. Henderson, 232 N.C. 1, 59 S.E.2d 227 (1950).

Under this section, in order to maintain an action for divorce, the husband and wife shall have (1) lived separate and apart for two years (now one year); and (2) the plaintiff, husband or wife, shall have resided in this State for a period of six months. The jurisdictional requirement as to residence under this section is met by allegation and proof of residence within this State for a period of six months next preceding the commencement of the action. Denson v. Denson, 255 N.C. 703, 122 S.E.2d 507 (1961).

To obtain a divorce pursuant to this section, all that is required is proof that the parties have lived separate and apart for one year and that one of the parties has lived in this State for six months next preceding institution of the suit. Bruce v. Bruce, 79 N.C. App. 579, 339 S.E.2d 855, cert. denied, 317 N.C. 701, 347 S.E.2d 36 (1986).

Statute of Limitations Not Applicable to Actions for Absolute Divorce. — Balancing the reasons for having statutes of limitation against this State's public policy of endeavoring to maintain the marital state on the one hand and not denying divorce to parties who have demonstrated a ground for divorce on the other hand, the general, residuary statute of limitations, G.S. 1-56, should not be applied to actions for absolute divorce under this section. Bruce v. Bruce, 79 N.C. App. 579, 339 S.E.2d 855, cert. denied, 317 N.C. 701, 347 S.E.2d 36 (1986).

Accrual of Cause of Action. — Separation, as a ground for divorce, is a type of continuing offense. It begins on the date the parties physically separate with the requisite intention that the separation remain permanent, and the cause of action under this section accrues at the end of one year. However, the cause of action continues to accrue even after the one year period, so long as the parties remain "separate and apart" within the meaning of the statute. Bruce v. Bruce, 79 N.C. App. 579, 339 S.E.2d 855, cert. denied, 317 N.C. 701, 347 S.E.2d 36 (1986).

But, the cessation of sexual relations alone does not constitute separation. Lin v. Lin, 108 N.C. App. 772, 425 S.E.2d 9 (1993).

An interlocutory appeal to determine the date of separation for the purposes of equitable distribution was rightfully dismissed, as the parties had been separated for a period far in excess of one year and as the date of separation was irrelevant to the validity of the divorce. Stafford v. Stafford, 351 N.C. 94, 520 S.E.2d 785 (1999).

Proper Parties. — The only persons who may bring an action for absolute divorce are those persons who are lawfully married to one another. Where there are children born to a marriage, it is neither proper nor necessary for them to be made parties to an action for divorce between their parents. Likewise, the only necessary parties in an action to set aside an absolute divorce decree after one spouse's death are the surviving spouse and the personal representative of the deceased spouse. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Required Findings. — The court erred in declaring the parties' divorce decree void where the divorce decree at issue was "in all respects regular on [its] face" and the defendant was properly served; the court's findings, required by this section, were found under the heading "Conclusions of Law" rather than under "Findings of Fact." Dunevant v. Dunevant, 142 N.C. App. 169, 542 S.E.2d 242, 2001 N.C. App. LEXIS 47 (2001).

Applicability of § 50-10. — The application to divorces under this section of the G.S. 50-10 requirement that the factual allegations supporting the divorce must be deemed denied requires a finding of the necessary facts. While it remains sound public policy not to allow the granting of such divorces on the pleadings, it would, nevertheless, appear that it would make good jurisprudential sense to clearly remove divorces under this section from the more cumbersome jury procedure and provide that all such cases be heard by the judge without a jury. Morris v. Morris, 45 N.C. App. 69, 262 S.E.2d 359 (1980).

Allegations and Proof Sufficient to Entitle Plaintiff to Divorce. — Where the complaint alleges, and there is evidence tending to show, that husband and wife, "have lived separate and apart for two years (now one year)" next immediately preceding the institution of the action, and that plaintiff "has resided in the State for a period of six months," nothing else appearing, the establishment of these allegations by proof would entitle plaintiff to a divorce. This section so provides. Taylor v. Taylor, 225 N.C. 80, 33 S.E.2d 492 (1945).

It is unnecessary to set out in the complaint the cause of the separation or to allege that it was without fault on the part of plaintiff or to aver that it was by mutual agreement of the parties. Taylor v. Taylor, 225 N.C. 80, 33 S.E.2d 492 (1945).

In order to be entitled to a divorce on the ground of separation, plaintiff must show the fact of marriage, that the parties have lived separate and apart for two years (now one year), and that plaintiff has been a resident of the State for one year (now six months). Oliver v. Oliver, 219 N.C. 299, 13 S.E.2d 549 (1941).

Where, in an action under this section, the testimony adduced by plaintiff is sufficient to establish, at the commencement of the action, that the plaintiff and defendant were husband and wife, that both of them had resided in the State for a period of six months, and that they had lived separate and apart within the meaning of the statute for an uninterrupted period of two years (now one year), the trial judge rightly refused to nonsuit the action. Mallard v. Mallard, 234 N.C. 654, 68 S.E.2d 247 (1951).

Complaint seeking an absolute divorce was not fatally defective in failing to allege that the parties lived separate and apart for one year with the intention by at least one of them that the separation be permanent, where it contained the allegations required by this section. Sharp v. Sharp, 84 N.C. App. 128, 351 S.E.2d 799 (1987).

Joinder of Grounds in Complaint. — Where the grounds are listed in the statutes for the same kind of divorce, the several grounds may be joined in one complaint, and the decree may be granted on any one of the grounds proved. Swygert v. Swygert, 46 N.C. App. 173, 264 S.E.2d 902 (1980).

Statement in Answer. — In an action under this section, it was held that the mere statement in the answer that the allegation in the complaint "that plaintiff and defendant have not lived together as man and wife since April 1, 1942, is not denied," was not an admission of a "separation." Moody v. Moody, 225 N.C. 89, 33 S.E.2d 491 (1945).

Stay Not Required. — A stay of plaintiff's action for absolute divorce was not required pending resolution of defendant's counterclaim for alimony in plaintiff's earlier action for divorce from bed and board, since defendant's claim for alimony, having been asserted in the prior action, would not be affected by an absolute divorce obtained by plaintiff in the action for absolute divorce. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

When Issues to Be Passed on by Jury. — In an action under this section, where the complaint alleged sufficient facts and defendant in her answer set up a divorce a mensa with alimony granted her on the grounds of abandonment, to which plaintiff replied without admission of wrongful or unlawful conduct on his part, a judgment for defendant on the pleadings was erroneous, as there were issues of fact raised to be tried by a jury. Lockhart v. Lockhart, 223 N.C. 123, 25 S.E.2d 465 (1943).

When Plaintiff May Not Voluntarily Dismiss Claim. — Where plaintiff seeks divorce upon the ground of one year's separation and defendant in his answer likewise prays for a divorce upon the same ground, defendant's prayer is in effect a counterclaim, and plaintiff therefore cannot voluntarily dismiss her claim without defendant's consent. The rationale for this rule is that it would be manifestly unjust to allow a plaintiff who comes into court upon solemn allegations which, if true, entitle defendant to some affirmative relief against the plaintiff, to withdraw, ex parte, the allegations after defendant has demanded the relief to which they entitle him. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Estoppel from Challenging Divorce Judgment. — Where husband filed for divorce and performed some of his obligations under separation agreement for several years, remarried in reliance on the divorce judgment, and did not object to the validity of the divorce decree or the agreement until he sought to defend his failure to comply with the judgment on grounds that it was void, he was estopped from questioning its validity and effect. Amick v. Amick, 80 N.C. App. 291, 341 S.E.2d 613 (1986).

Modification of Custody Order in Action Under This Section. — An order awarding the custody of minor children determines the present rights of the parties, but is not permanent in nature, and is subject to modification for subsequent change of circumstances affecting the welfare of the children; therefore, an order of the court, entered pursuant to former G.S. 50-16, awarding the custody of the children to the wife, did not preclude another judge of the superior court from awarding custody of the children to the husband in the wife's later action for absolute divorce under this section. Thomas v. Thomas, 259 N.C. 461, 130 S.E.2d 871 (1963).

Child Support Action Not Barred. — The inclusion in divorce judgment of a paragraph identifying plaintiff's former husband as the father of plaintiff's child operated only to identify the existence of a child born of the marriage and was not the subject of litigation; thus, collateral estoppel did not bar child support action against defendant. Guilford County ex rel. Child Support Enforcement Unit ex rel. Gardner v. Davis, 123 N.C. App. 527, 473 S.E.2d 640 (1996).

Evidence of Mental Impairment. — In action for divorce based on one year's separation where defendant wife asserted incurable mental illness as a defense, although plaintiff offered no expert evidence concerning the diagnosis of defendant's condition, plaintiff's own testimony showed defendant's ability to perform usual daily tasks when her illness was controlled with medication; moreover, the testimony of defendant's treating psychiatrist and the person most familiar with her condition over an extended period of time, corroborated certain of plaintiff's evidence. Scott v. Scott, 336 N.C. 284, 442 S.E.2d 493 (1994).

Mental Impairment. — To bar an action for divorce based on one year's separation, the mental impairment must be to such extent that defendant does not understand what he or she is engaged in doing and the nature and consequences of the act. Scott v. Scott, 336 N.C. 284, 442 S.E.2d 493 (1994).

Trial court properly excluded evidence of defendant's health and her prospects for obtaining medical insurance following divorce. Such evidence is not relevant to the trial court's determination to grant or deny a divorce pursuant to this section. Fletcher v. Fletcher, 104 N.C. App. 225, 408 S.E.2d 753 (1991).

Alimony. — When a husband was granted an absolute divorce on the grounds of separation for one year, and the wife did not file a counterclaim or separate claim for alimony before the trial court entered a judgment of absolute divorce, which did not preserve an alimony claim, a statement in the wife's answer that "the claims for alimony and equitable distribution pending this action are to be reserved" was insufficient to give the trial court jurisdiction, under G.S. 50-11, to consider the wife's amended answer and counterclaim for alimony, despite the husband's answer to that counterclaim, as subject matter jurisdiction could not be conferred by the parties' consent. Stark v. Ratashara, 177 N.C. App. 449, 628 S.E.2d 471, 2006 N.C. App. LEXIS 962 (2006), cert. denied, 360 N.C. 536, 633 S.E.2d 826 (2006).

For cases decided under subdivisions (1) through (5) of former § 50-5, which formerly set forth various grounds for divorce, see Wood v. Wood, 27 N.C. 674 (1845); Smith v. Morehead, 59 N.C. 360 (1863); Edwards v. Edwards, 61 N.C. 534 (1868); Barringer v. Barringer, 69 N.C. 179 (1873); Horne v. Horne, 72 N.C. 530, appeal dismissed, 72 N.C. 534 (1875); Long v. Long, 77 N.C. 304 (1877); McQueen v. McQueen, 82 N.C. 471 (1880); Webber v. Webber, 83 N.C. 280 (1880); Steel v. Steel, 104 N.C. 631, 10 S.E. 707 (1889); House v. House, 131 N.C. 140, 42 S.E. 546 (1902); Kinney v. Kinney, 149 N.C. 321, 63 S.E. 97 (1908); Ellett v. Ellett, 157 N.C. 161, 72 S.E. 861 (1911); Cooke v. Cooke, 164 N.C. 272, 80 S.E. 178 (1913); Alexander v. Alexander, 165 N.C. 45, 80 S.E. 890 (1914); Bryant v. Bryant, 171 N.C. 746, 88 S.E. 147 (1916); Sanderson v. Sanderson, 178 N.C. 339, 100 S.E. 590 (1919); Brown v. Brown, 182 N.C. 42, 108 S.E. 380 (1921); Lee v. Lee, 182 N.C. 61, 108 S.E. 352 (1921); Ellis v. Ellis, 190 N.C. 418, 130 S.E. 7 (1925); Nelson v. Nelson, 197 N.C. 465, 149 S.E. 585 (1929); Keys v. Tuten, 199 N.C. 368, 154 S.E. 631 (1930); Reeves v. Reeves, 203 N.C. 792, 167 S.E. 129 (1933); Smithdeal v. Smithdeal, 206 N.C. 397, 174 S.E. 118 (1934); Hyder v. Hyder, 210 N.C. 486, 187 S.E. 798 (1936); Burrowes v. Burrowes, 210 N.C. 788, 188 S.E. 648 (1936); Woodruff v. Woodruff, 215 N.C. 685, 3 S.E.2d 5 (1939); Young v. Young, 225 N.C. 340, 34 S.E.2d 154 (1945); Pearce v. Pearce, 225 N.C. 571, 35 S.E.2d 636 (1945); Pearce v. Pearce, 226 N.C. 307, 37 S.E.2d 904 (1946); Welch v. Welch, 226 N.C. 541, 39 S.E.2d 457 (1946); Smith v. Smith, 226 N.C. 544, 39 S.E.2d 458 (1946); Norman v. Norman, 230 N.C. 61, 51 S.E.2d 927 (1949); Cunningham v. Cunningham, 234 N.C. 1, 65 S.E.2d 375 (1951); Mallard v. Mallard, 234 N.C. 654, 68 S.E.2d 247 (1951); Carpenter v. Carpenter, 244 N.C. 286, 93 S.E.2d 617 (1956); Becker v. Becker, 262 N.C. 685, 138 S.E.2d 507 (1964); Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972); Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972); Owens v. Owens, 28 N.C. App. 713, 222 S.E.2d 704, cert. denied, 290 N.C. 95, 225 S.E.2d 324 (1976).

Applied in Hyder v. Hyder, 215 N.C. 239, 1 S.E.2d 540 (1939); Nall v. Nall, 229 N.C. 598, 50 S.E.2d 737 (1948); Deaton v. Deaton, 237 N.C. 487, 75 S.E.2d 398 (1953); O'Briant v. O'Briant, 239 N.C. 101, 79 S.E.2d 252 (1953); Whitener v. Whitener, 255 N.C. 731, 122 S.E.2d 705 (1961); Hutchins v. Hutchins, 260 N.C. 628, 133 S.E.2d 459 (1963); Richardson v. Richardson, 261 N.C. 521, 135 S.E.2d 532 (1964); Jones v. Jones, 261 N.C. 612, 135 S.E.2d 554 (1964); Ponder v. Ponder, 32 N.C. App. 150, 230 S.E.2d 786 (1977); Gerringer v. Gerringer, 42 N.C. App. 580, 257 S.E.2d 98 (1979); In re Hayes, 43 N.C. App. 515, 259 S.E.2d 327 (1979); Wilhelm v. Wilhelm, 43 N.C. App. 549, 259 S.E.2d 319

(1979); Mayer v. Mayer, 66 N.C. App. 522, 311 S.E.2d 659 (1984); Hinton v. Hinton, 70 N.C. App. 665, 321 S.E.2d 161 (1984).

Cited in Teasley v. Teasley, 205 N.C. 604, 172 S.E. 197 (1934); Smithdeal v. Smithdeal, 206 N.C. 397, 174 S.E. 118 (1934); Long v. Long, 206 N.C. 706, 175 S.E. 85 (1934); State v. Henderson, 207 N.C. 258, 176 S.E. 758 (1934); Campbell v. Campbell, 207 N.C. 859, 176 S.E. 250 (1934); Goodman v. Goodman, 208 N.C. 416, 181 S.E. 328 (1935); Brown v. Brown, 213 N.C. 347, 196 S.E. 333 (1938); Taylor v. Taylor, 225 N.C. 80, 33 S.E.2d 492 (1945); Carter v. Carter, 232 N.C. 614, 61 S.E.2d 711 (1950); McLean v. McLean, 233 N.C. 139, 63 S.E.2d 138 (1951); Livingston v. Livingston, 235 N.C. 515, 70 S.E.2d 480 (1952); Carpenter v. Carpenter, 244 N.C. 286, 93 S.E.2d 617 (1956); Shaver v. Shaver, 244 N.C. 309, 93 S.E.2d 614 (1956); Shaver v. Shaver, 248 N.C. 113, 102 S.E.2d 791 (1958); Sears v. Sears, 253 N.C. 415, 117 S.E.2d 7 (1960); Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969); Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972); Hamilton v. Hamilton, 296 N.C. 574, 251 S.E.2d 441 (1979); Wise v. Wise, 42 N.C. App. 5, 255 S.E.2d 570 (1979); O'Hara v. O'Hara, 46 N.C. App. 819, 266 S.E.2d 59 (1980); McCall v. Harris, 55 N.C. App. 390, 285 S.E.2d 335 (1982); Alexander v. Alexander, 68 N.C. App. 548, 315 S.E.2d 772 (1984); Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984); Seifert v. Seifert, 82 N.C. App. 329, 346 S.E.2d 504 (1986); Banner v. Banner, 86 N.C. App. 397, 358 S.E.2d 110 (1987); Coombs v. Coombs, 121 N.C. App. 746, 468 S.E.2d 807 (1996); Daniel v. Daniel, 132 N.C. App. 217, 510 S.E.2d 689 (1999); Coleman v. Coleman, 182 N.C. App. 25, 641 S.E.2d 332, 2007 N.C. App. LEXIS 475 (2007).

II. SEPARATION.

Editor's Note. *— Many of the cases below were decided prior to the 1987 amendment to this section, providing that isolated incidents of sexual intercourse shall not toll the statutory period for divorce predicated on one year separation. As to resumption of marital relations, see G.S. 52-10.2.*

Parties Must Have Lived Separate and Apart for One Year. — The material aspect of this statute is the requirement that the parties have lived separate and apart for one year prior to institution of the suit. Myers v. Myers, 62 N.C. App. 291, 302 S.E.2d 476 (1983).

The expression used in Byers v. Byers, 222 N.C. 298, 22 S.E.2d (1942), "that the bare fact of living separate and apart for the period of two years (now one year); standing alone, will not constitute a cause of action for divorce," should be viewed in the light of its setting, and construed accordingly. It was not intended as a delimitation of the statute. Byers v. Byers, 223 N.C. 85, 25 S.E.2d 466 (1943).

Separation Requirement Applies to Year Prior to Institution of Suit. — The requirement that parties live separate and apart for one year applies to the year prior to institution of the suit. Bruce v. Bruce, 79 N.C. App. 579, 339 S.E.2d 855, cert. denied, 317 N.C. 701, 347 S.E.2d 36 (1986).

The separation contemplated by this section is apparently unrestricted. Taylor v. Taylor, 225 N.C. 80, 33 S.E.2d 492 (1945).

Mutual Agreement to Separate Is Not Required. — A charge by the court to the jury that the living separate and apart means living separate and apart under mutual agreement only, was erroneous, entitling plaintiff to a new trial. Byers v. Byers, 222 N.C. 298, 22 S.E.2d 902 (1942), distinguishing Parker v. Parker, 210 N.C. 264, 186 S.E. 346 (1936), decided under prior wording of section. See 15 N.C.L. Rev. 348 (1937).

In order to be entitled to a divorce, a plaintiff need not show that a marital separation for the statutory period was by mutual agreement or under a decree of court. Beck v. Beck, 14 N.C. App. 163, 187 S.E.2d 355 (1972).

Husband's physical separation from his wife for the statutory one-year period of G.S. 50-6 and his accompanying intention to end the marriage were sufficient to entitle him to an absolute divorce, even though the wife did not know of his intention to end the marriage until less than a year before the husband filed for divorce; there was no requirement under G.S. 50-6 that the remaining spouse have knowledge of the other party's intention to cease cohabitation. Smith v. Smith, 151 N.C. App. 130, 564 S.E.2d 591, 2002 N.C. App. LEXIS 676 (2002).

But Was Required Formerly. — Before the 1937 amendment, which struck out of this section the phrase "either under deed of separation or otherwise," it was held that while the applicant need not be the injured party, the statute did not authorize a divorce where the husband had separated himself from his wife, or the wife had separated herself from her husband, without cause and without agreement, express or implied. Lee v. Lee, 182 N.C. 61, 108 S.E. 352 (1921); Parker v. Parker, 210 N.C. 264, 186 S.E. 346 (1936); Hyder v. Hyder, 210 N.C. 486, 187 S.E. 798 (1936); Reynolds v. Reynolds, 210 N.C. 554, 187 S.E. 768 (1936).

This section contains no requirement that separation of the parties be voluntary. Harrington v. Harrington, 286 N.C. 260, 210 S.E.2d 190 (1974). But see Williams v. Williams, 224 N.C. 91, 29 S.E.2d 39 (1944), holding that the separation under this section must be voluntary in its inception, and Taylor v. Taylor, 225 N.C. 80, 33 S.E.2d 492 (1945), holding that "separation" would not include an involuntary living apart, where there had been no previous separation, such as might arise from the incarceration or insanity of one of the parties.

But This Section Is Inapplicable Where Separation Is Due to Insanity of Defendant. — Divorce on the grounds of two years' (now one year's) separation under this section cannot be maintained when the separation is due to the insanity or mental incapacity of defendant spouse, the sole remedy in such instance being under former G.S. 50-5(6) (recodified as G.S. 50-5.1). Lawson v. Bennett, 240 N.C. 52, 81 S.E.2d 162 (1954); Moody v. Moody, 253 N.C. 752, 117 S.E.2d 724 (1961).

To bar an action for divorce based on two years' (now one year's) separation, the mental impairment must be to such an extent that defendant does not understand what he or she is engaged in doing and the nature and consequences of the act. Moody v. Moody, 253 N.C. 752, 117 S.E.2d 724 (1961).

"Judicial Separation" Included. — A legal separation for the requisite period of two years (now one year) is ground for divorce under this section. The separation here contemplated includes a "judicial separation" as well as one brought about by the act of the parties, or one of them. Lockhart v. Lockhart, 223 N.C. 559, 27 S.E.2d 444 (1943).

A separation by act of the parties, or one of them, or under order of court a mensa et thoro, suffices to meet the terms of this section. Taylor v. Taylor, 225 N.C. 80, 33 S.E.2d 492 (1945).

The effect of a judgment granting a divorce a mensa et thoro was to legalize the separation of the parties which theretofore had been caused by the husband's actions, and after two years (now one year) from the date of such judgment, the husband could proceed to an absolute divorce. Becker v. Becker, 262 N.C. 685, 138 S.E.2d 507 (1964). See also, Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957).

The effect of a divorce a mensa et thoro obtained by the wife on the ground that her husband abandoned her, was to legalize their separation from the date of such judgment; and in such case the husband, after two years (now one year) from the date of such judgment, could proceed to an absolute divorce. Richardson v. Richardson, 257 N.C. 705, 127 S.E.2d 525 (1962).

A judgment in an action instituted under former G.S. 50-16 decreeing that the husband had willfully abandoned the wife and awarding her support and maintenance constituted a judicial separation which, two years (now one year) thereafter, would permit the husband to obtain an absolute divorce. Rouse v. Rouse, 258 N.C. 520, 128 S.E.2d 865 (1963); Wilson v. Wilson, 260 N.C. 347, 132 S.E.2d 695 (1963).

The pendente lite order in the wife's action for divorce from bed and board legalized the separation between the husband and wife, since it provided not only for alimony pendente lite and child custody, but also that the wife have the sole use and peaceful and undisturbed possession of the residence, and such separation having continued for the requisite one year thereafter, the plaintiff-husband became entitled to a divorce. Earles v. Earles, 29 N.C. App. 348, 224 S.E.2d 284 (1976).

What Constitutes Legalized Separation. — Either an action for a divorce a mensa et thoro, an action for alimony without divorce under former G.S. 50-16, or a valid separation agreement may constitute a legalized separation which thereafter will permit either of the parties to obtain an absolute divorce on the ground of one year's separation. Harrington v. Harrington, 286 N.C. 260, 210 S.E.2d 190 (1974).

Valid separation agreement legalizes separation from and after the date thereof. Harrington v. Harrington, 286 N.C. 260, 210 S.E.2d 190 (1974).

To be valid a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Until deed of separation is rescinded, defendant cannot attack legality of separation or obtain alimony from plaintiff. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Effect of Resumption of Cohabitation upon Separation Agreement. — When separated spouses who have executed a separation agreement resume living together in the home which they occupied before the separation, they hold themselves out as man and wife in the ordinary acceptation of the descriptive phrase. Irrespective of whether they have resumed sexual relations, in contemplation of law, their action amounts to a resumption of marital cohabitation which rescinds their separation agreement insofar as it had not been executed. Further, a subsequent separation will not revive the agreement. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

The same public policy which will not permit spouses to continue to live together in the same home, holding themselves out to the public as husband and wife, to sue each other for an absolute divorce on the ground of separation, or to base the period of separation required for a divorce on any time they live together, will also nullify a separation agreement if the parties resume marital cohabitation. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

The heart of a separation agreement is the parties' intention and agreement to live separate and apart forever, and when a husband and wife enter into a deed of separation the policy of the law is that they are to live separate. Therefore, they void the separation agreement if they reestablish a matrimonial home. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Sexual intercourse between a husband and wife after the execution of separation agreement voids the contract. Murphy v. Murphy, 295 N.C. 390, 245 S.E.2d 693 (1978). But see now § 52-10.2.

Where a reconciliation and resumption of cohabitation has taken place, an order or separation agreement with provisions for future support and an agreement to live apart is necessarily abrogated. Williamson v. Williamson, 66 N.C. App. 315, 311 S.E.2d 325 (1984).

Grounds for Attacking Deed of Separation. — A married woman may attack the certificate of her acknowledgment and privy examination respecting her execution of a deed of separation, inter alia, upon the grounds of her mental incapacity, infancy, or the fraud of the grantee. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Effect of Decree Denying Alimony. — If a separation is legalized by an award of alimony without divorce, there is no sound reason why it should not also be legalized by a decree denying alimony based upon a finding of no dependency. In each case the court has considered and determined the respective rights and obligations of the separated parties insofar as support is concerned. In neither case is the court able to mend the broken marriage or to force the parties to live together if either persists in continuing to live apart. Cook v. Cook, 41 N.C. App. 156, 254 S.E.2d 261 (1979).

The separation of the parties became legalized by the entry of the judgment which denied defendant alimony and by entry of the order which awarded her possession of the house. The parties having lived separate and apart for more than one year after their separation thus became legalized, plaintiff was entitled to maintain an action for an absolute divorce under this section. The adjudication made in the prior action that plaintiff had originally wrongfully abandoned the defendant was not effective as a bar in the later action. Cook v. Cook, 41 N.C. App. 156, 254 S.E.2d 261 (1979).

Separation means cessation of cohabitation, and cohabitation means living together as man and wife, though not necessarily implying sexual relations. Cohabitation includes other marital responsibilities and duties. Dudley v. Dudley, 225 N.C. 83, 33 S.E.2d 489 (1945); Young v. Young, 225 N.C. 340, 34 S.E.2d 154 (1945); In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976); Tuttle v. Tuttle, 36 N.C. App. 635, 244 S.E.2d 447 (1978).

Physical Separation Must Be Accompanied by Intention to Cease Cohabitation. — A husband and wife live separate and apart for the prescribed period within the meaning of this section when, and only when, these two conditions concur: (1) They live separate and apart physically for an uninterrupted period of two years (now one year); and (2) their physical separation is accompanied by at least an intention on the part of one of them to cease their matrimonial cohabitation. Mallard v. Mallard, 234 N.C. 654, 68 S.E.2d 247 (1951); Richardson v. Richardson, 257 N.C. 705, 127 S.E.2d 525 (1962); Beck v. Beck, 14 N.C. App. 163, 187 S.E.2d 355 (1972).

The bare fact of living separate and apart for the period of two years (now one year), standing alone, will not constitute a cause of action for divorce. There must be at least an intention on the part of one of the parties to cease cohabitation, which must be shown to have existed at the time alleged as the beginning of the separation period. It must appear that the separation is with that definite purpose on the part of at least one of the parties. The exigencies of life and the necessity of making a livelihood may sometimes require that the husband shall absent himself from the wife for long periods, a situation which was not contemplated by the law as a cause of divorce in fixing the period of separation. Byers v. Byers, 222 N.C. 298, 22 S.E.2d 902 (1942).

The words "separate and apart," as used in this section, mean that there must be both a physical separation and an intention on the part of at least one of the parties to cease the matrimonial cohabitation. Earles v. Earles, 29 N.C. App. 348, 224 S.E.2d 284 (1976); Myers v. Myers, 62 N.C. App. 291, 302 S.E.2d 476 (1983).

Evidence of Conjugal Relations Within Statutory Period Before Action. — Sexual relations between spouses separated for less than one year invalidates those obligations of the parties, pursuant to a separation agreement, that are contingent upon the requirement that the parties "live continuously separate and apart" for one year. Higgins v. Higgins, 86 N.C. App. 513, 358 S.E.2d 553 (1987), aff'd, 321 N.C. 482, 364 S.E.2d 426 (1988).

Evidence that within the statutory period before the institution of the divorce action defendant visited plaintiff at army camp and plaintiff visited defendant on furloughs, and that at such times they cohabitated as man and wife, was sufficient to negative the conclusion that conjugal relations had ceased for the period prescribed by this section, and supported verdict in defendant's favor and judgment denying plaintiff's suit for divorce on the grounds of two years' (now one year's) separation. Mason v. Mason, 226 N.C. 740, 40 S.E.2d 204 (1946), decided prior to the 1987 amendment to this section.

The discontinuance of sexual relations is not in itself a living "separate and apart" within the meaning of the statute, and a divorce will be denied where it appears that, during the period relied upon, the parties had lived in the same house. Dudley v. Dudley, 33 S.E.2d 489 (1945).

Effect of Continuing Support of Spouse. — This section does not contemplate, as essential, a repudiation of all marital obligations, and the fact that the husband has supported the wife will not defeat his action. Byers v. Byers, 222 N.C. 298, 22 S.E.2d 902 (1942).

If a plaintiff in a divorce action on grounds of separation contributes to the support of his wife, solely in an attempt to fulfill the obligation imposed by statute, his conduct is not inconsistent with a legal separation; but if he makes such payments in recognition of his marital status and in discharge of his marital obligations, there is no living separate and apart within the meaning of the statute. Williams v. Williams, 224 N.C. 91, 29 S.E.2d 39 (1944).

When Requirements for Valid Separation Not Satisfied. — The law delineates two circumstances under which the law will hold spouses to have failed to satisfy the requirements of a valid separation: first, sexual activity between the parties, and, second, such association between the parties as to induce others to regard them as living together. Ledford v. Ledford, 49 N.C. App. 226, 271 S.E.2d 393 (1980), decided prior to the 1987 amendment to this section.

Casual and isolated social acts between separated spouses do not as a matter of law create a holding out as man and wife. Ledford v. Ledford, 49 N.C. App. 226, 271 S.E.2d 393 (1980).

Isolated or casual acts of sexual intercourse between separated spouses toll the statutory period required for divorce predicated on separation. Pitts v. Pitts, 54 N.C. App. 163, 282 S.E.2d 488 (1981), decided prior to the 1987 amendment to this section.

Question of Resumption of the Conjugal Relation After Separation Is for Jury. See Reynolds v. Reynolds, 210 N.C. 554, 187 S.E.2d 768 (1936).

Mutuality of Intent to Reconcile Is Essential Where Evidence Conflicts. — When the evidence is conflicting, the issue of the parties' mutual intent is an essential element in deciding whether the parties were reconciled and resumed cohabitation. Williamson v. Williamson, 66 N.C. App. 315, 311 S.E.2d 325 (1984); Camp v. Camp, 75 N.C. App. 498, 331 S.E.2d 163, cert. denied, 314 N.C. 663, 335 S.E.2d 493 (1985).

Separation May Not Be Based on Evidence Showing Cohabitation. — For the purposes of obtaining a divorce under this section, separation may not be predicated upon evidence which shows that during the statutorily prescribed period the parties have cohabited as husband and wife. Camp v. Camp, 75 N.C. App. 498, 331 S.E.2d 163, cert. denied, 314 N.C. 663, 335 S.E.2d 493 (1985).

Husband's return to the marital home for a 10-day period, during which time he, inter alia, never had any sexual relations with his wife, was constantly looking for work, and did not otherwise represent himself to have resumed the marital relationship, did not constitute a resumption of marital cohabitation such as to invalidate the parties' separation agreement and bar divorce on the grounds of living separate and apart for one year. Camp v. Camp, 75 N.C. App. 498, 331 S.E.2d 163, cert. denied, 314 N.C. 663, 335 S.E.2d 493 (1985).

Resumption of the marital relation is not inherently secretive and spouses are competent to testify about it. Williamson v. Williamson, 66 N.C. App. 315, 311 S.E.2d 325 (1984).

"Inclination and Opportunity" Rule Inapplicable to Proof of Resumption of Marital Relations. — The "inclination and opportunity" concept allows a presumption of adulterous sexual intercourse if adulterous inclination and opportunity are shown. The rule applies only to cases of alleged adultery, because adultery is an illegal act which by its very nature is difficult to prove. Such justification of the rule for adultery cases is nonexistent for proof of resumption of marital relations between separated spouses, an act which is not against the law but which merely breaks a contract between the spouses. Williamson v. Williamson, 66 N.C. App. 315, 311 S.E.2d 325 (1984).

Complaint must state a date of separation to establish the general time frame for divorce based on a year's separation. Myers v. Myers, 62 N.C. App. 291, 302 S.E.2d 476 (1983).

III. FAULT.

Either party may secure an absolute divorce under this section, even though the applicant is the party who commits the wrong, as granting divorces is exclusively statutory and this is an independent act of the General Assembly. Long v. Long, 206 N.C. 706, 175 S.E. 85 (1934); Byers v. Byers, 222 N.C. 298, 22 S.E.2d 902 (1942).

Either party may bring an action for absolute divorce under this section, and the jury's finding that defendant did not abandon plaintiff without cause did not preclude judgment in plaintiff's favor. Campbell v. Campbell, 207 N.C. 859, 176 S.E. 250 (1934).

Plaintiff Need Not Establish That He Is Injured Party. — Where the husband sues the wife for an absolute divorce upon the ground of two years' (now one year's) separation under this section, he is not required to establish as a constituent element of his cause of action that he is the injured party. Pickens v. Pickens, 258 N.C. 84, 127 S.E.2d 889 (1962); Overby v. Overby, 272 N.C. 636, 158 S.E.2d 799 (1968).

In an action for absolute divorce under this section, the plaintiff need not allege and prove that he or she is an injured party. Earles v. Earles, 29 N.C. App. 348, 224 S.E.2d 284 (1976).

Recrimination does not constitute a bar to plaintiff's action for divorce based on one year's separation. Smith v. Smith, 42 N.C. App. 246, 256 S.E.2d 282 (1979).

For case discussing the elimination of the defense of recrimination based on former G.S. 50-5 by Session Laws 1977, c. 817, s. 1, effective Aug. 1, 1977, and recrimination based on G.S. 50-7 by Session Laws 1977, 2nd Sess., c. 1190, s. 1, effective June 16, 1978, see Gardner v. Gardner, 48 N.C. App. 38, 269 S.E.2d 630 (1980).

This section is a "no-fault" statute. Recriminatory defenses are not applicable. Bruce v. Bruce, 79 N.C. App. 579, 339 S.E.2d 855, cert. denied, 317 N.C. 701, 347 S.E.2d 36 (1986).

Where Action Is Brought After July 31, 1977. — The defense of recrimination cannot be asserted in actions for absolute divorce instituted in this State after July 31, 1977, even if the alleged adulterous acts on the part of the plaintiff occurred after the separation of the parties. Edwards v. Edwards, 43 N.C. App. 296, 259 S.E.2d 11 (1979).

Even If Acts Occurred Prior to July 31, 1977. — Recrimination cannot be asserted as a defense in actions for absolute divorce based on a year's separation brought after July 31, 1977. Therefore, since plaintiff's action was begun on August 30, 1978, the defense of recrimination in the form of abandonment would not be available to defendant, even though the alleged abandonment occurred prior to the effective date of the statute. Boone v. Boone, 44 N.C. App. 79, 259 S.E.2d 921 (1979).

But Recrimination Could Be Pleaded in Action Brought Prior to Amendment. — Where husband filed action for divorce pursuant to this section on June 1, 1976, elimination of recriminatory defenses based on G.S. 50-7 by Session Laws 1977, 2nd Sess., c. 1190, s. 1, effective June 16, 1978, would not be applied retroactively so as to bar wife from pleading such defenses. Gardner v. Gardner, 48 N.C. App. 38, 269 S.E.2d 630 (1980).

Defense of Recrimination Prior to Amendment of Section. — For cases decided under the doctrine of recrimination, which allowed a defendant in a divorce action to set up as a defense in bar of plaintiff's action that plaintiff was guilty of misconduct which in itself would have been a ground for divorce, prior to elimination of the defense of recrimination by the amendments to this section by Session Laws 1977, c. 817, s. 1, and Session Laws 1977, 2nd Sess., c. 1190, s. 1, see Reynolds v. Reynolds, 208 N.C. 428, 181 S.E. 338 (1935); Hyder v. Hyder, 210 N.C. 486, 187 S.E. 798 (1936); Byers v. Byers, 223 N.C. 85, 25 S.E.2d 466 (1943); Pharr v. Pharr, 223 N.C. 115, 25 S.E.2d 471 (1943); Taylor v. Taylor, 225 N.C. 80, 33 S.E.2d 492 (1945); Welch v. Welch, 226 N.C. 541, 39 S.E.2d 457 (1946); Richardson v. Richardson, 257 N.C. 705, 127 S.E.2d 525 (1962); Edmisten v. Edmisten, 265 N.C. 488, 144 S.E.2d 404 (1965); Rupert v. Rupert, 15 N.C. App. 730, 190 S.E.2d 693, cert. denied, 282 N.C. 153, 191 S.E.2d 759 (1972); Gray v. Gray, 16 N.C. App. 730, 193 S.E.2d 492 (1972); Harrington v. Harrington, 286 N.C. 260, 210 S.E.2d 190 (1974); Heilman v. Heilman, 24 N.C. App. 11, 210 S.E.2d 69 (1974).

For cases as to defense of abandonment under this section prior to elimination of defense of recrimination, see Byers v. Byers, 223 N.C. 85, 25 S.E.2d 466 (1943); Pharr v. Pharr, 223 N.C. 115, 25 S.E.2d 471 (1943); Cameron v. Cameron, 235 N.C. 82, 68 S.E.2d 796 (1952); McLean v. McLean, 237 N.C. 122, 74 S.E.2d 320 (1953); Johnson v. Johnson, 237 N.C. 383, 75 S.E.2d 109 (1953); Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957); Taylor v. Taylor, 257 N.C. 130, 125 S.E.2d 373 (1962); Richardson v. Richardson, 257 N.C. 705, 127 S.E.2d 525 (1962); Pickens v. Pickens, 258 N.C. 84, 127 S.E.2d 889 (1962); O'Brien v. O'Brien, 266 N.C. 502, 146 S.E.2d 500 (1966); Campbell v. Campbell, 270 N.C. 298, 154 S.E.2d 101 (1967); Overby v. Overby, 272 N.C. 636, 158 S.E.2d 799 (1968); Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968); McLeod v. McLeod, 1 N.C. App. 396, 161 S.E.2d 635 (1968); Rupert v. Rupert, 15 N.C. App. 730, 190 S.E.2d 693, cert. denied, 282 N.C. 153, 191 S.E.2d 759 (1972); Harrington v. Harrington, 22 N.C. App. 419, 206 S.E.2d 742, rev'd on other grounds, 286 N.C. 260, 210 S.E.2d 190 (1974); Heilman v. Heilman, 24 N.C. App. 11, 210 S.E.2d 69 (1974).

IV. DOMICILE OR RESIDENCE.

The six months residency requirement means the six months next preceding commencement of the action. Bruce v. Bruce, 79 N.C. App. 579, 339 S.E.2d 855, cert. denied, 317 N.C. 701, 347 S.E.2d 36 (1986).

Separate Domicile for Wife. — North Carolina divorce statutes recognize the legality of a separate domicile or residence for the wife. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

To establish a domicile, there must be a residence and the intention to make it a home or to live there indefinitely. Bryant v. Bryant, 228 N.C. 287, 45 S.E.2d 572 (1947).

Plaintiff must be physically present in this State and have the intention of making his residence here a permanent abiding place in order to be domiciled here within the meaning of this section, making residence in this State for six months a jurisdictional prerequisite to the institution of an action for divorce on the grounds of two years' (now one year's) separation. Bryant v. Bryant, 228 N.C. 287, 45 S.E.2d 572 (1947).

The fact that a person obtains an automobile license and ration cards in another state, giving such state as his residence, while competent on the question of domicile, is not conclusive. Bryant v. Bryant, 228 N.C. 287, 45 S.E.2d 572 (1947).

Finding of Court as to Residence. — The finding of the court, supported by evidence, that plaintiff was physically present in this State for more than six months prior to instituting an action for divorce and that he regarded his residence here as a permanent home was sufficient to support a judgment denying defendant's motion in the cause to set aside the divorce decree on the ground of want of the jurisdictional requirement of domicile. Bryant v. Bryant, 228 N.C. 287, 45 S.E.2d 572 (1947).

District court properly exercised jurisdiction over the subject matter of the parties' divorce action as in the State of North Carolina subject matter jurisdiction for divorce involves not only bringing the matter in the correct court, but also the court's finding residence by one of the parties for the requisite length of time and verification of the pleadings. In the case at issue, the plaintiff husband sufficiently alleged that he was a citizen and resident of North Carolina for more than six months next preceding the institution of the action and had lived separate and apart from the wife for more than one year next preceding the institution of the action without resuming the marital relationship, with those district court findings being supported by the husband's verified complaint, which was treated as an affidavit. Wilson v. Wilson, 191 N.C. App. 789, 666 S.E.2d 653, 2008 N.C. App. LEXIS 1479 (2008).

How Decree Attacked on Ground of Nonresidence. — The proper procedure to attack a divorce decree on the ground that plaintiff had not been a resident of the State for six months preceding the institution of the action is by motion in the cause. Bryant v. Bryant, 228 N.C. 287, 45 S.E.2d 572 (1947).

Defect in Jurisdiction Held Insignificant Since Either Party Could Bring Proceeding. — Although the court improperly found jurisdiction over defendant, this error was insignificant, in that this section allows a divorce proceeding on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months. Andris v. Andris, 65 N.C. App. 688, 309 S.E.2d 570 (1983).

OPINIONS OF ATTORNEY GENERAL

Incompetency Following Separation. — A plaintiff may pursue a divorce option under this section where, after the parties have separated, the defendant sustains injuries bringing into question his competency. Section 50-5.1 is not available in such a case. See opinion of Attorney General to Mr. James Lee Knight, Clerk of Superior Court, Guilford County, 55 N.C.A.G. 82 (1986).

§ 50-7. Grounds for divorce from bed and board.

The court may grant divorces from bed and board on application of the party injured, made as by law provided, in the following cases if either party:

(1) Abandons his or her family.
(2) Maliciously turns the other out of doors.
(3) By cruel or barbarous treatment endangers the life of the other. In addition, the court may grant the victim of such treatment the remedies available under G.S. 50B-1, et seq.
(4) Offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome.
(5) Becomes an excessive user of alcohol or drugs so as to render the condition of the other spouse intolerable and the life of that spouse burdensome.
(6) Commits adultery. (1871-2, c. 193, s. 36; Code, s. 1286; Rev., s. 1562; C.S., s. 1660; 1967, c. 1152, s. 7; 1971, c. 1185, s. 22; 1979, c. 561, s. 5; 1985, c. 574, ss. 1, 2.)

Cross References. — For provision that in an action brought pursuant to this section, if either or both parties have sought and obtained marital counselling by a licensed physician, licensed psychologist, or certified marital family therapist, the person rendering such counselling shall not be competent to testify in the action concerning information acquired while rendering such counselling, see G.S. 8-53.6. As to effect of divorce a mensa et thoro on right to administer spouse's estate, see G.S. 31A-1. As to necessary allegations, see G.S. 50-8 and note. As to resumption of marital relations, see G.S. 52-10.2.

Legal Periodicals. — For case law survey on alimony without divorce, see 41 N.C.L. Rev. 459 (1963).

For article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

For note discussing application of the compulsory counterclaim provision of G.S. 1A-1, Rule 13 in divorce suits, see 57 N.C.L. Rev. 459 (1979).

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For note on separability of support and property provisions in ambiguous separation agreements, see 16 Wake Forest L. Rev. 152 (1980).

For 1984 survey, "Estoppel and Foreign Divorce," see 63 N.C.L. Rev. 1189 (1985).

For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

CASE NOTES

I. In General.
II. Abandonment.
III. Maliciously Turning Spouse Out.
IV. Cruel Treatment.
V. Indignities.
VI. Excessive Use of Alcohol or Drugs.

I. IN GENERAL.

A divorce from bed and board is nothing more than a judicial separation, that is, an authorized separation of husband and wife. Schlagel v. Schlagel, 253 N.C. 787, 117 S.E.2d 790 (1961); Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69 (1978).

Suit for divorce from bed and board is not exclusively a means for collection of alimony, but also a means of establishing a certain legal relationship. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Applicability of § 50-10. — Section 50-10 applies to a divorce from bed and board under this section. Schlagel v. Schlagel, 253 N.C. 787, 117 S.E.2d 790 (1961).

Finality. — A divorce from bed and board is a final order. There is no such thing as a divorce from bed and board pendente lite. Kale v. Kale, 25 N.C. App. 99, 212 S.E.2d 234, cert. denied, 287 N.C. 259, 214 S.E.2d 431 (1975).

No Action for "No Fault" Divorce from Bed and Board. — Where a husband and wife are living together and their children are in their joint custody and are being adequately supported by the supporting spouse, in the absence of allegations which would support an award of alimony or divorce, one spouse may not maintain an action to evict the other, get sole custody of the children, and obtain an order for child support; therefore, the trial court erred in denying defendant's motion to dismiss on the ground that the complaint failed to state a claim upon which relief could be granted, since the complaint attempted to assert, and the court allowed, what appeared to be a "no fault" divorce from bed and board, and such an action does not lie in this State. Harper v. Harper, 50 N.C. App. 394, 273 S.E.2d 731 (1981).

No Requirement for Separation of Parties. — There is no requirement for a separation of the parties in the sense of one moving out of the home before an action can be instituted and prosecuted under this section for divorce from bed and board. Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69 (1978).

A wife may pursue an action for divorce from bed and board and alimony while her husband is staying in the same house with her. Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69 (1978).

Plaintiff Must Petition for Divorce a Mensa. — A decree of divorce a mensa will not be granted in an action where plaintiff petitioned for absolute divorce. Morris v. Morris, 75 N.C. 168 (1876).

Allegations in a cross action for divorce a mensa et thoro, set up by defendant wife in husband's action for divorce, were held sufficient. Ragan v. Ragan, 214 N.C. 36, 197 S.E. 554 (1938).

It is not necessary for the plaintiff to establish all of the grounds for divorce a mensa et thoro alleged in her complaint in order to sustain her action. It is sufficient if she establishes the defendant's guilt of any of the acts that would constitute a cause of action for divorce from bed and board as enumerated in this section. Deaton v. Deaton, 234 N.C. 538, 67 S.E.2d 626 (1951); Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957).

To obtain a divorce from bed and board the law requires that defendant establish only one of the grounds specified in this section. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

Failure to Establish Ground for Divorce. — Where in his stipulation to the existence of ground for awarding alimony defendant did not specify which ground, of the ten enumerated in former G.S. 50-16.2, existed to support an alimony award, plaintiff could not automatically assume that the ground stipulated was one of the five grounds also listed in this section. Thus, as she presented no evidence establishing one of the grounds in this section, plaintiff failed to meet her burden of proof as to this issue, and the trial court properly denied her request for a divorce from bed and board. Perkins v. Perkins, 85 N.C. App. 660, 355 S.E.2d 848, cert. denied, 320 N.C. 633, 360 S.E.2d 92 (1987).

Grounds Available to Husband as Well as Wife. — The grounds for divorce a mensa given by this section are available to the husband as well as to the wife, or as stated by the express language of the statute, to "the injured party." Brewer v. Brewer, 198 N.C. 669, 153 S.E. 163 (1930); Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957).

Only the party injured is entitled to a divorce under this section. Vaughan v. Vaughan, 211 N.C. 354, 190 S.E. 492 (1937). See also, Carnes v. Carnes, 204 N.C. 636, 169 S.E. 222 (1933); Lawrence v. Lawrence, 226 N.C. 624, 39 S.E.2d 807 (1946).

When the misconduct of the complaining party is calculated to and does reasonably induce the conduct of defendant relied upon in an action for divorce a mensa et thoro, he or she, as the case may be, will not be permitted to take advantage of his or her own wrong, and the decree of divorce will be denied. Byers v. Byers, 223 N.C. 85, 25 S.E.2d 466 (1943); Pressley v. Pressley, 261 N.C. 326, 134 S.E.2d 609 (1964).

Plaintiff Must Prove Unprovoked Misconduct by Defendant. — To establish the existence of a ground listed in this section, plaintiff must allege and prove acts of misconduct by defendant and show that this misconduct was not provoked by plaintiff's actions. Perkins v. Perkins, 85 N.C. App. 660, 355 S.E.2d 848, cert. denied, 320 N.C. 633, 360 S.E.2d 92 (1987).

Effect of Delay in Bringing Action. — An unreasonable delay by one party, after a probable knowledge of the criminal conduct of the other, will, if unaccounted for, preclude such party from obtaining a decree for a separation from bed and board. Whittington v. Whittington, 19 N.C. 64 (1836).

But a delay of seven years in filing a petition was sufficiently accounted for by allegations that at the happening of the matters relied upon for divorce, the petitioner was a nonresident of the State, and was at the time of suit a pauper. Schonwald v. Schonwald, 62 N.C. 215 (1867).

Evidence of Acts Occurring "More Than Ten Years Ago". — Where a wife sues her husband for divorce a mensa et thoro, under this section, it is not error to admit on the trial evidence of his misconduct occurring "more than ten years ago" when it is a part of the whole course of his dealings coming down to within six months of the beginning of the action. Page v. Page, 167 N.C. 346, 83 S.E. 625 (1914).

Condonation is an affirmative defense to be alleged and proved by the party relying upon it, and less may be sufficient to destroy condonation than to found an original suit. Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

Resumption of Marital Relations as Condonation. — Nothing else appearing, the resumption of marital relations after a separation imports a condonation of previous offenses. Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

Mere Forgiveness Does Not Establish Condonation. — Evidence merely of forgiveness by the plaintiff, in her action for divorce a mensa et thoro against her husband, is insufficient to establish condonation. Page v. Page, 167 N.C. 346, 83 S.E. 625 (1914); Jones v. Jones, 173 N.C. 279, 91 S.E. 960 (1917).

Condonation is forgiveness upon condition, and the condition is that the party forgiven will abstain from like offenses afterwards. If the condition is violated, the original offense is revived. Lassiter v. Lassiter, 92 N.C. 129 (1885); Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

Repetition of the offense nullifies the previous condonation. Collier v. Collier, 16 N.C. 352 (1829); Gordon v. Gordon, 88 N.C. 45 (1883); Page v. Page, 167 N.C. 346, 83 S.E. 625 (1914).

Reconciliation Is Not a Defense to a Divorce from Bed and Board. — A divorce from bed and board is judicial separation. Reconciliation while the action is pending is not a defense to a divorce from bed and board, unlike other concepts such as condonation, that is, the forgiveness of a marital offense constituting a ground for divorce. Howell v. Tunstall, 64 N.C. App. 703, 308 S.E.2d 454 (1983).

But Resumption of Marital Relations

Destroys Effect of Divorce. — If the parties reconcile and resume cohabitation as man and wife after a divorce from bed and board is granted, the effect of the divorce from bed and board is destroyed. No court action to end such divorce is necessary. Howell v. Tunstall, 64 N.C. App. 703, 308 S.E.2d 454 (1983).

A resumption of marital relations would invalidate a divorce a mensa et thoro. Rouse v. Rouse, 258 N.C. 520, 128 S.E.2d 865 (1963).

Findings of Fact Required. — In an action for divorce from bed and board under this section, the trial court should make adequate findings of facts (i.e. specific acts of misconduct) to support the conclusion of law that the noninjured party has (1) abandoned the family; (2) maliciously turned the other out of doors; (3) endangered the life of the other by cruel or barbarous treatment; (4) offered such indignities to the person of the other as to render his or her condition intolerable; or (5) become an excessive user of alcohol or drugs so that the other's life is burdensome. Steele v. Steele, 36 N.C. App. 601, 244 S.E.2d 466 (1978).

Judgment Invalid Without Finding of Grounds. — Where judgment of divorce from bed and board contained absolutely no finding of the existence of any of the grounds for divorce from bed and board cognizable under this section, the district court was without power or authority, and therefore without jurisdiction, to enter it. Allred v. Tucci, 85 N.C. App. 138, 354 S.E.2d 291, cert. denied, 320 N.C. 166, 358 S.E.2d 47 (1987).

Proceeding to set aside invalid divorce decree is not barred by death of one spouse where property rights are involved. Allred v. Tucci, 85 N.C. App. 138, 354 S.E.2d 291, cert. denied, 320 N.C. 166, 358 S.E.2d 47 (1987).

Alimony. — Where, in husband's action for divorce a vinculo, the wife sets up a cross action for divorce a mensa, the court has the power to make an order for the payment of alimony upon the jury's determination of the issues in favor of the wife. Norman v. Norman, 230 N.C. 61, 51 S.E.2d 927 (1949).

In an action for divorce, a verified answer and cross action setting forth a cause of action for divorce a mensa is sufficient to sustain an order allowing alimony pendente lite. Nall v. Nall, 229 N.C. 598, 50 S.E.2d 737 (1948).

Every ground for divorce from bed and board also serves as a ground for alimony. Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

Applied in Albritton v. Albritton, 210 N.C. 111, 185 S.E. 762 (1936); Sumner v. Sumner, 227 N.C. 610, 44 S.E.2d 40 (1947); Bunn v. Bunn, 258 N.C. 445, 128 S.E.2d 792 (1963); Adams v. Adams, 262 N.C. 556, 138 S.E.2d 204 (1964); Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979); Blair v. Blair, 44 N.C. App. 605, 261 S.E.2d 301 (1980).

Cited in Brown v. Brown, 205 N.C. 64, 169 S.E. 818 (1933); Lockhart v. Lockhart, 223 N.C. 559, 27 S.E.2d 444 (1943); Stanley v. Stanley, 226 N.C. 129, 37 S.E.2d 118 (1946); Bateman v. Bateman, 232 N.C. 659, 61 S.E.2d 909 (1950); Bateman v. Bateman, 233 N.C. 357, 64 S.E.2d 156 (1951); Livingston v. Livingston, 235 N.C. 515, 70 S.E.2d 480 (1952); Feldman v. Feldman, 236 N.C. 731, 73 S.E.2d 865 (1952); Johnson v. Johnson, 237 N.C. 383, 75 S.E.2d 109 (1953); Morgan v. Brooks, 241 N.C. 527, 85 S.E.2d 869 (1955); McDowell v. McDowell, 243 N.C. 286, 90 S.E.2d 544 (1955); Rowland v. Rowland, 253 N.C. 328, 116 S.E.2d 795 (1960); Pickens v. Pickens, 258 N.C. 84, 127 S.E.2d 889 (1962); Richardson v. Richardson, 4 N.C. App. 99, 165 S.E.2d 678 (1969); Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969); Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976); Cook v. Cook, 41 N.C. App. 156, 254 S.E.2d 261 (1979); State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988); Morrow v. Morrow, 94 N.C. App. 187, 379 S.E.2d 705 (1989); Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989); State v. Byrd, 185 N.C. App. 597, 649 S.E.2d 444, 2007 N.C. App. LEXIS 1953 (2007).

II. ABANDONMENT.

What Is Abandonment. — One spouse abandons the other where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without intent of renewing it. Morris v. Morris, 46 N.C. App. 701, 266 S.E.2d 381, aff'd, 301 N.C. 525, 272 S.E.2d 1 (1980); Roberts v. Roberts, 68 N.C. App. 163, 314 S.E.2d 781 (1984).

Abandonment under this subdivision is not synonymous with the offense defined in § 14-322. Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957).

Abandonment under this subdivision is not synonymous with the criminal offense defined in G.S. 14-322. In a prosecution under G.S. 14-322, the State must establish (1) a willful abandonment and (2) a willful failure to provide adequate support. Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966).

There is a distinction between criminal abandonment and the matrimonial offense of desertion. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

It is not necessary that the husband should leave the State. Witty v. Barham, 147 N.C. 479, 61 S.E. 372 (1908).

Nor is it necessary for the husband himself to depart from his home and leave his wife in order to abandon her. By cruel treatment or failure to provide for her support, he may compel her to leave him, which would constitute abandonment by the husband. Blanchard v. Blanchard, 226 N.C. 152, 36 S.E.2d 919 (1946), holding evidence insufficient to show abandonment by husband; Somerset v. Somerset, 3 N.C. App. 473, 165 S.E.2d 33 (1969); Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

It is not necessary, to constitute abandonment of a wife by the husband, that he leave her, but he may constructively abandon her by treating her with such cruelty as to compel her to leave him. Eudy v. Eudy, 24 N.C. App. 516, 211 S.E.2d 536, aff'd, 288 N.C. 71, 215 S.E.2d 782 (1975).

Continued and Persistent Cruelty or Neglect May Constitute Abandonment. — If a husband, by continued and persistent cruelty or neglect, forces his wife to leave his home, he may himself be guilty of abandonment. Somerset v. Somerset, 3 N.C. App. 473, 165 S.E.2d 33 (1969).

Sleeping in Separate Bedroom Is Not Abandonment. — A husband who has neither left the marital home nor withheld support cannot be found to have abandoned his wife merely by electing to sleep in a separate bedroom. Oakley v. Oakley, 54 N.C. App. 161, 282 S.E.2d 589 (1981).

Nor Is Separation by Mutual Agreement. — Abandonment or desertion, as a marital wrong committed by one spouse against the other, does not occur if the parties live apart by mutual agreement. Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

When the complaining spouse has consented to a separation which was not caused by the other's misconduct, the plaintiff cannot obtain a divorce or alimony on the basis of abandonment. Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

Unless Induced by Misconduct of One Spouse. — Where the agreement to separate is induced by the misconduct of one spouse, the other can still maintain the charge of voluntary abandonment. Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

The consent which will bar divorce on grounds of abandonment is a positive willingness on the part of the complainant — a consent not induced by the misconduct of the other spouse — to cease cohabitation. Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

And Not Mere Acquiescence in the Inevitable. — Mere acquiescence in a wrongful and inevitable separation, which the complaining spouse could not prevent after reasonable efforts to preserve the marriage, does not make the separation voluntary or affect the right to divorce or alimony. Nor, under such circumstances, is the innocent party obliged to protest or to exert physical force or other importunity to prevent the other party from leaving. Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

Abandonment imports willfulness and maliciously turning the spouse out of doors. Brooks v. Brooks, 226 N.C. 280, 37 S.E.2d 909 (1946).

Plaintiff Must Prove That Abandonment Was Willful. — Where wife sues husband for a divorce from bed and board upon the ground of abandonment under this section, she must prove as an essential part of her case that her husband has willfully abandoned her. Cameron v. Cameron, 235 N.C. 82, 68 S.E.2d 796 (1952).

When Abandonment Is Justified. — The Supreme Court, in applying the provisions of subdivision (1) of this section, has never undertaken to formulate any all-embracing definition or rule of general application respecting what conduct on the part of one spouse will justify the other in withdrawing from the marital relation, and each case must be determined in large measure upon its own particular circumstances. Ordinarily, however, the withdrawing spouse is not justified in leaving the other unless the conduct of the latter is such as would likely render it impossible for the withdrawing spouse to continue the marital relation with safety, health, and self-respect, and as would constitute ground in itself for divorce at least from bed and board. Caddell v. Caddell, 236 N.C. 686, 73 S.E.2d 923 (1952).

Plaintiff Must Prove Absence of Justification. — Where a spouse seeks to recover alimony on the grounds of abandonment, that spouse has the burden of proving each and every element of abandonment, including the absence of justification. Morris v. Morris, 46 N.C. App. 701, 266 S.E.2d 381, aff'd, 301 N.C. 525, 272 S.E.2d 1 (1980).

The burden of proof upon a plaintiff alleging defendant's abandonment is not to negate every possible justification for defendant-husband's leaving, but rather to prove only the absence of conduct on her part which rendered it impossible for him to continue in the marriage. Morris v. Morris, 46 N.C. App. 701, 266 S.E.2d 381, aff'd, 301 N.C. 525, 272 S.E.2d 1 (1980).

Withdrawal from Home May Be Abandonment Even If Support Is Paid. — A husband may be deemed to have abandoned his wife within the meaning of subdivision (1) of this section, and so be liable for alimony, notwithstanding the fact that, after cohabitation is brought to an end, he voluntarily provides her with adequate support. Whether his withdrawal from the home, followed by such support, constitutes an abandonment which is ground for suit by the wife for divorce from bed and board, and therefore ground for suit by her for alimony without divorce, depends upon whether his withdrawal from the home was justified by the conduct of the wife. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

A wife is entitled to her husband's society and the protection of his name and home in cohabitation. The permanent denial of these rights may be aggravated by leaving her destitute or may be mitigated by a liberal provision for her support, but if the cohabitation is brought to an end without justification and without the consent of the wife and without the intention of renewing it, the matrimonial offense of desertion is complete. Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966); Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

The husband's willful failure to provide adequate support for his wife may be evidence of his abandonment of her, but the mere fact that he provides adequate support for her does not in itself negative abandonment. Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957); Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966); Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

And Defendant May Not Defeat Action by Making Voluntary Support Payments. — A defendant may not abandon his wife and defeat an action under this section by making voluntary payments which he may abandon at will. Thurston v. Thurston, 256 N.C. 663, 124 S.E.2d 852 (1962); Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966).

Acts Held to Constitute Abandonment. — Where a husband drives his wife from his house, or obtains her removal by stratagem, or withholds support from her while there, he is deemed to have abandoned her. Setzer v. Setzer, 128 N.C. 170, 38 S.E. 731 (1901).

A husband who permitted and encouraged certain of his grown children to remain constantly at home in a drunken condition, and allowed them to curse, abuse, and harass his wife at all hours of the day and night, and who told his wife to get her things out of his house, was guilty of such cruel treatment toward his wife as to constitute an abandonment of her. Bailey v. Bailey, 243 N.C. 412, 90 S.E.2d 696 (1956).

Allegations that plaintiff was compelled to leave her husband because of his willful failure and refusal to provide her with support and that his failure was without provocation on her part were sufficient to state a cause of action for alimony without divorce on the ground of abandonment. Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968).

Plaintiff simply moved out of his adjacent apartment and stopped supporting his wife at the same time defendant's earnings ceased and she was entering hospital to undergo surgery; the parties lived together as husband and wife "in the usually accepted sense" until that time at which time plaintiff abandoned defendant. Lin v. Lin, 108 N.C. App. 772, 425 S.E.2d 9 (1993).

Finding of Constructive Abandonment Upheld. — Where the record portrayed defendant as a busy professional who became so completely immersed in his work that, by his conduct, he effectively abandoned his wife and children; additionally, the findings of fact pointed to a pattern of behavior by defendant over a 20-year period where plaintiff was left to her own devices without defendant's assistance in maintaining a family and rearing their children, and, although the court noted that at least 10 years earlier plaintiff wife had told defendant that she needed more of his time and attention and the situation improved somewhat thereafter, it improved only for a short time, these finding supported the court's conclusion that the husband had constructively abandoned his wife. Ellinwood v. Ellinwood, 94 N.C. App. 682, 381 S.E.2d 162 (1989).

Instructions as to Burden of Proof Held Erroneous. — In an action for alimony without divorce on the ground of abandonment, an instruction that the wife had the burden of showing that the husband's separation from her was free of fault on her part and that she was blameless, was erroneous. Likewise, an instruction that plaintiff had the burden of proving that the defendant's separation was wrongful, without charging upon what phase or phases of the evidence defendant's separation would be wrongful, and without defining wrongful except in abstract terms, was insufficient. Caddell v. Caddell, 236 N.C. 686, 73 S.E.2d 923 (1952).

Lapse of seven years from time of separation did not bar a cross action for divorce a mensa on the ground of constructive abandonment, or application for alimony pendente lite, either by laches or any statute of limitation. Nall v. Nall, 229 N.C. 598, 50 S.E.2d 737 (1948).

Prior Action Under This Section Held to Abate Action under § 50-6. — The pendency of a prior action by the wife for a divorce from bed and board upon the ground of abandonment under this section abated a subsequent action by the husband for an absolute divorce upon the ground of two years' (now one year's) separation under G.S. 50-6. Cameron v. Cameron, 235 N.C. 82, 68 S.E.2d 796 (1952).

Question of Custody. — Whether mother abandoned father within the meaning of subdivision (1) of this section was not controlling on the question of custody. Kenney v. Kenney, 15 N.C. App. 665, 190 S.E.2d 650 (1972).

III. MALICIOUSLY TURNING SPOUSE OUT.

Subdivision (2) Is an Instance of Abandonment Under Subdivision (1). — The ground for divorce a mensa given the wife under subdivision (2) of this section, because of being maliciously turned out of doors by her husband, is but an instance of wrongful abandonment provided by subdivision (1). Medlin v. Medlin, 175 N.C. 529, 95 S.E. 857 (1918).

Adverse Ruling in Previous Action. — A denial of alimony in an independent action for alimony without divorce brought by the wife on grounds that her husband maliciously turned her out of doors would conclude her upon her crossbill setting up the same matter in an action thereafter brought by her husband against her for divorce a vinculo. Medlin v. Medlin, 175 N.C. 529, 95 S.E. 857 (1918).

IV. CRUEL TREATMENT.

Necessary Allegations Under Subdivisions (3) and (4). — A wife, in alleging a cause of action for divorce from bed and board under subdivisions (3) and (4) of this section, must set out with particularity the wrongful acts of the husband upon which she relies and also that such acts were without adequate provocation on her part. Ollis v. Ollis, 241 N.C. 709, 86 S.E.2d 420 (1955); Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957).

Allegation of actual physical violence is not required under subdivision (3) of this section. Pearce v. Pearce, 226 N.C. 307, 37 S.E.2d 904 (1946).

Cruelty and indignities, like other matrimonial offenses, may be condoned. Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

Revival of Cause After Condonation. — Much less cruelty or indignity is sufficient to revive a transaction occurring before the condonation, than to support an original suit for divorce. Lassiter v. Lassiter, 92 N.C. 130 (1885).

Acts Committed More Than 10 Years Before. — A divorce would not be granted for cruel and barbarous treatment where it appeared that the acts complained of were committed more than 10 years before the commencement of the action, and in the meanwhile the parties had continued to reside together. O'Connor v. O'Connor, 109 N.C. 139, 13 S.E. 887 (1891).

Illustrative Cases. — The communication of an infectious disease by the husband to the wife was not sufficient ground under subdivision (3) of this section. Long v. Long, 9 N.C. 189 (1822).

Whipping of wife held cause for divorce in Taylor v. Taylor, 76 N.C. 433 (1877).

For further illustrative cases, see also Griffith v. Griffith, 89 N.C. 113 (1883); Jackson v. Jackson, 11 S.E. 173 (1890).

V. INDIGNITIES.

Subdivision (4) Is Remedial. — It would seem that the legislature purposely omitted to specify the particular acts of indignity for which divorces may in all cases be obtained. The matter is left at large under general words, thus leaving the courts to deal with each particular case and to determine it upon its own peculiar circumstances, so as to carry into effect the purpose and remedial object of the statute. Taylor v. Taylor, 76 N.C. 433 (1877); Sanders v. Sanders, 157 N.C. 229, 72 S.E. 876 (1911).

Nature of Indignities. — To entitle a wife to a divorce from bed and board under subdivision (4) of this section, the indignity offered by the husband must be such as may be expected to seriously annoy a woman of ordinary sense and temper, and must be repeated or continued so that it may appear to have been done willfully and intentionally or at least consciously by the husband to the annoyance of the wife. Miller v. Miller, 78 N.C. 102 (1878).

Facts in Each Case Are Determinative. — The acts of the husband which will render the wife's condition intolerable and her life burdensome so as to entitle her to a divorce a mensa are largely dependent on the facts in each particular case, including her station in life, temperament, state of health, habits and feelings. Sanders v. Sanders, 157 N.C. 229, 72 S.E. 876 (1911).

Allegations and Proof. — Under subdivision (4) of this section plaintiff must set out with particularity the language and conduct on the part of defendant relied upon, and must allege and prove that such acts were without adequate provocation on her part. Lawrence v. Lawrence, 226 N.C. 624, 39 S.E.2d 807 (1946); Best v. Best, 228 N.C. 9, 44 S.E.2d 214 (1947); Ollis v. Ollis, 241 N.C. 709, 86 S.E.2d 420 (1955); Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957); Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964); Butler v. Butler, 1 N.C. App. 356, 161 S.E.2d 618 (1968).

As to necessary allegations and proof under subdivision (4) of this section, see also Pearce v. Pearce, 225 N.C. 571, 35 S.E.2d 636 (1945).

Plaintiff's Innocence Must Be Shown — Generally. — The complaint must aver, and facts must be found upon which it can be seen, that the plaintiff did not by her own conduct contribute to the wrongs and abuses of which she complains. White v. White, 84 N.C. 340 (1881); Garsed v. Garsed, 170 N.C. 672, 87 S.E. 45 (1915).

In a cross-action under this section, the omission of an allegation that plaintiff's conduct was without provocation on defendant's part was fatal. Pearce v. Pearce, 225 N.C. 571, 35 S.E.2d 636 (1945).

In North Carolina, a party relying on subdivision (4) must not have provoked the "indignities" of which he complains. Puett v. Puett, 75 N.C. App. 554, 331 S.E.2d 287 (1985).

Same — General Allegation Insufficient. — It is essential that the plaintiff specifically set forth in her complaint the circumstances under which the violence was committed, what her conduct was, and especially what she had done to provoke such conduct on the part of her husband. A general allegation that such conduct was "without cause or provocation on her part" is insufficient. Everton v. Everton, 50 N.C. 202 (1857); O'Connor v. O'Connor, 109 N.C. 139, 13 S.E. 887 (1891); Martin v. Martin, 130 N.C. 27, 40 S.E. 822 (1902).

Failure to Allege and Prove That Husband's Accusations of Infidelity Were False. — In an action for divorce a mensa et thoro and for subsistence, plaintiff alleged that defendant had repeatedly accused her of having sexual relations with her foster father and other men, and her evidence tended to show that all of the specific acts of abuse and misconduct complained of occurred in connection with this accusation. Plaintiff further alleged that she had been faithful and dutiful, and that defendant's acts of abuse and misconduct were without provocation or justification, but did not specifically allege or testify that the accusation was false. It was held that defendant's motion for judgment as of nonsuit should have been allowed, since even if the allegation denying provocation or justification was taken as denial of the charge of infidelity, plaintiff offered no testimony in support of such denial. Lawrence v. Lawrence, 226 N.C. 624, 39 S.E.2d 807 (1946).

Admissible Evidence of Indignities. — In plaintiff's action for divorce from bed and board, the trial court did not err in admitting into evidence testimony concerning defendant's use of pornographic material in the presence of the parties' minor children, defendant's refusal to provide educational support for one of the parties' adult children, and defendant's sexual advances upon the parties' daughter, since such evidence was relevant to show the circumstances surrounding plaintiff's claim that defendant's acts constituted such indignities to plaintiff's person that her condition was rendered intolerable and her life burdensome. Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243, cert. denied, 302 N.C. 634, 280 S.E.2d 449 (1981).

Grant of Divorce Reversed Where Husband's Behavior Contributed to Wife's Criticism and Accusations. — In a divorce action under subdivision (4), the judge expressly concluded that the plaintiff-husband was not blameless and the judge's findings compelled the conclusion that the husband's conduct—rescue squad activities despite wife's suspicions of unfaithfulness, public name calling—so contributed to his wife's criticism and accusations and to the parties' repeated arguments that the grant of divorce had to be reversed. Puett v. Puett, 75 N.C. App. 554, 331 S.E.2d 287 (1985).

Illustrative Cases. — Husband's persistent charge of adultery against a virtuous wife, accompanied by a contemptuous declaration that she was no longer his wife and by abandonment of her bed, was such an indignity to wife's person as would entitle her to a partial divorce and to alimony. Everton v. Everton, 50 N.C. 202 (1857).

Where petitioner alleged that her husband had become jealous of her without cause, had shaken his fist in her face and threatened her, and had declared to her face and published to the neighborhood that the child with which she was pregnant was not his, that her condition from such treatment had become intolerable and her life burdensome, and that she had been compelled to quit his house and seek the protection of her father, it was held that she had set out enough to entitle her to alimony pendente lite. Erwin v. Erwin, 57 N.C. 82 (1858).

Where a drunken husband cursed his wife and drove her from his house, and by demonstrations of violence caused her to leave the bedside of a dying child and seek safety and protection at a distance of several miles, this was sufficient cause for divorce under subdivision (4) of this section. Scoggins v. Scoggins, 85 N.C. 348 (1881).

A divorce from bed and board will be granted the wife if it is shown that the husband made foul and injurious accusations, refused to bed with wife, and denied that she was his wife. Green v. Green, 131 N.C. 533, 42 S.E. 954 (1902).

When in an action by a wife for divorce a mensa there was evidence tending to show that plaintiff, in her married life, was free from blame and that defendant's conduct was a long course of neglect, cruelty, humiliation, and insult, repeated and persisted in, it was sufficient to bring the cause within the words of subdivision (4) of this section, that defendant had offered "such indignities to [wife's] person as to render her condition intolerable and her life burdensome." Sanders v. Sanders, 157 N.C. 229, 72 S.E. 876 (1911).

Allegations that husband had been living in adultery, had repeatedly avowed his loss of affection for and his desire to be rid of his wife, had ejected her from his bed, and had finally ordered her from his home, saying that he never intended to live with her again, stated a cause of action. Pearce v. Pearce, 226 N.C. 307, 37 S.E.2d 904 (1946).

In plaintiff's action for divorce from bed and board on the ground that defendant had inflicted such indignities upon her as to render her life burdensome, evidence was sufficient to enable the jury to find for plaintiff where it tended to show that at some time prior to 1969 defendant began sleeping and spending the majority of his time in the basement of the parties' home, isolated from plaintiff; that upon moving into the basement, defendant withdrew from active participation in the resolution of familial and household problems; that defendant viewed hardcore pornographic material in his basement and permitted his minor children to view such material; that during 1973 and 1974 defendant requested that plaintiff indulge him in various unnatural sexual desires; and that subsequent to 1975 defendant was absent from the parties' home every weekend and all holidays until September 24, 1976, when he left the home for good. Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243, cert. denied, 302 N.C. 634, 280 S.E.2d 449 (1981).

As a ground for the divorce, the trial court did not err in finding that the wife subjected the husband to indignities that made the husband's life burdensome and the husband's condition intolerable under G.S. 50-7(4); there was evidence that the wife (1) was involved in an extramarital affair, (2) wrecked the marital home after being ordered to leave it, (3) twice had the husband removed after filing false domestic violence proceedings, (4) was physically violent to the husband, (5) left the husband on three occasions without telling the husband where she was going, and (6) did not return for three or four nights. Evans v. Evans, 169 N.C. App. 358, 610 S.E.2d 264, 2005 N.C. App. LEXIS 609 (2005).

VI. EXCESSIVE USE OF ALCOHOL OR DRUGS.

Allegations of Habitual Drunkenness. — Allegations in complaint that defendant had been an habitual drunkard during the prior three years were sufficient to state a cause of action for divorce from bed and board under subdivision (5) of this section. Best v. Best, 228 N.C. 9, 44 S.E.2d 214 (1947).

§ 50-8. Contents of complaint; verification; venue and service in action by nonresident; certain divorces validated.

In all actions for divorce the complaint shall be verified in accordance with the provisions of Rule 11 of the Rules of Civil Procedure and G.S. 1-148. The plaintiff shall set forth in his or her complaint that the complainant or defendant has been a resident of the State of North Carolina for at least six months next preceding the filing of the complaint, and that the facts set forth therein as grounds for divorce, except in actions for divorce from bed and board, have existed to his or her knowledge for at least six months prior to the filing of the complaint: Provided, however, that if the cause for divorce is one-year separation, then it shall not be necessary to allege in the complaint that the grounds for divorce have existed for at least six months prior to the filing of the complaint; it being the purpose of this proviso to permit a divorce after such separation of one year without awaiting an additional six months for filing the complaint: Provided, further, that if the complainant is a nonresident of the State action shall be brought in the county of the defendant's residence, and summons served upon the defendant personally or service of summons accepted by the defendant personally in the manner provided in G.S. 1A-1, Rule 4(j)(1). Notwithstanding any other provision of this section, any suit or action for divorce heretofore instituted by a nonresident of this State in which the defendant was personally served with summons or in which the defendant personally accepted service of the summons and the case was tried and final judgment entered in a court of this State in a county other than the county of the defendant's residence, is hereby validated and declared to be legal and proper, the same as if the suit or action for divorce had been brought in the county of the defendant's residence.

In all divorce actions the complaint shall set forth the name and age of any minor child or children of the marriage, and in the event there are no minor children of the marriage, the complaint shall so state. In addition, when there are minor children of the marriage, the complaint shall state the social security number of the plaintiff and, if known, the social security number of the defendant.

In all prior suits and actions for divorce heretofore instituted and tried in the courts of this State where the averments of fact required to be contained in the affidavit heretofore required by this section are or have been alleged and set forth in the complaint in said suits or actions and said complaints have been duly verified as required by Rule 11 of the Rules of Civil Procedure, said allegations so contained in said complaints shall be deemed to be, and are hereby made, a substantial compliance as to the allegations heretofore required by this section to be set forth in any affidavit; and all such suits or actions for divorce, as well as the judgments or decrees issued and entered as a result thereof, are hereby validated and declared to be legal and proper judgments and decrees of divorce.

In all suits and actions for divorce heretofore instituted and tried in this State on and subsequent to the 5th day of April, 1951, wherein the statements, averments, or allegations in the verification to the complaint in said suits or actions are not in accordance with the provisions of Rule 11 of the Rules of Civil Procedure and G.S. 1-148 or the requirements of this section as to verification of complaint or the allegations, statements or averments in the verification contain the language that the facts set forth in the complaint are true "to the best of affiant's knowledge and belief" instead of the language "that the same is true to his (or her) own knowledge" or similar variation in language, said allegations, statements and averments in said verifications as contained in or attached to said complaint shall be deemed to be, and are hereby made, a substantial compliance as to the allegations, averments or statements required by this section to be set forth in any such verifications; and all such suits or actions for divorce, as well as the judgments or decrees issued and entered as a result thereof, are hereby validated and declared to be legal and proper judgments and decrees of divorce. The judgment of divorce shall include, where there are minor children of the parties, the social security numbers of the parties. (1868-9, c. 93, s. 46; 1869-70, c. 184; Code, s. 1287; Rev., s. 1563; 1907, c. 1008, s. 1; C.S., s. 1661; 1925, c. 93; 1933, c. 71, ss. 2, 3; 1943, c. 448, s. 1; 1947, c. 165; 1949, c. 264, s. 4; 1951, c. 590; 1955, c. 103; 1965, c. 636, s. 3; c. 751, s. 1; 1967, c. 50; c. 954, s. 3; 1969, c. 803; 1971, c. 415; 1973, c. 39; 1981, c. 599, s. 15; 1997-433, s. 4.3; 1998-17, s. 1.)

Editor's Note. — Session Laws 1971, c. 1065 provided:

"Section 1. All divorces granted between January 1, 1969 and the date of the ratification of this act [July 21, 1971] are hereby validated as to the complaint being certified by the attorney rather than verified by the plaintiff.

"Sec. 2. It is the intent of the General Assembly to validate divorces which were based on complaints relying on G.S. 50-8 which, due to a typographical error, indicated that complaints for divorce should be certified rather than verified."

The Rules of Civil Procedure, referred to in this section, are found in G.S. 1A-1.

Legal Periodicals. — For brief comment on the 1947 amendment, see 25 N.C.L. Rev. 412 (1947).

For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 375 (1951).

For 1984 survey, "Estoppel and Foreign Divorce," see 63 N.C.L. Rev. 1189 (1985).

For comment, "Conflicts of Law in Divorce Litigation: A Looking-Glass World?," see 10 Campbell L. Rev. 145 (1987).

CASE NOTES

I. In General.
II. Complaint.
III. Verification.
IV. Residence and Domicile.

I. IN GENERAL.

No Conflict with § 1A-1, Rule 13(a). — There is no conflict between the statutes dealing with procedure in divorce actions and G.S. 1A-1, Rule 13(a). Rather, G.S. 1A-1, Rule 13(a) superimposes an additional characteristic on certain kinds of counterclaims. Gardner v. Gardner, 294 N.C. 172, 240 S.E.2d 399 (1978).

The statutes dealing specifically with divorce actions do not prescribe a procedure for counterclaims different from that prescribed in G.S. 1A-1, Rule 13(a). Gardner v. Gardner, 294 N.C. 172, 240 S.E.2d 399 (1978).

Applied in Scoggins v. Scoggins, 85 N.C. 348 (1881); White v. White, 179 N.C. 592, 103 S.E. 216 (1920); Williams v. Williams, 180 N.C. 273, 104 S.E. 561 (1920); Clarke v. Clarke, 47 N.C.

App. 249, 267 S.E.2d 361 (1980); Lynch v. Lynch, 302 N.C. 189, 274 S.E.2d 212 (1981); Allred v. Tucci, 85 N.C. App. 138, 354 S.E.2d 291 (1987).

Cited in Keys v. Tuten, 199 N.C. 368, 154 S.E. 631 (1930); Hodges v. Hodges, 226 N.C. 570, 39 S.E.2d 596 (1946); Rowland v. Rowland, 253 N.C. 328, 116 S.E.2d 795 (1960); Martin v. Martin, 253 N.C. 704, 118 S.E.2d 29 (1961); Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962); Butler v. Butler, 1 N.C. App. 356, 161 S.E.2d 618 (1968); Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972); Smith v. Smith, 56 N.C. App. 812, 290 S.E.2d 390 (1982); Bryant v. Nationwide Mut. Fire. Ins. Co., 67 N.C. App. 616, 313 S.E.2d 803 (1984); In re Triscari Children, 109 N.C. App. 285, 426 S.E.2d 435 (1993); Gaskill v. State ex rel. Cobey, 109 N.C. App. 656, 428 S.E.2d 474 (1993); State v. Thibodeaux, 352 N.C. 570, 532 S.E.2d 797, 2000 N.C. LEXIS 615 (2000); In re T.R.P., 360 N.C. 588, 636 S.E.2d 787, 2006 N.C. LEXIS 1193 (2006); Hawkins v. Hawkins, — N.C. App. —, 664 S.E.2d 616, 2008 N.C. App. LEXIS 1520 (2008).

II. COMPLAINT.

Plaintiff Must Allege Material Facts Required by This Section. — To allege a cause of action for divorce, a plaintiff, in addition to one or more of the grounds for divorce, must allege the additional material facts now required by this section. Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957).

Such Allegations Are Indispensable Constituent Elements of Cause of Action. — The legal effect of the 1951 amendment to this section is that the allegations required to be set forth in the complaint are now indispensable constituent elements of plaintiff's cause of action, and the facts so alleged must be established by the verdict of a jury. Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957).

The allegations required by this section are indispensable constituent elements of a divorce action and must be established either by the verdict of a jury or by a judge, as the pertinent statute may permit. Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975), overruled on other grounds, Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982); Boyd v. Boyd, 61 N.C. App. 334, 300 S.E.2d 569 (1983).

Which Must Be Found True. — All averments required by the statute must be both alleged in the complaint and found by the finder of fact to be true before a divorce judgment may be entered. Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975), overruled on other grounds, Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982).

Statement in General Terms. — The matters in the jurisdictional affidavit (now the complaint) in an action for divorce a mensa brought by the wife may be stated in general terms following the language of the statute. Sanders v. Sanders, 157 N.C. 229, 72 S.E. 876 (1911); Jones v. Jones, 173 N.C. 279, 91 S.E. 960 (1917).

Allegation of Six Months' Prior Knowledge — Generally. — The affidavit (now the complaint) must state that the action was not brought within six months from the time the plaintiff first acquired knowledge of the facts stated therein. Clark v. Clark, 133 N.C. 28, 45 S.E. 342 (1903). See also, O'Connor v. O'Connor, 109 N.C. 139, 13 S.E. 887 (1891); Green v. Green, 131 N.C. 533, 42 S.E. 954 (1902).

Six months' prior knowledge was formerly not required to be alleged in the complaint. Kinney v. Kinney, 149 N.C. 321, 63 S.E. 97 (1908).

While, in an action for divorce a mensa, it is advisable that the pleading allege that the facts set forth therein as grounds for divorce had existed to complaint's knowledge for at least six months prior to the filing of the pleading in accordance with the language of the statute, where the wife's pleading in her cross-action for divorce a mensa alleged gross mistreatment of her by the husband, culminating in his locking her out of her home and ordering her away on a specified date more than six months prior to the filing of the pleading, with verification that the facts alleged therein were true to her own knowledge, her pleading would be held sufficient on this aspect. Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957).

Same — When Unnecessary. — By Laws 1925, c. 93, this section was amended so that in cases where the cause for divorce is five years' (now one year's) separation, then the six months' prior knowledge need not be alleged. Ellis v. Ellis, 190 N.C. 418, 130 S.E. 7 (1925); Carpenter v. Carpenter, 244 N.C. 286, 93 S.E.2d 617 (1956). See also, Smithdeal v. Smithdeal, 206 N.C. 397, 174 S.E. 118 (1934).

Section Requires Complaint to Set Forth Certain Information as to Children. — This section requires that in all divorce actions the complaint shall set forth the name and age of any minor child or children of the marriage, and that in the event there are no minor children of the marriage, the complaint shall so state. Jones v. Jones, 20 N.C. App. 607, 202 S.E.2d 279, cert. denied, 285 N.C. 234, 204 S.E.2d 23 (1974).

Allegations of the names and ages of any children of a party seeking divorce in North Carolina are required by this section, in order that the court may protect the interests of such children if the parties have failed to do so. Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991), appeal dismissed, 331 N.C. 286, 417 S.E.2d 254 (1992).

The obvious reason for this requirement is to bring to the attention of the court any minor children that might be affected by the divorce, to the end that the court will protect the interests of those children. Jones v. Jones, 20 N.C. App. 607, 202 S.E.2d 279, cert. denied, 285 N.C. 234, 204 S.E.2d 23 (1974); Cobb v. Cobb, 42 N.C. App. 373, 256 S.E.2d 722 (1979).

The reason for the requirement of this section for a pleading relating to minor children is not to establish jurisdiction. Cobb v. Cobb, 42 N.C. App. 373, 256 S.E.2d 722 (1979).

Answer Constituting Counterclaim. — Where the complaint in a suit for an absolute divorce alleged facts entitling either or both of the parties to the marriage to an absolute divorce, defendant's answer admitting these allegations, together with his prayer for an absolute divorce on the same grounds, was in effect a counterclaim seeking affirmative relief and arising out of the same transactions alleged in the complaint. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Proof Must Correspond to Allegations. — As the allegations in a petition for divorce are directed by statute to be sworn to, it is more emphatically required in such a case than in others that the allegations and proofs should correspond; otherwise the court cannot decree a divorce. Foy v. Foy, 35 N.C. 90 (1851); Young v. Young, 225 N.C. 340, 34 S.E.2d 154 (1945).

III. VERIFICATION.

In a divorce action a verification is required as an essential part of the complaint. The want of a proper verification is a fatal defect and a cause for dismissal of the action. Boyd v. Boyd, 61 N.C. App. 334, 300 S.E.2d 569 (1983).

Verification Must Be as Required. — In an application for alimony pendente lite the affidavit and petition must be verified as required by this section. Clark v. Clark, 133 N.C. 28, 45 S.E. 342 (1903). See also, Hopkins v. Hopkins, 132 N.C. 22, 43 S.E. 508 (1903).

Verification of a pleading stating that it was "sworn and subscribed to" was not sufficient. Martin v. Martin, 130 N.C. 27, 40 S.E. 822 (1902).

For case holding verification in substantial compliance with former G.S. 1-145 sufficient, see Bolin v. Bolin, 242 N.C. 642, 89 S.E.2d 303 (1955).

In Accordance with § 1A-1, Rule 11. — This section requires that for a complaint for divorce to be valid, it must be verified in accordance with G.S. 1A-1, Rule 11, when it is filed. It is not sufficient to obtain verification before the complaint and summons are served on the defendant. Boyd v. Boyd, 61 N.C. App. 334, 300 S.E.2d 569 (1983).

Verification of Answer Setting Up Cross-Action. — In husband's action for divorce a vinculo, wife's answer setting up a cross-action must be verified under this section, as a jurisdictional prerequisite, and when the answer is not so verified the granting of permanent alimony is erroneous. Silver v. Silver, 220 N.C. 191, 16 S.E.2d 834 (1941).

Verification of Counterclaim. — A decree of divorce was not improperly granted because of defective verification of defendant-husband's pleadings, where the counterclaim in which the divorce was prayed for was verified, although the original pleadings were not. Swygert v. Swygert, 46 N.C. App. 173, 264 S.E.2d 902 (1980).

An action for permanent alimony is a permissive counterclaim and is not required to be verified. Newsome v. Newsome, 43 N.C. App. 580, 259 S.E.2d 577 (1979).

As to waiver of verification of subsequent pleadings, see Calaway v. Harris, 229 N.C. 117, 47 S.E.2d 796 (1948).

Impeachment of Verification. — Such uncertainties as plaintiff expressed under cross-examination as to the exact nature of his act in verifying a complaint afforded an insufficient basis to warrant impeachment of his verification. Accordingly, the court erred in allowing defendant's motion to strike the verification and in dismissing plaintiff's complaint. Skinner v. Skinner, 28 N.C. App. 412, 222 S.E.2d 258, cert. denied, 289 N.C. 726, 224 S.E.2d 674 (1976).

Effect of False Swearing on Decree. — If a decree of divorce, regular in all respects on the face of the judgment roll, is obtained by false swearing, by way of pleading and of evidence, relating to the cause or ground for divorce, the decree is voidable but not void, and is immune from attack by either party to the divorce. Carpenter v. Carpenter, 244 N.C. 286, 93 S.E.2d 617 (1956).

In an action for annulment of a marriage entered into between plaintiff husband and defendant wife following a decree of divorce in favor of defendant against her former husband, plaintiff, who had been married to defendant for six years, could not attack the divorce decree by alleging false swearing of defendant in regard to the ground or cause for divorce. Carpenter v. Carpenter, 244 N.C. 286, 93 S.E.2d 617 (1956).

In an action for divorce the affidavit formerly required by this section in connection with the complaint was jurisdictional, and a complaint accompanied by a false statutory affidavit would be regarded as insufficient to empower the court to grant a decree of divorce; the correct procedure for relief against the decree would be by motion in the cause. Young v. Young, 225 N.C. 340, 34 S.E.2d 154 (1945), wherein the plaintiff was held to have practiced imposition upon the court.

As to the affidavit formerly required by this section, see Holloman v. Holloman, 127 N.C. 15, 37 S.E. 68 (1900); Nichols v. Nichols, 128 N.C. 108, 38 S.E. 296 (1901); Johnson v. Johnson, 141 N.C. 91, 53 S.E. 623 (1906); State v. Williams, 220 N.C. 445, 17 S.E.2d 769 (1941), rev'd on other grounds, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942).

IV. RESIDENCE AND DOMICILE.

Jurisdiction in divorce actions is conferred by statute. Israel v. Israel, 255 N.C. 391, 121 S.E.2d 713 (1961).

And Is Founded on Domicile. — Judicial power to grant a divorce that is, jurisdiction strictly speaking, is founded on domicile. Israel v. Israel, 255 N.C. 391, 121 S.E.2d 713 (1961).

The domicile of one spouse within a state gives power to that state to dissolve a marriage wheresoever contracted. Israel v. Israel, 255 N.C. 391, 121 S.E.2d 713 (1961).

"Domicile" Defined. — That place is properly the domicile of a person where he has his true permanent home and principal establishment, and to which he has, whenever he is absent, the intention of returning, and from which he has no present intention of moving. Israel v. Israel, 255 N.C. 391, 121 S.E.2d 713 (1961).

"Residence" has been interpreted to mean the equivalent of "domicile." Andris v. Andris, 65 N.C. App. 688, 309 S.E.2d 570 (1983).

Residence and Intent Must Be Shown. — To establish a domicile there must be a residence, and the intention to make it a home or to live there permanently or indefinitely. Israel v. Israel, 255 N.C. 391, 121 S.E.2d 713 (1961).

In order to establish a domicile, a party must make a showing of both actual residence in the new locality and the intent to remain there permanently. Andris v. Andris, 65 N.C. App. 688, 309 S.E.2d 570 (1983).

The residence requirement in this section is jurisdictional. Eudy v. Eudy, 24 N.C. App. 516, 211 S.E.2d 536, aff'd, 288 N.C. 71, 215 S.E.2d 782 (1975).

The requirement that one of the parties to a divorce action shall have resided in this State for a specified period of time next preceding the commencement of the action is jurisdictional. Israel v. Israel, 255 N.C. 391, 121 S.E.2d 713 (1961).

Residency for Six Months Required. — In order to obtain a valid divorce in North Carolina, the plaintiff or defendant must have resided in this State for at least six months next preceding institution of the action for divorce. Eudy v. Eudy, 24 N.C. App. 516, 211 S.E.2d 536, aff'd, 288 N.C. 71, 215 S.E.2d 782 (1975).

The period of residence in this section applies to an action for divorce from bed and board as well as to an action for absolute divorce. Eudy v. Eudy, 24 N.C. App. 516, 211 S.E.2d 536, aff'd, 288 N.C. 71, 215 S.E.2d 782 (1975).

But the residency requirement of this section is not applicable in an action for alimony without divorce. Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975), overruled on other grounds, Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982).

A bona fide "residence," necessary under statutes in order to confer jurisdiction in divorce proceedings, is within the legal meaning of the word "domicile," that is, an abode animo manendi, a place where a person lives or has his home, to which, when absent, he intends to return, and from which he has no present purpose to depart. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

"Residence" means actual residence, and prior to the 1949 amendment, which allows suit to be brought where defendant has been a resident of the State for six months, a nonresident wife in suing for divorce could not avail herself of the maxim that "her domicile was that of her husband," where she had not actually satisfied the residence requirement. Schonwald v. Schonwald, 55 N.C. 367 (1856).

Separate Domicile for Wife. — North Carolina divorce statutes recognize the legality of a separate domicile, or residence, for the wife. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

There is no logical, legal or equitable reason for allowing wife, whose misconduct has brought about the separation, to insist upon the legal fiction that her domicile follows that of her husband, and thereby to defeat his action for divorce brought in the jurisdiction in which she actually resides. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

One need not be a citizen of the United States in order to establish residence or domicile within this State for purposes of divorce actions. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

Effect of Temporary Removal. — Where husband and wife establish a residence in this State, the wife, by leaving the State for a temporary purpose, without any intention of changing her residence, does not thereby lose her citizenship. Moore v. Moore, 130 N.C. 333, 41 S.E. 943 (1902).

The domicile of a soldier or sailor in the military or naval service of his country generally remains unchanged, domicile being neither gained nor lost by being temporarily stationed in the line of duty at a particular place, even for a period of years. A new domicile may, however, be acquired if both the fact and the intent concur. Israel v. Israel, 255 N.C. 391, 121 S.E.2d 713 (1961).

Naval officer was properly found to be domiciled in North Carolina where: (1) He had changed his voter registration from Pennsylvania to Guilford County, (2) He had filed a North Carolina income tax return for the year 1981, (3) He had changed his permanent address with the Navy to his father's address in Greensboro as of August 1, 1981, (4) He had opened a bank account in Greensboro in August, 1981 and had maintained it since that time, (5) He had changed the registration of his motor vehicle from Pennsylvania to North Carolina and had paid North Carolina property taxes, (6) He had resided at his parents' house whenever on leave from the Navy, and (7) He had severed all ties with the State of Pennsylvania. In short, plaintiff did everything possible to establish a residence in North Carolina. The transient nature of his career with the United States Navy prohibited him from doing anything further. Andris v. Andris, 65 N.C. App. 688, 309 S.E.2d 570 (1983).

Residency Established Via Verified Complaint. — District court properly exercised jurisdiction over the subject matter of the parties' divorce action as in the State of North Carolina subject matter jurisdiction for divorce involves not only bringing the matter in the correct court, but also the court's finding residence by one of the parties for the requisite length of time and verification of the pleadings. In the case at issue, the plaintiff husband sufficiently alleged that he was a citizen and resident of North Carolina for more than six months next preceding the institution of the action and had lived separate and apart from the wife for more than one year next preceding the institution of the action without resuming the marital relationship, with those district court findings being supported by the husband's verified complaint, which was treated as an affidavit. Wilson v. Wilson, 191 N.C. App. 789, 666 S.E.2d 653, 2008 N.C. App. LEXIS 1479 (2008).

OPINIONS OF ATTORNEY GENERAL

Not Advisable for Attorney to Act as Notary and Verify Client's Divorce Complaint. — It is not advisable for a notary who is also a partner in a law firm acting of counsel to an attorney filing a divorce complaint to notarize the verification of the client. A divorce complaint which is not properly notarized is subject to dismissal. See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, 58 N.C.A.G. 35 (1988).

When one partner of Firm A appears as attorney for a plaintiff in a divorce proceeding, the other partners in the firm also appear, and they could be prohibited under former G.S. 47-8 from notarizing the verification of the client. This would be true whether or not the firm appears as "of counsel" to the individual partner on the face of the complaint or answer. Therefore, such practice should be avoided, and as an attorney/notary who acts in this fashion proceeds at his own risk. See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, 58 N.C.A.G. 35 (1988).

§ 50-9. Effect of answer of summons by defendant.

In all cases upon an action for a divorce absolute, where judgment of divorce has heretofore been granted and where the plaintiff has caused to be served upon the defendant in person a legal summons, whether by verified complaint or unverified complaint, and such defendant answered such summons, and where the trial of said action was duly and legally had in all other respects and judgments rendered by a judge of the superior court upon issues answered by a judge and jury, in accordance with law, such judgments are hereby declared to have the same force and effect as any judgment upon an action for divorce otherwise had legally and regularly. (1929, c. 290, s. 1; 1947, c. 393.)

CASE NOTES

Cited in Piguerra v. Piguerra, 54 N.C. App. 188, 282 S.E.2d 567 (1981).

§ 50-10. Material facts found by judge or jury in divorce or annulment proceedings; when notice of trial not required; procedure same as ordinary civil actions.

(a) Except as provided for in subsection (e) of this section, the material facts in every complaint asking for a divorce or for an annulment shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge or jury.

(b) Nothing herein shall require notice of trial to be given to a defendant who has not made an appearance in the action.

(c) The determination of whether there is to be a jury trial or a trial before the judge without a jury shall be made in accordance with G.S. 1A-1, Rules 38 and 39.

(d) The provisions of G.S. 1A-1, Rule 56, shall be applicable to actions for absolute divorce pursuant to G.S. 50-6, for the purpose of determining whether any genuine issue of material fact remains for trial by jury, but in the event the court determines that no genuine issue of material fact remains for trial by jury, the court must find the facts as provided herein. The court may enter a judgment of absolute divorce pursuant to the procedures set forth in G.S. 1A-1, Rule 56, finding all requisite facts from nontestimonial evidence presented by affidavit, verified motion or other verified pleading.

(e) The clerk of superior court, upon request of the plaintiff, may enter judgment in cases in which the plaintiff's only claim against the defendant is for absolute divorce, or absolute divorce and the resumption of a former name, and the defendant has been defaulted for failure to appear, the defendant has answered admitting the allegations of the complaint, or the defendant has filed a waiver of the right to answer, and the defendant is not an infant or incompetent person. (1868-9, c. 93, s. 47; Code, s. 1288; Rev., s. 1564; C.S., s. 1662; 1963, c. 540, ss. 1, 2; 1965, c. 105; c. 636, s. 4; 1971, c. 17; 1973, cc. 2, 460; 1981, c. 12; 1983 (Reg. Sess., 1984), c. 1037, s. 4; 1985, c. 140; 1991, c. 568, s. 1; 2004-128, s. 6.)

Cross References. — As to competency of spouse as witness in civil actions, see G.S. 8-56.

Editor's Note. — Session Laws 1991, c. 568, s. 2 provides that any judgment of absolute divorce entered prior to October 1, 1991, on the basis of nontestimonial evidence pursuant to G.S. 1A-1, Rule 56, which is proper in all other respects, is valid and of full force and effect.

Legal Periodicals. — For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *Some of the cases below were decided under the various versions of this section applicable at the time, and may not reflect all subsequent amendments.*

Purpose of Section. — The object of this section was to prevent a judgment from being taken by default or by collusion, and to require the facts to be found by a jury. Campbell v. Campbell, 179 N.C. 413, 102 S.E. 737 (1920); Cobb v. Cobb, 42 N.C. App. 373, 256 S.E.2d 722 (1979).

As to the purpose of this section, see also Moss v. Moss, 24 N.C. 55 (1841); Hooper v. Hooper, 165 N.C. 605, 81 S.E. 933 (1914).

The procedure in a divorce action is not the same as the procedure in other civil actions, in that the material facts in the complaint are deemed denied, whether actually denied by pleading or not, and in that no judgment shall be given in favor of the plaintiff until such facts have been found by a jury (now a judge or jury). Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972).

Section Applies to Cross-Action. — This section is applicable to a defendant who files a cross-action and prays for a divorce therein from the plaintiff. Saunderson v. Saunderson, 195 N.C. 169, 141 S.E. 572 (1928).

Allegations in Counterclaim Deemed Denied in Divorce Case. — Despite the fact that the wife did not respond to allegations of marital misconduct and fault contained in the husband's counterclaim in the parties' divorce case, pursuant to G.S. 50-10(a), all of the allegations of the counterclaim were deemed denied. Phillips v. Phillips, 185 N.C. App. 238, 647 S.E.2d 481, 2007 N.C. App. LEXIS 1735 (2007).

Suits for Alimony Without Divorce. — Suits for alimony without divorce are within the analogy of divorce laws and within the purview of that portion of this section which controverts all material facts in every divorce action. Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973).

Section 50-16.8 changes the procedure to be followed in actions for alimony without divorce from the divorce procedure set forth in this section to the procedure applicable to other civil actions. Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972).

Presumption of Denial — Generally. — The provisions of this section that the allegations of the complaint in an action for divorce "are deemed to be denied" applies only to the trial upon the merits, since the facts must be found by a jury (now a judge or jury). Zimmerman v. Zimmerman, 113 N.C. 432, 18 S.E. 334 (1893).

The denial by the statute of the plaintiff's allegations in an action for divorce presumes, as a matter of law, a meritorious defense, and does not require that this be found by the judge in passing upon a motion to set aside a judgment rendered in an action. Campbell v. Campbell, 179 N.C. 413, 102 S.E. 737 (1920).

Same — In Cross-Action. — The defendant in an action for divorce a vinculo, may file a cross-action for the same relief, and where no reply has been filed by the plaintiff, and no evidence has been offered by him, an issue is raised by this section, and upon a verdict on the required issues, a judgment may be rendered upon the cross-action if the pleadings and the evidence are sufficient. Ellis v. Ellis, 190 N.C. 418, 130 S.E. 7 (1925).

All the allegations of defendant's counterclaim wherein he sought a divorce from bed and board were deemed to be denied by the plaintiff, even though she failed to answer the counterclaim. Skamarak v. Skamarak, 81 N.C. App. 125, 343 S.E.2d 559 (1986).

Same — Time for Answering Not Affected. — The provision of this section putting in a denial of the plaintiff's allegations in an action for divorce did not affect the defendant's right to 20 days after completion of the service of summons by publication in which to answer or demur, etc. Campbell v. Campbell, 179 N.C. 413, 102 S.E. 737 (1920).

Entry of Specific Denial by Defendant Not Prejudicial. — Since this section declares in effect that the material allegations of the complaint in a divorce action shall be deemed and treated as denied, it is inconsequential whether or not the defendant enters a denial, and the entry of a specific denial by the defendant, under discretionary leave of the court, cannot prejudice the plaintiff. Walker v. Walker, 238 N.C. 299, 77 S.E.2d 715 (1953).

Facts That Must Be Alleged Must Be Proved. — Under this section and G.S. 50-8, upon the basic principle that a plaintiff must prove what he must allege, a plaintiff is entitled to a judgment of divorce only if the issues submitted and answered in favor of the plaintiff establish, inter alia, (1) the requisite facts as to residence, and (2) that (except where the alleged cause for divorce is one year's separation) the facts set forth as grounds for divorce have existed to his or her knowledge for at least six months prior to the filing of the complaint. Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957).

The allegations required by G.S. 50-8 are indispensable constituent elements of a divorce action and must be established either by the verdict of a jury or by a judge, as the pertinent statute may permit. Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975), overruled on other grounds, Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982).

The statutory changes eliminating the necessity for the filing of an affidavit and allowing a judge in some cases to become the trier of facts in divorce actions do not change the fundamental precepts that jurisdiction over the subject matter of divorce is statutory and that all averments required by the statute must be both alleged in the complaint and found by the finder of fact to be true before a divorce judgment may be entered. Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975), overruled on other grounds, Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982).

A divorce will be granted only after the facts establishing a statutory ground for divorce have been pleaded and actually proved. Adair v. Adair, 62 N.C. App. 493, 303 S.E.2d 190, cert. denied, 309 N.C. 319, 307 S.E.2d 162 (1983).

Material Facts Must Be Found by Judge or Jury. — This section requires that, in a divorce action, the material facts as to the grounds for divorce must be found by a jury (now a judge or jury). Wicker v. Wicker, 255 N.C. 723, 122 S.E.2d 703 (1961).

The material facts in every complaint asking for a divorce are deemed to be denied under the statute, and no judgment is allowed to be given in favor of the plaintiff in any such complaint until all the material facts have been found by a jury. Skamarak v. Skamarak, 81 N.C. App. 125, 343 S.E.2d 559 (1986).

Required Findings. — The court erred in declaring the parties' divorce decree void where the divorce decree at issue was "in all respects regular on [its] face" and the defendant was properly served; the court's findings, required by this section, were found under the heading "Conclusions of Law" rather than under "Findings of Fact." Dunevant v. Dunevant, 142 N.C. App. 169, 542 S.E.2d 242, 2001 N.C. App. LEXIS 47 (2001).

Failure to Raise Genuine Issue of Material Fact. — The wife's answer generally denying the allegations of the husband's complaint for an absolute divorce was insufficient to raise a genuine issue of material fact. Daniel v. Daniel, 132 N.C. App. 217, 510 S.E.2d 689 (1999).

Judgment Invalid Without Finding of Grounds. — Where judgment of divorce from bed and board contained absolutely no finding of the existence of any of the grounds for divorce from bed and board cognizable under

G.S. 50-7, the district court was without power or authority, and therefore without jurisdiction, to enter it. Allred v. Tucci, 85 N.C. App. 138, 354 S.E.2d 291, cert. denied, 320 N.C. 166, 358 S.E.2d 47 (1987).

Order in Habeas Corpus Proceeding Is Not Res Judicata in Divorce Action. — It is patent that an order entered in a habeas corpus proceeding based on facts found by the trial judge is not res judicata in an action for divorce upon the ground of adultery. Wicker v. Wicker, 255 N.C. 723, 122 S.E.2d 703 (1961).

Summary Judgment. — Under this section as it read prior to amendment in 1991, summary judgment could not be entered granting an absolute divorce in this State. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

Rendering of Default Judgment as Sanction in Annulment Action Improper. — Default judgment was incorrectly entered pursuant to G.S. 1A-1, N.C. R. Civ. P. 37, due to a purported wife's failure to comply with the trial court's discovery orders in an annulment proceeding because a judgment for annulment could not be entered by default under G.S. 50-10(a), which gave the trial court subject matter jurisdiction over the annulment action. Hawkins v. Hawkins, — N.C. App. —, 664 S.E.2d 616, 2008 N.C. App. LEXIS 1520 (2008).

Decree by Consent, Stipulation, or Admissions. — This section itself raises issues in a divorce action as to all material facts, regardless of whether the parties by their pleadings have raised any issue and even where all material facts are admitted. Thus, this section has the effect of prohibiting entry of a divorce decree by consent, stipulation, or admissions of the parties, and requires instead that all material facts be found, either by a jury where the right to a jury trial has been preserved as provided in G.S. 1A-1, Rules 38 and 39, or by the court where a jury trial has been waived. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979), decided prior to 1991 amendment.

Right to Jury Trial Preserved. — Where the defendant in apt time and manner demands a jury trial and does not thereafter waive but continues to assert her right to a jury trial, although it may seem futile for defendant to insist upon a trial by jury when, but for this section, no real issue exists, this section gives her the right to do so, and it would be error for the trial court to deny her the right to have the facts found in a trial by jury. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

1971 Amendment Did Not Nullify Right Conferred Prior to Amendment. — Where the last pleading was filed nearly six months prior to the 1971 amendment of this section, the amendment did not nullify the right to request a jury trial "prior to the call of the action for trial" conferred by this section at the time defendant filed the last pleading. Branch v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972).

The substance of the 1973 amendment is very similar to that of the 1971 amendment. Laws v. Laws, 22 N.C. App. 344, 206 S.E.2d 324 (1974).

The 1973 amendment did not alter the procedure for securing a jury trial in actions for absolute divorce after a one-year separation where an answer had been filed at least 10 days prior to the effective date of the amendment. Laws v. Laws, 22 N.C. App. 344, 206 S.E.2d 324 (1974).

Waiver of Jury Trial. — Defendant waived his right to trial by jury in an action for divorce on the ground of two years' (now one year's) separation when he failed to file a request therefor prior to the call of the action for trial, and the fact that defendant had alleged a cross-action for divorce for adultery did not affect this result when defendant withdrew his cross-action before the case was called. Becker v. Becker, 262 N.C. 685, 138 S.E.2d 507 (1964), decided prior to the 1973 amendment.

In a suit for divorce on the grounds of separation, where defendant was personally served with summons, the judge, in the absence of a request for a jury trial filed prior to the call of the action for trial, had authority to hear the evidence, answer the issues, and render judgment thereon. This rule applied equally to contested and uncontested divorce actions. Langley v. Langley, 268 N.C. 415, 150 S.E.2d 764 (1966), decided prior to the 1973 amendment.

A party may waive the right to a jury trial in civil actions by failure to follow the statutory procedure to preserve such right. Laws v. Laws, 1 N.C. App. 243, 161 S.E.2d 40 (1968), decided prior to the 1973 amendment.

Question for Jury. — Where the facts in a divorce action were in dispute, the case was one for the jury. Taylor v. Taylor, 225 N.C. 80, 33 S.E.2d 492 (1945).

Evidence in divorce action held insufficient to carry case to jury. Moody v. Moody, 225 N.C. 89, 33 S.E.2d 491 (1945).

Instruction Not at Variance with Section. — In an action for absolute divorce, a charge in reference to the admissions of counsel that the evidence was sufficient to support an affirmative answer to the issues of marriage, separation and residence was not equivalent to a directed verdict and not at variance with the provisions of this section. Nelson v. Nelson, 197 N.C. 465, 149 S.E. 585 (1929).

Verdict of Jury. — In a proceeding for a divorce, the issues submitted and the verdict found should be as specific and certain as the facts alleged in the petition. Wood v. Wood, 27 N.C. 674 (1845).

As to validity of verdict by 11 jurors, see

Hall v. Hall, 131 N.C. 185, 42 S.E. 562 (1902).

Proof of Adultery. — For cases as to incompetence of one spouse to prove adultery of the other, prior to deletion of this provision by Session Laws 1983 (Reg. Sess., 1984), c. 1037, see Toole v. Toole, 112 N.C. 152, 16 S.E. 912 (1893); Hooper v. Hooper, 165 N.C. 605, 81 S.E. 933 (1914); Vickers v. Vickers, 188 N.C. 448, 124 S.E. 737 (1924); Becker v. Becker, 262 N.C. 685, 138 S.E.2d 507 (1964), citing Perkins v. Perkins, 88 N.C. 41 (1883); Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969); Gordon v. Gordon, 7 N.C. App. 206, 171 S.E.2d 805 (1970); Phillips v. Phillips, 9 N.C. App. 438, 176 S.E.2d 379 (1970); Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972); Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972); Bowen v. Bowen, 19 N.C. App. 710, 200 S.E.2d 214 (1973); Earles v. Earles, 26 N.C. App. 559, 216 S.E.2d 739, cert. denied, 288 N.C. 239, 217 S.E.2d 679 (1975); Traywick v. Traywick, 28 N.C. App. 291, 221 S.E.2d 85 (1976); VanDooren v. VanDooren, 37 N.C. App. 333, 246 S.E.2d 20, cert. denied, 295 N.C. 653, 248 S.E.2d 258 (1978); Horner v. Horner, 47 N.C. App. 334, 267 S.E.2d 65, cert. denied, 301 N.C. 89, 273 S.E.2d 297 (1980); Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243, cert. denied, 302 N.C. 634, 280 S.E.2d 449 (1981); Spencer v. Spencer, 61 N.C. App. 535, 301 S.E.2d 411, cert. denied, 308 N.C. 678, 304 S.E.2d 757 (1983).

Applied in Carpenter v. Carpenter, 244 N.C. 286, 93 S.E.2d 617 (1956); Biggs v. Biggs, 253 N.C. 10, 116 S.E.2d 178 (1960); Richardson v. Richardson, 257 N.C. 705, 127 S.E.2d 525 (1962); Hinson v. Hinson, 17 N.C. App. 505, 195 S.E.2d 98 (1973); Miller v. Miller, 38 N.C. App. 95, 247 S.E.2d 278 (1978); Watts v. Watts, 44 N.C. App. 46, 260 S.E.2d 170 (1979); Morris v. Morris, 45 N.C. App. 69, 262 S.E.2d 359 (1980); Williamson v. Williamson, 66 N.C. App. 315, 311 S.E.2d 325 (1984); Fulton v. Vickery, 73 N.C. App. 382, 326 S.E.2d 354 (1985).

Cited in State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948); Blankenship v. Blankenship, 256 N.C. 638, 124 S.E.2d 857 (1962); Anthony v. Anthony, 8 N.C. App. 20, 173 S.E.2d 617 (1970); Whitaker v. Whitaker, 16 N.C. App. 432, 192 S.E.2d 80 (1972); Pettus v. Pettus, 62 N.C. App. 141, 302 S.E.2d 261 (1983); Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994); McCall v. McCall, 138 N.C. App. 706, 531 S.E.2d 894, 2000 N.C. App. LEXIS 795 (2000); McCall v. McCall, 138 N.C. App. 706, 531 S.E.2d 894, 2000 N.C. App. LEXIS 795 (2000).

OPINIONS OF ATTORNEY GENERAL

Service of process upon defendant in divorce action by leaving copies with defendant's mother at defendant's address was sufficient service and sufficient for nonjury trial. See opinion of Attorney General to the Honorable John S. Gardner, District Court Judge, Sixteenth Judicial District, 41 N.C.A.G. 473 (1971), decided prior to the 1973 amendment.

Service of Process by Publication Does Not Prohibit Waiver of Right to Trial by Jury. — See opinion of Attorney General to Mr. Tom H. Matthews, 43 N.C.A.G. 48 (1973), decided prior to the 1973 amendment.

§ 50-11. Effects of absolute divorce.

(a) After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine except as hereinafter set out, and either party may marry again without restriction arising from the dissolved marriage.

(b) No judgment of divorce shall render illegitimate any child in esse, or begotten of the body of the wife during coverture.

(c) A divorce obtained pursuant to G.S. 50-5.1 or G.S. 50-6 shall not affect the rights of either spouse with respect to any action for alimony or postseparation support pending at the time the judgment for divorce is granted. Furthermore, a judgment of absolute divorce shall not impair or destroy the right of a spouse to receive alimony or postseparation support or affect any other rights provided for such spouse under any judgment or decree of a court rendered before or at the time of the judgment of absolute divorce.

(d) A divorce obtained outside the State in an action in which jurisdiction over the person of the dependent spouse was not obtained shall not impair or destroy the right of the dependent spouse to alimony as provided by the laws of this State.

(e) An absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce; except, the defendant may bring an action or file a motion in the cause for equitable distribution within six months from the date of the judgment in such a case if service of process upon the defendant was by publication pursuant to G.S. 1A-1, Rule 4 and the defendant failed to appear in the action for divorce.

(f) An absolute divorce by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property shall not destroy the right of a spouse to equitable distribution under G.S. 50-20 if an action or motion in the cause is filed within six months after the judgment of divorce is entered. The validity of such divorce may be attacked in the action for equitable distribution. (1871-2, c. 193, s. 43; Code, s. 1295; Rev., s. 1569; 1919, c. 204; C.S., s. 1663; 1953, c. 1313; 1955, c. 872, s. 1; 1967, c. 1152, s. 3; 1981, c. 190; c. 815, s. 2; 1987, c. 844, s. 3; 1991, c. 569, s. 2; 1995, c. 319, s. 8; 1998-217, s. 7(a), (b).)

Cross References. — As to procedures in actions for equitable distribution of property, see G.S. 50-21.

Editor's Note. — Session Laws 1995, c. 319, which amended this section, in s. 12 provides that this act applies to civil actions filed on or after October 1, 1995, and shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995.

This section, prior to the amendment by Session Laws 1995, c. 319, read as follows: "**Effects of absolute divorce.**

(a) After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine except as hereinafter set out, and either party may marry again without restriction arising from the dissolved marriage.

(b) No judgment of divorce shall render illegitimate any child in esse, or begotten of the body of the wife during coverture.

(c) A divorce obtained pursuant to G.S. 50-5.1 or G.S. 50-6 shall not affect the rights of either spouse with respect to any action for alimony or alimony pendente lite pending at the time the judgment for divorce is granted. Furthermore, a judgment of absolute divorce shall not impair or destroy the right of a spouse to receive alimony or alimony pendente lite or affect any other rights provided for such spouse under any judgment or decree of a court rendered before or at the time of the judgment of absolute divorce.

(d) A divorce obtained outside the State in an action in which jurisdiction over the person of the dependent spouse was not obtained shall not impair or destroy the right of the dependent spouse to alimony as provided by the laws of this State.

(e) An absolute divorce obtained within this State shall destroy the right of a spouse to an equitable distribution of the marital property under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce; except, the defendant may bring an action or file a motion in the cause for equitable distribution within six months from the date of the judgment in such a case if service of process upon the defendant was by publication pursuant to G.S. 1A-1, Rule 4 and the defendant failed to appear in the action for divorce.

(f) An absolute divorce by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property shall not destroy the right of a spouse to an equitable distribution of marital property under G.S. 50-20 if an action or motion in the cause is filed within six months after the judgment of divorce is entered. The validity of such divorce may be attacked in the action for equitable distribution."

Legal Periodicals. — For note on permanent alimony incident to absolute divorce, see 31 N.C.L. Rev. 482 (1953).

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

For article, "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

For survey of 1976 case law on domestic relations, see 55 N.C.L. Rev. 1018 (1977).

For survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the State in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

For survey of 1980 family law, see 59 N.C.L. Rev. 1194 (1981).

For survey of 1981 family law, see 60 N.C.L. Rev. 1379 (1982).

For comment on the tax effects of equitable distribution upon divorce, see 18 Wake Forest L. Rev. 555 (1982).

For 1984 survey, "Estoppel and Foreign Divorce," see 63 N.C.L. Rev. 1189 (1985).

CASE NOTES

Editor's Note. *— Some of the cases below were decided under the various versions of this section applicable at the time, and may not reflect all subsequent amendments.*

Cessation of Right to Support. — This section is declarative of the common law in that one of the rights which determines and ceases after a judgment of absolute divorce is the right to support. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Power to Enter Alimony Order Ends upon Divorce. — When a party has secured an absolute divorce, it is beyond the power of the court thereafter to enter an order for alimony. Mitchell v. Mitchell, 270 N.C. 253, 154 S.E.2d 71 (1967).

Wife's answer and counterclaim did not sufficiently preserve her claim for alimony, under G.S. 50-11(c), after an absolute divorce was granted, when she requested a certain monthly amount of alimony, because such a claim could arise on several alternative grounds requiring a trial court's consideration of at least 16 "relevant factors" in determining whether statutory grounds existed to award alimony, and if so whether such an award was equitable under G.S. 50-16.3A; so, under G.S. 1A-1-8(a)(1), an alimony pleading had to contain notice of the grounds upon which this relief was sought, and as the wife's answer did not state such grounds, it was insufficient. Coleman v. Coleman, 182 N.C. App. 25, 641 S.E.2d 332, 2007 N.C. App. LEXIS 475 (2007).

Jurisdiction. — Where the parties invoked the jurisdiction of the district court to equitably distribute their marital property in the action for absolute divorce and equitable distribution of their marital property, the district court did not lose jurisdiction to equitably distribute the marital property because of its failure to enter a judgment in the equitable distribution case before the special proceeding seeking partition of the marital property was filed in the office of the clerk of superior court. Garrison v. Garrison, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

The words "or at the time of" in subsection (c) of this section were added to complement G.S. 50-16.8(b), which allows the questions of divorce and alimony to be determined in a single action. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Alimony May Be Awarded After Hearing on Remand. — If alimony is found to be appropriate after a hearing on remand, the ensuing judgment or decree awarding it will relate back to the time when the application for alimony should have been considered, which is "before or at the time of the rendering of the judgment for absolute divorce." McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Decree of Absolute Divorce on Counterclaim to Action for Alimony as Interlocutory Judgment. — A decree of absolute divorce upon a counterclaim to an action for alimony without divorce was not a final judgment as to the remainder of the claims to be adjudicated in the action. Instead, it was merely an interlocutory judgment, to become final upon a complete adjudication of all claims, rights and liabilities of the parties. It did not terminate or determine the remaining issues arising from the pleadings in the action. Therefore, the court could amend, modify or rescind it at anytime prior to final judgment. Hamilton v. Hamilton, 36 N.C. App. 755, 245 S.E.2d 399 (1978), aff'd, 296 N.C. 574, 251 S.E.2d 441 (1979).

A judgment of absolute divorce upon a counterclaim to an action for alimony without divorce, rendered prior to final determination of all issues, was interlocutory and subject to the provisions of G.S. 1A-1, Rule 54(b), for purposes of determining its finality. Hamilton v. Hamilton, 36 N.C. App. 755, 245 S.E.2d 399 (1978), aff'd, 296 N.C. 574, 251 S.E.2d 441 (1979).

Effect of Absolute Divorce on Prior Judgment for Alimony Without Divorce. — A judgment for absolute divorce awarded to the husband on the ground of two years' (now one year's) separation did not invalidate a judgment for alimony without divorce entered in favor of the wife before the action for absolute divorce was instituted. Blankenship v. Blankenship, 256 N.C. 638, 124 S.E.2d 857 (1962).

Subsection (e) merely requires an equitable distribution claim to be asserted at any time prior to judgment, and does not prohibit a claim asserted before a divorce action is filed. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

Trial court erred in granting a husband's motion to dismiss a wife's motion for equitable distribution, pursuant to G.S. 50-20, in a divorce action where the wife filed the motion on the day before the judgment was signed by the judge and filed, at which point the judgment became final pursuant to G.S. 1A-1-58; therefore, G.S. 50-11(e) did not destroy the wife's right to seek equitable distribution as the motion was filed before an absolute divorce was granted. Santana v. Santana, 171 N.C. App. 432, 614 S.E.2d 438, 2005 N.C. App. LEXIS 1204 (2005).

Equitable Distribution After Judgment of Absolute Divorce. — Under this section, a judgment of absolute divorce destroys the right to equitable distribution unless the right is asserted prior to judgment of absolute divorce. Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987).

If a person entitled to equitable distribution does not specifically apply for it by cross-action or by a separate action prior to the judgment of absolute divorce, the divorce judgment destroys that person's statutory right to equitable distribution. Lutz v. Lutz, 101 N.C. App. 298, 399 S.E.2d 385 (1991), cert. denied, 328 N.C. 732, 404 S.E.2d 871 (1991).

If alimony and equitable distribution claims are properly asserted, whether by the filing of an action or raising of counterclaims, and are not voluntarily dismissed pursuant to Rule 41(a)(1) until after judgment of absolute divorce is entered, a new action based on those claims may be filed within the one year period provided by the rule. Stegall v. Stegall, 336 N.C. 473, 444 S.E.2d 177 (1994).

Although subsection (e) requires that a claim for equitable distribution be brought prior to the granting of the divorce; where the trial court granted defendant relief from the judgment of absolute divorce and permitted defendant to file her answer, the effect was the same as if the judgment had never been entered, and defendant's right to equitable distribution was revived. Baker v. Baker, 115 N.C. App. 337, 444 S.E.2d 478 (1994).

Wife sufficiently preserved her claim to an equitable distribution of marital property under G.S. 50-11(e) when her answer to her husband's complaint for divorce requested and reserved a right to equitable distribution, because the remedy of equitable distribution in a divorce case only applied to marital assets, and G.S. 50-21(a) gave a party asserting a claim for such redress 90 days to provide specific information about the property claimed to be subject to equitable distribution; so, to constitute a valid equitable distribution claim, the wife's counterclaim for equitable distribution did not have to state that it applied to the parties' marital assets or property, and the husband was put on notice that the wife asked the court to equitably distribute the parties' marital and divisible property. Coleman v. Coleman, 182 N.C. App. 25, 641 S.E.2d 332, 2007 N.C. App. LEXIS 475 (2007).

In proceedings in which a former husband was granted an absolute divorce, the former wife was not entitled to compel an equitable distribution affidavit from the former husband because the wife failed to properly file her equitable distribution claim pursuant to G.S. 50-21(a) as a separate action, cross-action, or motion in the cause within six months after the husband dismissed his own equitable distribution claim as required by G.S. 50-11(e) and (f); an oral motion by the wife for such a claim did not constitute the required motion. Webb v. Webb, 188 N.C. App. 621, 656 S.E.2d 334, 2008 N.C. App. LEXIS 203 (2008).

Trial court erred in granting defendant wife's motion to be "relieved of the effect" of a divorce judgment solely to the extent that the judgment barred her claim for equitable distribution. Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987).

Authority for Equitable Distribution. — Where neither party made application or stated a claim for equitable distribution prior to the judgment of absolute divorce, the trial court lacked the authority to enter such a judgment. Stirewalt v. Stirewalt, 114 N.C. App. 107, 440 S.E.2d 854 (1994).

The superior court had no authority to partition marital property pursuant to the provisions of § 46-1 et seq. where, as here, the jurisdiction of the district court has been properly invoked to equitably distribute such marital property. Garrison v. Garrison, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

Effect on Pending Action for Alimony Without Divorce. — Where, pending wife's action for alimony without divorce, husband obtained decree of absolute divorce on the ground of separation for the statutory period under G.S. 50-6, it was held that the final judgment in her action would be rendered after absolute divorce, and that she therefore would not be entitled to permanent alimony in her action, since under the common law she would not be entitled to alimony after a divorce a vinculo, and that the saving provisions of this section would not be applicable. Yow v. Yow, 243 N.C. 79, 89 S.E.2d 867 (1955), decided prior to 1991 amendment.

Effect of Divorce Granted on Counterclaim to Pending Action for Alimony. — A decree of absolute divorce, granted to the defendant in a prior separate hearing on his counterclaim to an action for alimony without divorce, could not be pleaded as a bar to the judgment awarding alimony in the subsequent hearing on the plaintiff's claim which initiated the action. Hamilton v. Hamilton, 36 N.C. App. 755, 245 S.E.2d 399 (1978), aff'd, 296 N.C. 574, 251 S.E.2d 441 (1979).

Effect on Alimony Pendente Lite. — A dependent spouse's action for alimony without divorce was properly dismissed and order awarding alimony pendente lite was properly terminated on motion of the supporting spouse where he had been granted an absolute divorce in an action instituted by him after the order for alimony pendente lite was entered. Smith v. Smith, 12 N.C. App. 378, 183 S.E.2d 283 (1971), decided prior to 1991 amendment.

Where a judgment awarding the wife alimony pendente lite, to be continued until the award of permanent alimony, was rendered before rendition of judgment for absolute divorce, the rights provided for the wife by the prior judgment could not be impaired or destroyed by the subsequently rendered decree of absolute divorce, and defendant remained liable to continue to make the payments under the alimony pendente lite order. Johnson v. Johnson, 17 N.C. App. 398, 194 S.E.2d 562 (1973).

Effect on Debts. — Debt incurred after separation of the parties was not subject to equitable distribution. Harrington v. Harrington, 110 N.C. App. 782, 431 S.E.2d 240 (1993).

Effect of Divorce Under Former Law. — For other cases dealing with the effect of an absolute divorce on the right to alimony, decided under this section as it stood before the 1953, 1955 and 1967 amendments, see Duffy v. Duffy, 120 N.C. 346, 27 S.E. 28 (1897); Livingston v. Livingston, 235 N.C. 515, 70 S.E.2d 480 (1952); Feldman v. Feldman, 236 N.C. 731, 73 S.E.2d 865 (1953); Merritt v. Merritt, 237 N.C. 271, 74 S.E.2d 529 (1953); Deaton v. Deaton, 237 N.C. 487, 75 S.E.2d 398 (1953).

Absolute Defense Under Prior Law. — An alimony claim made pursuant to G.S. 50-16.3A(a) and filed within one year of plaintiff's dismissal of her first claim (under repealed G.S. 50-16.6(a)) failed to qualify as "a new action based on the same claim" under Rule 41(a)(1) because the G.S. 50-16.3A(a) claim for alimony was distinct from that set out by the repealed section in that it deferred to the court's discretion on the decision of whether to award alimony where both the supporting and dependent spouse "each participated in an act of illicit sexual behavior," whereas the old section foreclosed a dependent spouse from recovering; to allow her to maintain this new action would have deprived the defendant/husband of a statutory absolute defense he had had under the old law. Brannock v. Brannock, 135 N.C. App. 635, 523 S.E.2d 110, 1999 N.C. App. LEXIS 1240 (1999).

South Carolina Divorce Action Did Not Destroy Right to Equitable Distribution Under This Section. — Where neither party to a divorce action in South Carolina requested an adjudication of their property rights it necessarily followed that under the South Carolina statute the court never acquired jurisdiction over their marital property and that the divorce judgment entered therein did not destroy plaintiff's right to an equitable distribution of their marital property under this section. Cooper v. Cooper, 90 N.C. App. 665, 369 S.E.2d 630 (1988).

Asserting Claim to Property Was Not Notice of Equitable Distribution. — In divorce case, defendant's answer asserting a claim to an interest in a specific piece of property, or to proceeds in plaintiff's possession flowing from defendant's interest in that piece of property, was not sufficient to put plaintiff on notice that he was asserting a claim for equitable distribution under G.S. 50-20. Goodwin v. Zeydel, 96 N.C. App. 670, 387 S.E.2d 57 (1990).

Trial court had no authority to reaffirm divorce decree and reserve for future resolution the issue of equitable distribution where the trial court did not set aside the divorce but rather attempted to nullify the consequences of defendant's failure to assert her claim for equitable distribution prior to the entry of judgment of divorce. Even if the court had effectively set aside, briefly, the divorce decree itself and then immediately reinstated the divorce decree with a reservation of an equitable distribution claim, the reservation of the equitable distribution claim would have been a legal nullity because plaintiff voluntarily dismissed his equitable distribution claim and defendant did not, during the time the divorce was arguably set aside, file an answer, counterclaim, or separate action requesting equitable distribution. Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991).

Waiver of Equitable Distribution Induced by Misrepresentations of Other Party. — Defendant would be estopped from asserting the defense that plaintiff did not preserve her equitable distribution claim if plaintiff, in good faith, relied on the misrepresentations of the defendant in waiving her right to equitable distribution. Harroff v. Harroff, 100 N.C. App. 686, 398 S.E.2d 340 (1990), discretionary review denied, 328 N.C. 330, 402 S.E.2d 833 (1991).

Divorce Decree Containing Provision Reserving Equitable Distribution Issue. — Where decree for absolute divorce contained a provision reserving the issue of equitable distribution for hearing at a later date, trial judge, with whom plaintiff thereafter filed a motion to dismiss defendant's claim for equitable distribution pursuant to subsection (e) of this section, had no authority to find error and reverse or vacate divorce judge's order reserving the issue. Stone v. Stone, 96 N.C. App. 633, 386 S.E.2d 602 (1989), cert. denied, 326 N.C. 805, 393 S.E.2d 906 (1990).

Rights Under Consent Judgment as Contractual. — Insofar as consent judgment imposed a duty of support on defendant-husband beyond that imposed by the common law or by statute, plaintiff-wife's rights did not arise out of the marriage, but out of contract. Haynes v. Haynes, 45 N.C. App. 376, 263 S.E.2d 783 (1980).

Consent Judgment Held Not Affected. — Where a consent judgment for alimony without divorce had been entered, a condition of which was that the wife would remain unmarried, the subsequent decreeing of a divorce a vinculo to the wife was not a violation of the terms of the consent judgment, and the judge had no authority to reduce the amount of alimony provided in the consent judgment upon that ground. Lentz v. Lentz, 193 N.C. 742, 138 S.E. 12, aff'd, 194 N.C. 673, 140 S.E. 440 (1927), overruled on other grounds, Story v. Story, 221

N.C. 114, 19 S.E.2d 136 (1942).

Contractual Right to Continued Support Under Separation Agreement. — A separation agreement by which the husband agrees to support his wife even after a decree of divorce has been entered which, under this section, would otherwise terminate his obligation, is nonetheless valid. In such a case, the wife's right to continued support does not arise out of the marriage, but arises out of contract and survives the judgment of absolute divorce. Haynes v. Haynes, 45 N.C. App. 376, 263 S.E.2d 783 (1980).

Claim for Arrearages in Payment Under Predivorce Separation Agreement. — Plaintiff's claim for arrearages in payments under a predivorce separation agreement was based on a right arising out of contract, which survived a judgment of absolute divorce, and was not a right arising out of marriage which was terminated by a judgment of absolute divorce. McKnight v. McKnight, 25 N.C. App. 246, 212 S.E.2d 902, cert. denied, 287 N.C. 466, 215 S.E.2d 624 (1975).

Enforcement of Separation Agreement. — This section does not protect a mere separation agreement as an award of alimony, and such an agreement may not be enforced by imprisonment for contempt. Stanley v. Stanley, 226 N.C. 129, 37 S.E.2d 118 (1946).

Award of Attorneys' Fees Where Plaintiff Is Unable to Defray Expenses. — An award under either G.S. 50-13.6 for "reasonable attorneys' fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit" or under subsection (c) of this section and G.S. 50-16.4, applying the doctrine of Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972), is appropriate upon a finding by the trial court in the exercise of its discretion that the plaintiff is unable to defray the expense of the suit. Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

Award of Counsel Fees for Services Rendered Subsequent to Absolute Divorce. — Unless the case falls within one of the two exceptions (now one exception) made by subsection (c) of this section, counsel fees may be awarded for services rendered to a dependent spouse subsequent to an absolute divorce in seeking to obtain or in resisting a motion for a revision of alimony or other rights provided under any judgment or decree of a court rendered before or at the time of the rendering of the judgment for absolute divorce. Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972).

Under subsection (c) of this section, an award of counsel fees is allowed for services rendered to a dependent spouse subsequent to an absolute divorce in seeking to obtain or in resisting a motion for revision of alimony or other rights. Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Counsel Fees for Enforcement of Subsistence Pendente Lite. — Since a wife's right to receive subsistence pendente lite is not destroyed by a judgment of absolute divorce, where her action for alimony without divorce is still pending, it would seem that the proviso in this section is broad enough to include counsel fees to the wife to enforce the payment to her of subsistence pendente lite in arrears, for without counsel her right to enforce such payments might be impaired or destroyed. Yow v. Yow, 243 N.C. 79, 89 S.E.2d 867 (1955).

Divorce Does Not Annul or Revoke Insurance Beneficiary Designation. — Neither this section, which provides that "all rights arising out of the marriage shall cease and determine," nor G.S. 31A-1, which bars rights to "any rights or interests in the property of the other spouse," discloses a legislative intent that divorce should annul or revoke the beneficiary designation in a garden-variety insurance certificate. DeVane v. Travelers Ins. Co., 8 N.C. App. 247, 174 S.E.2d 146 (1970).

Power of Alabama Court to Modify North Carolina Alimony Decree. — An Alabama court which had in personam jurisdiction over the parties could modify a North Carolina alimony decree, where the Alabama court in effect found that circumstances had changed since the entry of the North Carolina decree. Vincent v. Vincent, 38 N.C. App. 580, 248 S.E.2d 410 (1978).

An Alabama court with in personam jurisdiction over the parties could not modify retroactively a North Carolina alimony judgment where there was no showing of any sudden emergency requiring such a reduction. Vincent v. Vincent, 38 N.C. App. 580, 248 S.E.2d 410 (1978).

Claim for Equitable Distribution Properly Dismissed. — Trial court did not err in dismissing the wife's tardy claim for equitable distribution, either on the ground that the trial court had left the issue open or upon the ground that the husband was equitably estopped from relying on subsection (e) of this section, where, although the trial court specifically reserved the issue of equitable distribution for the future in its judgment of absolute divorce, the wife had not, and the husband had asserted a claim for equitable distribution for the future prior to the judgment of absolute divorce. Lutz v. Lutz, 101 N.C. App. 298, 399 S.E.2d 385 (1991), cert. denied, 328 N.C. 732, 404 S.E.2d 871 (1991).

Where an Alabama court which had in personam jurisdiction over the parties modified a North Carolina alimony decree, the dependent spouse's right to alimony was terminated as of the entry of the Alabama decree. There was no need to prolong the litigation by requiring the supporting spouse to commence a third proceeding in North Carolina to set aside the prior North Carolina judgment. Vincent v. Vincent, 38 N.C. App. 580, 248 S.E.2d 410 (1978).

As to nonapplicability of 1953 and 1955 amendments to a 1951 judgment for absolute divorce, see Yow v. Yow, 243 N.C. 79, 89 S.E.2d 867 (1955).

Former Bar Against Alimony for Spouse Obtaining Divorce on Ground of Separation. — As to the bar against a decree of alimony for the dependent spouse where this spouse both initiated an action for and obtained a divorce on the ground of the statutory separation period under subsection (c) of this section prior to its amendment by Session Laws 1981, c. 190, see Porter v. Citizens Bank, 249 N.C. 173, 105 S.E.2d 669 (1958); Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972); McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Power to Enter Alimony Order Ends Upon Divorce. — Party's filed counterclaim was sufficient to constitute an action pending when judgment of absolute divorce was entered, and a person had to apply specifically for the claim by cross-action or by a separate action, and the bare reservation by a trial court only preserved the claim for the party who had asserted the right prior to judgment of absolute divorce; while this applied to equitable distribution, there was no reason why alimony should not be treated the same for preservation purposes. Stark v. Ratashara, 177 N.C. App. 449, 628 S.E.2d 471, 2006 N.C. App. LEXIS 962 (2006), cert. denied, 360 N.C. 536, 633 S.E.2d 826 (2006).

When a husband was granted an absolute divorce on the grounds of separation for one year, and the wife did not file a counterclaim or separate claim for alimony before the trial court entered a judgment of absolute divorce, which did not preserve an alimony claim, a statement in the wife's answer that "the claims for alimony and equitable distribution pending this action are to be reserved" was insufficient to give the trial court jurisdiction, under G.S. 50-11, to consider the wife's amended answer and counterclaim for alimony, despite the husband's answer to that counterclaim, as subject matter jurisdiction could not be conferred by the parties' consent. Stark v. Ratashara, 177 N.C. App. 449, 628 S.E.2d 471, 2006 N.C. App. LEXIS 962 (2006), cert. denied, 360 N.C. 536, 633 S.E.2d 826 (2006).

Applied in Bowling v. Bowling, 252 N.C. 527, 114 S.E.2d 228 (1960); Biggs v. Biggs, 253 N.C. 10, 116 S.E.2d 178 (1960); Sears v. Sears, 253 N.C. 415, 117 S.E.2d 7 (1960); Darden v. Darden, 20 N.C. App. 433, 201 S.E.2d 538 (1974); Sawyer v. Sawyer, 21 N.C. App. 293, 204 S.E.2d 224 (1974); Amaker v. Amaker, 28 N.C. App. 558, 221 S.E.2d 917 (1976); Webber v. Webber, 32 N.C. App. 572, 232 S.E.2d 865 (1977); Roberts v. Roberts, 38 N.C. App. 295, 248 S.E.2d 85 (1978); Wise v. Wise, 42 N.C. App. 5, 255 S.E.2d 570 (1979); Lockamy v. Lockamy, 111 N.C. App. 260, 432 S.E.2d 176 (1993); Gilbert v. Gilbert, 111 N.C. App. 233, 431 S.E.2d 805 (1993).

Cited in In Dyer v. Dyer, 212 N.C. 620, 194 S.E. 278 (1937); Brown v. Brown, 224 N.C. 556, 31 S.E.2d 529 (1944); Pearce v. Pearce, 225 N.C. 571, 35 S.E.2d 636 (1945); Kinross-Wright v. Kinross-Wright, 248 N.C. 1, 102 S.E.2d 469 (1958); Taylor v. Taylor, 257 N.C. 130, 125 S.E.2d 373 (1962); Thurston v. Thurston, 256 N.C. 663, 124 S.E.2d 852 (1962); O'Brien v. O'Brien, 266 N.C. 502, 146 S.E.2d 500 (1966); Becker v. Becker, 273 N.C. 65, 159 S.E.2d 569 (1968); Bailey v. Bailey, 26 N.C. App. 444, 216 S.E.2d 394 (1975); Hamilton v. Hamilton, 296 N.C. 574, 251 S.E.2d 441 (1979); Britt v. Britt, 49 N.C. App. 463, 271 S.E.2d 921 (1980); O'Hara v. O'Hara, 46 N.C. App. 819, 266 S.E.2d 59 (1980); Payne v. Payne, 49 N.C. App. 132, 270 S.E.2d 546 (1980); McCall v. Harris, 55 N.C. App. 390, 285 S.E.2d 335 (1982); Robinson v. Robinson, 56 N.C. App. 737, 289 S.E.2d 612 (1982); Burmann v. Burmann, 64 N.C. App. 729, 308 S.E.2d 101 (1983); In re Cooper, 81 N.C. App. 27, 344 S.E.2d 27 (1986); Lawson v. Lawson, 84 N.C. App. 51, 351 S.E.2d 794 (1987); Banner v. Banner, 86 N.C. App. 397, 358 S.E.2d 110 (1987).

§ 50-11.1. Children born of voidable marriage legitimate.

A child born of voidable marriage or a bigamous marriage is legitimate notwithstanding the annulment of the marriage. (1951, c. 893, s. 2.)

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Child of Bigamous Marriage Entitled to Proceeds of Insurance Policy on Father. — Under this section, there can be no question but that a child born of a bigamous marriage is legitimate and as such is entitled to the proceeds of a policy of insurance issued to his deceased father pursuant to the Federal Employees' Group Life Insurance Act. Varker v. Metropolitan Life Ins. Co., 184 F. Supp. 159 (M.D.N.C. 1960).

Cited in Rehm v. Rehm, 2 N.C. App. 298, 163 S.E.2d 54 (1968).

§ 50-11.2. Judgment provisions pertaining to care, custody, tuition and maintenance of minor children.

Where the court has the requisite jurisdiction and upon proper pleadings and proper and due notice to all interested parties the judgment in a divorce action may contain such provisions respecting care, custody, tuition and maintenance of the minor children of the marriage as the court may adjudge; and from time to time such provisions may be modified upon due notice and hearing and a showing of a substantial change in condition; and if there be no minor children, the judgment may so state. The jurisdictional requirements of G.S. 50A-201, 50A-203, or 50A-204 shall apply in regard to a custody decree. (1973, c. 927, s. 1; 1979, c. 110, s. 11; 1999-223, s. 10.)

Legal Periodicals. — For article, "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

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Substantial Change in Condition. — A change in condition is substantial if the change would affect the best interests and welfare of the child. Carmichael v. Carmichael, 40 N.C. App. 277, 252 S.E.2d 257 (1979).

Effect of Separation Agreement. — While the marital and property rights of the parties under the provisions of a valid separation agreement cannot be ignored or set aside by the court without consent of the parties, such agreements are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children. Soper v. Soper, 29 N.C. App. 95, 223 S.E.2d 560 (1976).

Where parties to a separation agreement agree upon the amount of the support and maintenance of their minor children, there is a presumption, in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable and that upon motion for an increase in such allowance, a court is not warranted in ordering an increase in the absence of any evidence of a change of conditions. Soper v. Soper, 29 N.C. App. 95, 223 S.E.2d 560 (1976).

Cited in Mohr v. Mohr, 155 N.C. App. 421, 573 S.E.2d 729, 2002 N.C. App. LEXIS 1590 (2002).

§ 50-11.3. Certain judgments entered prior to January 1, 1981, validated.

Any judgment of divorce which has been entered prior to January 1, 1981, by a court of competent jurisdiction within the State of North Carolina without a conclusion of law that the plaintiff was entitled to an absolute divorce, but which is proper in all other respects, is hereby rendered valid and of full force and effect. (1977, c. 320; 1981, c. 473.)

§ 50-11.4. Certain judgments of divorce validated.

Any judgment of divorce entered as a result of an action instituted prior to October 1, 1983, upon any grounds abolished by Chapter 613 of the 1983 Session Laws as amended by Section 217(O) of Chapter 923 of the 1983 Session Laws, which is proper in all other respects, is hereby rendered valid and of full force and effect. (1985 (Reg. Sess., 1986), c. 952.)

§ 50-12. Resumption of maiden or premarriage surname.

(a) Any woman whose marriage is dissolved by a decree of absolute divorce may, upon application to the clerk of court of the county in which she resides or where the divorce was granted setting forth her intention to do so, change her name to any of the following:

(1) Her maiden name; or
(2) The surname of a prior deceased husband; or
(3) The surname of a prior living husband if she has children who have that husband's surname.

(a1) A man whose marriage is dissolved by decree of absolute divorce may, upon application to the clerk of court of the county in which he resides or where the divorce was granted setting forth his intention to do so, change the surname he took upon marriage to his premarriage surname.

(b) The application shall be addressed to the clerk of the court of the county in which such divorced person resides or where the divorce was granted, and shall set forth the full name of the former spouse of the applicant, the name of the county and state in which the divorce was granted, and the term or session of court at which such divorce was granted, and shall be signed by the woman in her full maiden name, or by the man in his full premarriage surname. The clerks of court of the several counties of the State shall record and index such applications in such manner as shall be required by the Administrative Office of the Courts.

(c) If an applicant, since the divorce, has adopted one of the surnames listed in subsection (a) or (a1) of this section, the applicant's use and adoption of that name is validated.

(d) In the complaint, or counterclaim for divorce filed by any person in this State, the person may petition the court to adopt any surname as provided by this section, and the court is authorized to incorporate in the divorce decree an order authorizing the person to adopt that surname. (1937, c. 53; 1941, c. 9; 1951, c. 780; 1957, c. 394; 1971, c. 1185, s. 23; 1981, c. 494, ss. 1-4; 1985, c. 488; 1993 (Reg. Sess., 1994), c. 565, s. 1; 2005-38, s. 1.)

CASE NOTES

Wife Need Not Use Husband's Surname. — There is no statutory requirement in this State that a married woman use her husband's surname. In re Mohlman, 26 N.C. App. 220, 216 S.E.2d 147 (1975).

Section Merely Recognizes Possible Common-Law Change in Name. — This section does not imply a requirement that a married woman must assume her husband's surname. It merely recognizes that by her marriage the wife may have, through usage, effected a common-law change in her name, but it does not indicate that she was compelled to do so. In re Mohlman, 26 N.C. App. 220, 216 S.E.2d 147 (1975).

Woman Does Not by Marriage Give Up Right to Change Name. — Nothing in the law states that by marriage a woman gives up her right as a person to change her name as anyone else might change his or hers. In re Mohlman, 26 N.C. App. 220, 216 S.E.2d 147 (1975).

OPINIONS OF ATTORNEY GENERAL

Wife Must Have Filed Complaint or Counterclaim. — The court, in the divorce decree, may not grant authorization for the wife to resume her maiden name unless the wife filed complaint for divorce or a counterclaim (cross bill) for divorce. See opinion of Attorney General to the Honorable John H. Parker, District Court Judge, 10th Judicial District, 50 N.C.A.G. 16 (1980).

§ 50-13: Repealed by Session Laws 1967, c. 1153, s. 1.

Cross References. — As to actions or proceedings for custody of minor children, see G.S. 50-13.1 et seq.

§ 50-13.1. Action or proceeding for custody of minor child.

(a) Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided. Any person whose actions resulted in a conviction under G.S. 14-27.2 or G.S. 14-27.3 and the conception of the minor child may not claim the right to custody of that minor child. Unless a contrary intent is clear, the word "custody" shall be deemed to include custody or visitation or both.

(a1) Notwithstanding any other provision of law, any person instituting an action or proceeding for custody ex parte who has been convicted of a sexually violent offense as defined in G.S. 14-208.6(5) shall disclose the conviction in the pleadings.

(b) Whenever it appears to the court, from the pleadings or otherwise, that an action involves a contested issue as to the custody or visitation of a minor child, the matter, where there is a program established pursuant to G.S. 7A-494, shall be set for mediation of the unresolved issues as to custody and visitation before or concurrent with the setting of the matter for hearing unless the court waives mediation pursuant to subsection (c). Issues that arise in motions for contempt or for modifications as well as in other pleadings shall be set for mediation unless mediation is waived by the court. Alimony, child support, and other economic issues may not be referred for mediation pursuant to this section. The purposes of mediation under this section include the pursuit of the following goals:

(1) To reduce any acrimony that exists between the parties to a dispute involving custody or visitation of a minor child;
(2) The development of custody and visitation agreements that are in the child's best interest;
(3) To provide the parties with informed choices and, where possible, to give the parties the responsibility for making decisions about child custody and visitation;
(4) To provide a structured, confidential, nonadversarial setting that will facilitate the cooperative resolution of custody and visitation disputes and minimize the stress and anxiety to which the parties, and especially the child, are subjected; and
(5) To reduce the relitigation of custody and visitation disputes.

(c) For good cause, on the motion of either party or on the court's own motion, the court may waive the mandatory setting under Article 39A of Chapter 7A of the General Statutes of a contested custody or visitation matter for mediation. Good cause may include, but is not limited to, the following: a showing of undue hardship to a party; an agreement between the parties for voluntary mediation, subject to court approval; allegations of abuse or neglect of the minor child; allegations of alcoholism, drug abuse, or domestic violence between the parents in common; or allegations of severe psychological, psychiatric, or emotional problems. A showing by either party that the party resides more than fifty miles from the court shall be considered good cause.

(d) Either party may move to have the mediation proceedings dismissed and the action heard in court due to the mediator's bias, undue familiarity with a party, or other prejudicial ground.

(e) Mediation proceeding shall be held in private and shall be confidential. Except as provided in this Article, all verbal or written communications from either or both parties to the mediator or between the parties in the presence of the mediator made in a proceeding pursuant to this section are absolutely privileged and inadmissible in court. The mediator may assess the needs and interests of the child, and may interview the child or others who are not parties to the proceedings when he or she thinks appropriate.

(f) Neither the mediator nor any party or other person involved in mediation sessions under this section shall be competent to testify to communications made during or in furtherance of such mediation sessions; provided, there is no privilege as to communications made in furtherance of a crime or fraud. Nothing in this subsection shall be construed as permitting an individual to obtain immunity from prosecution for criminal conduct or as excusing an individual from the reporting requirements of Article 3 of Chapter 7B of the General Statutes or G.S. 108A-102.

(g) Any agreement reached by the parties as a result of the mediation shall be reduced to writing, signed by each party, and submitted to the court as soon as practicable. Unless the court finds good reason not to, it shall incorporate the agreement in a court order and it shall become enforceable as a court order. If some or all of the issues as to custody or visitation are not resolved by mediation, the mediator shall report that fact to the court.

(h) If an agreement that results from mediation and is incorporated into a court order is referred to as a "parenting agreement" or called by some similar name, it shall nevertheless be deemed to be a custody order or child custody determination for purposes of Chapter 50A of the General Statutes, G.S. 14-320.1, G.S. 110-139.1, or other places where those terms appear.

(i) If the child whose custody is the subject of an action under this Chapter also is the subject of a juvenile abuse, neglect, or dependency proceeding pursuant to Subchapter 1 of Chapter 7B of the General Statutes, then the custody action under this Chapter is stayed as provided in G.S. 7B-200. (1967, c. 1153, s. 2; 1989, c. 795, s. 15(b); 1998-202, s. 13(p); 2004-128, s. 10; 2005-320, s. 5; 2005-423, s. 4; 2007-462, s. 1.)

Local Modification. — Gaston: 1983, c. 761, s. 162; 1987 (Reg. Sess., 1988), c. 1036, s. 2; 1989, c. 547, s. 2; Mecklenburg: 1983, c. 761, s. 162; 1985, c. 698, s. 18(a); 1987, c. 524, s. 5; 1987, c. 703, s. 3; 1987 (Reg. Sess., 1988), c. 1036, s. 2; 1989, c. 547, s. 2.

Cross References. — As to jurisdiction of proceedings for child support and child custody, see G.S. 7A-244.

Editor's Note. — This section was amended by Session Laws 1989, c. 795, s. 15(b), in the coded bill drafting format provided by G.S. 120-20.1. Subsection (a) of this section has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2003-381, s. 2(a)-(c), provides: "The Administrative Office of the Courts, in consultation with the Department of Health and Human Services, shall establish a pilot program in the Twelfth Judicial District that addresses the issue of conflicting child custody orders. To the extent that this act or the program established pursuant to it conflicts with any State law, the program supersedes that law. However, the Department of Health and Human Services shall ensure that federal funding is not jeopardized.

"Under this program, when a court obtains jurisdiction over a juvenile as the result of a petition alleging that the juvenile is abused, neglected, or dependent:

"(1) The court in the juvenile proceeding may stay any other civil action in this State in which the custody of the juvenile is an issue.

"(2) If an order entered in the juvenile proceeding and an order entered in another civil custody action conflict, the order in the juvenile proceeding controls as long as the court continues to retain jurisdiction in the juvenile proceeding.

"(3) The court in the juvenile proceeding may order that any civil action or claim for custody filed in the pilot judicial district be consolidated with the juvenile proceeding.

"(4) If a civil action or claim for custody has been filed in a district other than the pilot judicial district, then the court in the juvenile proceeding may, after consulting with the court in the other district, order that the civil action or claim for custody be transferred to the pilot judicial district or may order a change of venue in the juvenile proceeding and transfer the juvenile proceeding to the other district.

"(5) The court may establish a mechanism for determining the legal status of a juvenile after jurisdiction of the juvenile court terminates, including a determination as to who has custody of the juvenile and under what circumstances custody may subsequently be changed.

"The Administrative Office of the Courts shall evaluate the pilot program and report its findings and recommendations to the 2005 General Assembly prior to its convening."

Subsection (a1), as added by Session Laws 2007-462, s. 1, effective October 1, 2007, is applicable to actions or proceedings filed on or after that date.

Legal Periodicals. — For caselaw survey on custody of children, see 41 N.C.L. Rev. 464 (1963); 44 N.C.L. Rev. 1000 (1966).

For survey of 1981 family law, see 60 N.C.L. Rev. 1379 (1982).

For article, "Equating a Stepparent's Rights and Liabilities Vis-A-Vis Custody, Visitation and Support upon Dissolution of the Marriage with Those of the Natural Parent — An Equitable Solution to a Growing Dilemma?," see 17 N.C. Cent. L.J. 1 (1988).

For comment, "An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts," see 71 N.C.L. Rev. 1857 (1993).

For note, "Balancing the Welfare of Children with the Rights of Parents: Peterson v. Rogers and the Role of Religion in Custody Disputes", see 73 N.C.L. Rev. 1271 (1995).

For survey, "Why the Best Interests Standard Should Survive Petersen v. Rogers," see 73 N.C.L. Rev. 2451 (1995).

For comment, "Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina's Pre-Trial Process," 18 Campbell L. Rev. 281 (1996).

For article, "Re-Evaluating Grandparent Visitation in North Carolina in Light of Troxel v. Granville," see 23 Campbell L. Rev. 249 (2001).

For casenote: "The Established Standard for Fathers Who Have Acknowledged Paternity and Who Are Seeking Custody of Their Illegitimate Child(ren): Rosero v. Blake, 357 N.C. 193 (2003)," see 26 N.C. Cent. L.J. 116 (2003).

CASE NOTES

Legislative Intent. — By the enactment of G.S. 50-13.1 et seq., the legislature has sought to eliminate conflicting and inconsistent statutes which have caused pitfalls for litigants, and to bring all of the statutes relating to child custody and support together into one act. In re Holt, 1 N.C. App. 108, 160 S.E.2d 90 (1968); In re King, 3 N.C. App. 466, 165 S.E.2d 60 (1969); Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972).

Construction With Other Sections. — Subsection 7A-289.33(1) [see now G.S. 7B-1112(1)] is an exception to the general grant of standing to seek custody under subsection (a) of this section. Krauss v. Wayne County Dep't of Social Servs., 347 N.C. 371, 493 S.E.2d 428 (1997).

Trial court, in a custody case involving the son where reunification with a parent was the original goal and the county social services agency had obtained legal custody of him while awaiting a permanent disposition, did not enter a proper civil child-custody order pursuant to G.S. 7B-911. It made no findings of fact regarding its decision to transfer the son's juvenile case pursuant to "Chapter 50," G.S. 50-13.1, and to terminate its jurisdiction. In re J.B., — N.C. App. —, 677 S.E.2d 532, 2009 N.C. App. LEXIS 765 (2009).

This and the following sections do not alter basic legal principles concerning custody. In re Moore, 8 N.C. App. 251, 174 S.E.2d 135 (1970).

Broad Application of Section. — Had the legislature intended this section to apply to only those custody disputes involved in a divorce or separation, it would have expressly so provided; therefore, the mere fact that it is found in the chapter of the General Statutes governing divorce and alimony is not sufficient to cause its application to be restricted to custody disputes involved in separation or divorce. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

Consideration of Prior Orders. — The trial court did not err in considering temporary custody orders and prior contempt orders in determining the issue of child custody. Raynor v. Odom, 124 N.C. App. 724, 478 S.E.2d 655 (1996).

This Section and § 48-9.1 Distinguished. — When this section and G.S. 48-9.1 are construed together, it is apparent that this section was intended as a broad statute, covering a myriad of situations in which custody disputes are involved, while G.S. 48-9.1 is a narrow statute, applicable only to custody of a minor child surrendered by its natural parents pursuant to G.S. 48-9(a)(1). Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

Section 48-9.1(1) as Exception to Grant of Standing in This Section. — Section 48-9.1(1) was intended as an exception to the general grant of standing to contest custody set forth in this section. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

Rights of Parents. — Absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail. Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994).

Rights of Parents Following Termination for Neglect. — Plaintiff did not have standing to seek custody of his biological children as an "other" person under subsection (a) of this section where his parental rights were previously terminated for neglect. Krauss v. Wayne County Dep't of Social Servs., 347 N.C. 371, 493 S.E.2d 428 (1997).

Rights of Presumed Parents. — Where there was no evidence another man had either been adjudicated the father of the child or acknowledged paternity, the marital presumption, that plaintiff was the natural father of the child, had not been rebutted and plaintiff thus had standing under this section to seek visitation rights with the child. Jones v. Patience, 121 N.C. App. 434, 466 S.E.2d 720 (1996).

Actions by Strangers. — This section was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers. Such a right would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children. Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994).

Standing of Other Persons to Bring Actions. — Where a third party and a child have an established relationship in the nature of parent-child relationship, the third party has standing as an "other person" under this subsection. Ellison v. Ramos, 130 N.C. App. 389, 502 S.E.2d 891 (1998), appeal dismissed, 349 N.C. 356, 517 S.E.2d 891 (1998).

Child's putative father had standing to seek the child's custody, under G.S. 50-13.1(a), before his paternity was proved, based on the trial court's findings that the child shared his last name, and he had visited the child for two years since the child's birth. Smith v. Barbour, 154 N.C. App. 402, 571 S.E.2d 872, 2002 N.C. App. LEXIS 1450 (2002), cert. denied, — N.C. —, 599 S.E.2d 408 (2004).

Former domestic partner's allegations that she was an "other person" who had standing to seek custody were sufficient under Ellison to support a trial court's denial of a biological mother's motion to dismiss the partner's petition for custody. The partner established standing under G.S. 50-13.1 by alleging that she and the mother: (1) jointly raised the child; (2) entered into a parenting agreement in which they each acknowledged that the partner was a de facto parent; (3) the partner had formed a psychological parenting relationship with the child; and (4) the child had lived all his life enjoying the equal participation of the mother and the partner in his emotional and financial care and support, guidance and decision-making. Mason v. Dwinnell, 190 N.C. App. 209, 660 S.E.2d 58, 2008 N.C. App. LEXIS 908 (2008).

When a mother sued the adoptive parents of the mother's children for, inter alia, visitation with the children, the mother was not a qualified "other person," under G.S. 50-13.1, because, once the mother consented to the children's adoption by the adoptive parents, the mother was a legal stranger to the children who had no right to seek visitation with or custody of the children. Quets v. Needham, — N.C. App. —, — S.E.2d —, 2009 N.C. App. LEXIS 1169 (July 21, 2009).

Standing of Other Persons to Bring Actions. — Trial court properly considered an aunt and uncle's petition for custody of the aunt's and uncle's nephew, under G.S. 50-13.1(a), because (1) the aunt and uncle were the child's relatives, and (2) the child's mother acted in a manner inconsistent with the mother's paramount interest in the child's custody by placing the child with other parties and by acknowledging the mother's substance abuse problems. Yurek v. Shaffer, — N.C. App. —, 678 S.E.2d 738, 2009 N.C. App. LEXIS 1079 (July 7, 2009).

Conditions on Parental Visitation. — Trial court did not err in conditioning parent's visitation of minor children on the noncustodial parent's ability to control his obsessive compulsive behavior when with the children. Surles v. Surles, 113 N.C. App. 32, 437 S.E.2d 661 (1993).

Claim Not Precluded by Consent to Adoption. — Where petitioner signed a consent to the adoption of his children by their grandparents, the petitioner was rendered a stranger to the blood, but this in no way precluded his right to claim custody as an "other person" within the meaning of this section. In re Rooker, 43 N.C. App. 397, 258 S.E.2d 828 (1979).

Best Interests of Child. — Subsection (a) of this section does not convey an absolute right upon every person who allegedly has an interest in the child to assert custody, but must operate to promote the best interests of the child in all custody determinations. Krauss v. Wayne County Dep't of Social Servs., 347 N.C. 371, 493 S.E.2d 428 (1997).

Regardless of the relationship between stepfather and child, the trial court erred when it granted stepfather visitation based on child's best interest without first determining if mother had acted inconsistently with her parental responsibilities. Seyboth v. Seyboth, 147 N.C. App. 63, 554 S.E.2d 378, 2001 N.C. App. LEXIS 1044 (2001).

Order that deferred to a ch. 50 custody action but required agency to develop a permanency plan and the child's aunt to take specific steps to comply with it was not a final order; since the trial court also had a continuing G.S. 7B-907 duty to consider evidence regarding the child's best interests, res judicata did not bar it from terminating the aunt's parental rights. In re C.E.L., 171 N.C. App. 468, 615 S.E.2d 427, 2005 N.C. App. LEXIS 1361 (2005).

Conclusion of law that it was in a child's best interest to grant legal custody to the child's father was supported by the findings of fact because the father's fitness and ability to provide proper care to and supervision of the child and the mother's unfitness and inability to provide proper care for the child were uncontested as it was found: (1) that the father's visitation with the child had gone well; (2) that the child enjoyed a loving relationship with the father; (3) that the father was the child's biological father; (4) that the father had not abrogated his constitutional rights to parent the child; and (5) that, even though the father testified that he did not want to disrupt the child's situation by having the child live with him permanently, he also testified that he would take the child. In re H.S.F., — N.C. App. —, 645 S.E.2d 383, 2007 N.C. App. LEXIS 748 (2007).

Sole custody award to a mother, subject to the father's visitation rights, was proper under G.S. 50-13.1 as it was in the children's best interests since the father had physically and emotionally abused the mother, and the mother continued to fear the father; the children were more closely bonded to the mother. O'Connor v. Zelinske, — N.C. App. —, 668 S.E.2d 615, 2008 N.C. App. LEXIS 2014 (2008).

Grandparents' Rights to Visitation Following Adoption and Termination. — The provisions of this section do not grant grandparents in a Chapter 7A proceeding standing to seek custody or visitation of a child who has been placed in the custody of the Department of Social Services after the child has been surrendered for adoption by one parent and the parental rights of the other parent have been terminated. Swing v. Garrison, 112 N.C. App. 818, 436 S.E.2d 895 (1993).

Grandparents' Rights When Family Intact. — Reading subsection (a) in conjunction with G.S. 50-13.2(b1), 50-13.5(j), and 50-13.2A strongly suggests that the legislature did not intend "custody" and "visitation" to be interpreted as synonymous in the context of grandparents' rights. The three special statutes provide grandparents with the right to seek "visitation" only in certain clearly specified situations. Those situations do not include that of initiating suit against parents whose family is intact and where no custody proceeding is ongoing. McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995).

Section 50-13.1(a) does not grant plaintiffs the right to sue for visitation when no custody proceeding is ongoing and the minor children's family is intact. McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995).

Grandparents do not have standing pursuant to subsection (a) to seek visitation with their grandchildren when the natural parents have legal custody of their children and are living with them as an intact family. Fisher v. Fisher, 124 N.C. App. 442, 477 S.E.2d 251 (1996).

Section 50-13.5(j) makes it clear that grandparents have the right to file suit for custody or visitation during an ongoing proceeding, but it does not restrict their right to bring an initial custody suit pursuant to this section when there are allegations that the parent is unfit. Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996).

Subsection (a) grants grandparents the right to bring an initial suit for custody when there are allegations that the child's parents are unfit. Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996).

This statute is available for grandparents who seek visitation rights in two situations: (1) when the parents are unfit, have abandoned or neglected the child or have died; or (2) when by separation or divorce, custody is at issue between the parents; therefore, the statute was unavailable to a biological grandmother whose grandchildren had been adopted by their biological aunt. Hill v. Newman, 131 N.C. App. 793, 509 S.E.2d 226 (1998).

G.S. 50-13.1(a) did not provide a grandparent a right to sue for visitation with the children of the grandparent's deceased child, since the custody proceedings between the child and the children's surviving parent were terminated upon the child's death and the grandparent made no showing that the surviving parent was unfit. McDuffie v. Mitchell, 155 N.C. App. 587, 573 S.E.2d 606, 2002 N.C. App. LEXIS 1580 (2002), cert. denied, 357 N.C. 165, 580 S.E.2d 368 (2003).

Grandparent Had No Rights to Proceed. — There are four statutes in North Carolina which permit a grandparent to maintain an action for custody or visitation of a minor child, and although plaintiff, mother of the deceased father of the two minor children, did not specify under which statute she filed, it was clear that she had no right to proceed under this section, or 50-13.2(b1), 50-13.2A, or 50-13.5(j). Shaut v. Cannon, 136 N.C. App. 834, 526 S.E.2d 214, 2000 N.C. App. LEXIS 158 (2000).

Disatisfaction with defendant mother's husband, their standard of living, and the couple's residence did not provide plaintiff grandmother and her husband with an adequate claim upon which court could justify removal of grandchild from mother's custody; plaintiff must allege facts which would support a finding that the defendant engaged in conduct inconsistent with her parental responsibility and/or constitutionally protected status. Penland v. Harris, 135 N.C. App. 359, 520 S.E.2d 105 (1999).

Grandparents, whose son was living separate and apart from his wife and children when he died in a highway accident, could not seek visitation with their grandchildren under this section because the children and their widowed mother constituted an "intact family." Montgomery v. Montgomery, 136 N.C. App. 435, 524 S.E.2d 360, 2000 N.C. App. LEXIS 19 (2000).

The plaintiff/grandmother had no standing to seek visitation with her grandchildren under this section where the grandchildren, whose mother died in an automobile accident, and their father were an "intact family." Price v. Breedlove, 138 N.C. App. 149, 530 S.E.2d 559, 2000 N.C. App. LEXIS 543 (2000).

When grandparents initiate custody lawsuits under G.S. 50-13.1(a), those grandparents are not required to prove the grandchild is not living in an intact family in order to gain custody, instead, the grandparent must show that the parent is unfit or has taken action inconsistent with her parental status in order to gain custody of the child; the requirement to show unfitness if a grandparent initiates a custody dispute is consistent with a parent's constitutionally protected right to the care, custody, and control of the child and protects the parent's right to control with whom his child associates on a daily basis. Eakett v. Eakett, 157 N.C. App. 550, 579 S.E.2d 486, 2003 N.C. App. LEXIS 729 (2003).

Intact family rule protects the parental right to determine with whom her children shall associate so a grandparent cannot initiate a lawsuit for visitation rights unless the child's family is already undergoing some strain on the family relationship, such as an adoption or an ongoing custody battle; accordingly, the grandparent's rights to the care, custody and control of the child are not constitutionally protected while the parent's rights are protected. Eakett v. Eakett, 157 N.C. App. 550, 579 S.E.2d 486, 2003 N.C. App. LEXIS 729 (2003).

Under G.S. 50-13.1(a), 50-13.2(b1), 50-13.2A, 50-13.5(j), a grandparent's right to visitation arises either in the context of an ongoing custody proceeding or where the minor child is in the custody of a stepparent or a relative—the "intact family" rule; in a case that does not involve adoption by a stepparent or other relative, a grandparent must prove that the child's family is not intact before the grandparent can intervene to request visitation with his grandchild—G.S. 50-13.1(a), 50-13.2(b1), 50-13.2A, 50-13.5(j) does not grant grandparents the right to sue for visitation when no custody proceeding is ongoing and the minor children's family is intact. Eakett v. Eakett, 157 N.C. App. 550, 579 S.E.2d 486, 2003 N.C. App. LEXIS 729 (2003).

As a grandmother failed to allege conduct sufficient to support a finding that the parents engaged in conduct inconsistent with their parental rights and responsibilities, she could not overcome the presumption that the parents had the superior right to the care, custody, and control of the child, and lacked standing to intervene. Perdue v. Fuqua, — N.C. App. —, 673 S.E.2d 145, 2009 N.C. App. LEXIS 210 (2009).

Excluding Grandfather's Evidence in Support of Custody Motion Was Error. — The trial court erred in refusing to allow appellant paternal grandfather to offer evidence on the question of the best interest of the minor child in support of his motion for custody. In re O'Neal, 140 N.C. App. 254, 535 S.E.2d 620, 2000 N.C. App. LEXIS 1115 (2000).

Award of Custody to Great Grandmother. — Termination of the aunt's parental rights and an award of permanent custody to the child's maternal great-grandmother was supported by substantial, competent evidence and affirmed, even though they had a pending ch. 50 custody action, where evidence at the G.S. 7B-907 hearing indicated that the child's aunt, who had been awarded temporary custody, failed to: (1) comply with court orders, including drug testing; (2) make reasonable and timely progress towards permanency, including providing suitable living conditions; (3) prove that it was possible for the child to return to her home within six months; and (4) prove it was in the child's best interests to live with her. In re C.E.L., 171 N.C. App. 468, 615 S.E.2d 427, 2005 N.C. App. LEXIS 1361 (2005).

Trial court properly applied G.S. 50-13.2's "best interests of the child" standard in awarding joint custody to a child's biological mother and her former domestic partner. The partner had standing to seek custody as an "other person" under G.S. 50-13.1(a), and there was clear and convincing evidence that the partner and the child established a significant bond. Mason v. Dwinnell, 190 N.C. App. 209, 660 S.E.2d 58, 2008 N.C. App. LEXIS 908 (2008).

Nonretroactivity. — Sections 50-13.1 through 50-13.8, relating to the custody and support of minor children, do not apply to litigation pending on October 1, 1967, the effective date of the statutes. Speck v. Speck, 5 N.C. App. 296, 168 S.E.2d 672 (1969).

This and the following sections do not apply retroactively. Hopkins v. Hopkins, 8 N.C. App. 162, 174 S.E.2d 103 (1970).

Jurisdiction, Generally. — Where there is no question raised about the court having jurisdiction over a child, the matter of his custody is left open and this section applies. Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

Continuing Nature of Jurisdiction. — The court in which a divorce action is brought acquires jurisdiction over the custody of the unemancipated children of the marriage, and such jurisdiction continues even after the divorce becomes final. Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974).

Portion of Order Retaining Jurisdiction Interlocutory. — Trial court's order retaining jurisdiction to determine custody is not a final determination of issue involved; rather it determines where children's custody issue will be heard, which is preliminary to a final decree. The portion of the order retaining jurisdiction is interlocutory in nature. No substantial right of the defendant is affected which cannot be protected by the timely appeal from the trial court's ultimate disposition of the entire controversy on the merits. Walleshauser v. Walleshauser, 100 N.C. App. 594, 397 S.E.2d 371 (1990).

District court had no right to assume custody jurisdiction of minor children upon its finding that they were "neglected" children, to the exclusion of the district court which had previously acquired such custody jurisdiction in a divorce and custody proceeding involving the children's parents. In re Greer, 26 N.C. App. 106, 215 S.E.2d 404, cert. denied, 287 N.C. 664, 216 S.E.2d 910 (1975).

Meaning of Word "Parents". — The word "parents" in former G.S. 50-13 and G.S. 49-1 and the word "parent" in G.S. 49-2 relate to the rights and duties of parents in respect to their children, and are in pari materia. Dellinger v. Bollinger, 242 N.C. 696, 89 S.E.2d 592 (1955).

Family Units. — Unmarried parents living with their children have been accorded recognition as family units. Fisher v. Fisher, 124 N.C. App. 442, 477 S.E.2d 251 (1996).

A single parent living with his or her child is an intact family. Fisher v. Fisher, 124 N.C. App. 442, 477 S.E.2d 251 (1996).

"Minor Child" Under Prior Law. — Before the enactment of Chapter 48A, it was evident that the meaning of "minor child" within the purview of G.S. 50-13.1, et seq., contemplated the common-law age of majority, 21. Crouch v. Crouch, 14 N.C. App. 49, 187 S.E.2d 348, cert. denied, 281 N.C. 314, 188 S.E.2d 897 (1972).

Nothing in this section limits custody proceedings to the parent of a legitimate child. Conley v. Johnson, 24 N.C. App. 122, 210 S.E.2d 88 (1974).

Civil Action to Obtain Custody of Illegitimate Child. — Under the 1949 amendment to former G.S. 50-13, either parent could institute a special proceeding to obtain custody of his or her child in cases not theretofore provided for by former G.S. 17-39, and this amendment authorized such proceeding by the mother of an illegitimate child to obtain its custody from her aunt, with whom she had entrusted the child, and thus restricted the jurisdiction of the juvenile court in such instances. In re Cranford, 231 N.C. 91, 56 S.E.2d 35 (1949). See also, Dellinger v. Bollinger, 242 N.C. 696, 89 S.E.2d 592 (1955).

The putative father of an illegitimate child, even though his right to custody is not primary, has such an interest in the welfare of his child that he can bring a proceeding against the mother for its custody. Jolly v. Queen, 264 N.C. 711, 142 S.E.2d 592 (1965), decided under former § 50-13.

Claim for Custody Held Not Frivolous. — Where there was no indication at trial that the grandparents in fact did not wish to obtain custody of the children or that their claim was made in bad faith, the fact that the grandparents had originally asked for visitation did not make their later claim for custody violative of G.S. 1A-1, Rule 11. Kerns v. Southern, 100 N.C. App. 664, 397 S.E.2d 651 (1990).

Trial Court Erred in Failing to Honor the Order Requiring the Parties to Mediate Child Custody and Visitation. — Trial court erred in failing to honor the order requiring the parties to mediate child custody and visitation issues and in prematurely deciding those issues without allowing the parties to attempt an amicable compromise beneficial to them and the minor child; nothing in the record indicated contemplation of or compliance with G.S. 50-13.1, and the record was devoid of the materials and motions expressly required for compliance with the local rules established pursuant to G.S. 50-13.1 for the regulation of mediation of custody and visitation. Chillari v. Chillari, 159 N.C. App. 670, 583 S.E.2d 367, 2003 N.C. App. LEXIS 1515 (2003).

Where grandmother was a good housekeeper and showed the ability to care for the children the trial court erred in denying and dismissing grandmother's petition for custody on the basis of its "serious concerns" about her parenting skills because of problems experienced by her daughter. Smith v. Alleghany County Dep't of Social Servs., 114 N.C. App. 727, 443 S.E.2d 101, cert. denied, 337 N.C. 696, 448 S.E.2d 533 (1994).

Relocation to Another State Held Proper. — Mother was properly permitted to relocate with the parties' three children to Minnesota under G.S. 50-13.1 as: (1) neither the father nor the mother had a support system in North Carolina; (2) the maternal grandmother could assist in supporting the children if the mother and the children moved back to Minnesota; (3) the mother had a job lined up in Minnesota; (4) the advantages of relocation to the children outweighed the disadvantages, and relocation was in the children's best interests; and (5) the father's visitation rights had to be subordinated to the children's best interests. O'Connor v. Zelinske, — N.C. App. —, 668 S.E.2d 615, 2008 N.C. App. LEXIS 2014 (2008).

As to effect of foreign adjudication of paternity, see Brondum v. Cox, 292 N.C. 192, 232 S.E.2d 687 (1977).

Applied in Mauney v. Mauney, 12 N.C. App. 269, 182 S.E.2d 861 (1971); In re Branch, 16 N.C. App. 413, 192 S.E.2d 43 (1972); In re Shue, 311 N.C. 586, 319 S.E.2d 567 (1984); McRoy v. Hodges, 160 N.C. App. 381, 585 S.E.2d 441, 2003 N.C. App. LEXIS 1790 (2003); Smith v. Barbour, — N.C. App. —, 671 S.E.2d 578, 2009 N.C. App. LEXIS 109 (2009).

Cited in Blake v. Blake, 6 N.C. App. 410, 170 S.E.2d 87 (1969); Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973); Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975); Acker v.

Barnes, 33 N.C. App. 750, 236 S.E.2d 715 (1977); Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640 (1979); Neal v. Neal, 69 N.C. App. 766, 318 S.E.2d 255 (1984); Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986); In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988); In re Duncan, 112 N.C. App. 196, 435 S.E.2d 121 (1993); Regan v. Smith, 131 N.C. App. 851, 509 S.E.2d 452 (1998); West v. Marko, 141 N.C. App. 688, 541 S.E.2d 226, 2001 N.C. App. LEXIS 15 (2001); David v. Ferguson, 153 N.C. App. 482, 571 S.E.2d 230, 2002 N.C. App. LEXIS 1176 (2002); Mohr v. Mohr, 155 N.C. App. 421, 573 S.E.2d 729, 2002 N.C. App. LEXIS 1590 (2002); Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41, 2003 N.C. LEXIS 605 (2003); Chillari v. Chillari, 159 N.C. App. 670, 583 S.E.2d 367, 2003 N.C. App. LEXIS 1515 (2003); Gorsuch v. Dees, 173 N.C. App. 223, 618 S.E.2d 747, 2005 N.C. App. LEXIS 1914 (2005).

§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.

(a) An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child. Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. Joint custody to the parents shall be considered upon the request of either parent.

(b) An order for custody of a minor child may grant joint custody to the parents, exclusive custody to one person, agency, organization, or institution, or grant custody to two or more persons, agencies, organizations, or institutions. Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child. If the court finds that domestic violence has occurred, the court shall enter such orders that best protect the children and party who were the victims of domestic violence, in accordance with the provisions of G.S. 50B-3(a1)(1), (2), and (3). If a party is absent or relocates with or without the children because of an act of domestic violence, the absence or relocation shall not be a factor that weighs against the party in determining custody or visitation. Absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child.

(b1) An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.

(c) An order for custody of a minor child may provide for such child to be taken outside of the State, but if the order contemplates the return of the child to this State, the judge may require the person, agency, organization or institution having custody out of this State to give bond or other security conditioned upon the return of the child to this State in accordance with the order of the court.

(d) If, within a reasonable time, one parent fails to consent to adoption pursuant to Chapter 48 of the General Statutes or parental rights have not been terminated, the consent of the other consenting parent shall not be effective in an action for custody of the child.

(e) An order for custody of a minor child may provide for visitation rights by electronic communication. In granting visitation by electronic communication, the court shall consider the following:

(1) Whether electronic communication is in the best interest of the minor child.
(2) Whether equipment to communicate by electronic means is available, accessible, and affordable to the parents of the minor child.
(3) Any other factor the court deems appropriate in determining whether to grant visitation by electronic communication.

The court may set guidelines for electronic communication, including the hours in which the communication may be made, the allocation of costs between the parents in implementing electronic communication with the child, and the furnishing of access information between parents necessary to facilitate electronic communication. Electronic communication with a minor child may be used to supplement visitation with the child. Electronic communication may not be used as a replacement or substitution for custody or visitation. The amount of time electronic communication is used shall not be a factor in calculating child support or be used to justify or support relocation by the custodial parent out of the immediate area or the State. Electronic communication between the minor child and the parent may be subject to supervision as ordered by the court. As used in this subsection, 'electronic communication' means contact, other than face-to-face contact, facilitated by electronic means, such as by telephone, electronic mail, instant messaging, video teleconferencing, wired or wireless technologies by Internet, or other medium of communication. (1957, c. 545; 1967, c. 1153, s. 2; 1977, c. 501, s. 2; 1979, c. 967; 1981, c. 735, ss. 1, 2; 1985, c. 575, s. 3; 1987, c. 541, s. 2; c. 776; 1995 (Reg. Sess., 1996), c. 591, s. 5; 2004-186, s. 17.1; 2009-314, s. 1.)

Cross References. — As to procedure, etc., in actions for custody and support, see G.S. 50-13.5 and notes thereunder. As to written findings or denial of visitation rights to parent, see G.S. 50-13.5(i). As to custody and visitation rights of grandparents, see G.S. 50-13.5(j). As to the maintenance of certain actions as independent actions, see G.S. 50-19.

Effect of Amendments. — Session Laws 2009-314, s. 1, effective July 17, 2009, added subsection (e).

Legal Periodicals. — For article, "Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents," see 1976 Duke L.J. 911.

For article, "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

For survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article on rights and interest of parent, child, family and state, see 4 Campbell L. Rev. 85 (1981).

For article, "Custody of the Illegitimate Child," see 18 N.C. Cent. L.J. 18 (1989).

For article, "The Parental Rights of Unwed Fathers: A Developmental Perspective," see 20 N.C. Cent. L.J. 45 (1992).

For note, "Balancing the Welfare of Children with the Rights of Parents: Peterson v. Rogers and the Role of Religion in Custody Disputes", see 73 N.C.L. Rev. 1271 (1995).

For survey, "Why the Best Interests Standard Should Survive Petersen v. Rogers," see 73 N.C.L. Rev. 2451 (1995).

For note, "The Effect on the Child of a Custodial Parent's Involvement in an Intimate Same-Sex Relationship," see 10 Campbell L. Rev. 131 (1996).

For casenote: "The Established Standard for Fathers Who Have Acknowledged Paternity and Who Are Seeking Custody of Their Illegitimate Child(ren): Rosero v. Blake, 357 N.C. 193 (2003)," see 26 N.C. Cent. L.J. 116 (2003).

CASE NOTES

I. In General.
II. Welfare of Child.
III. Right of Parents to Custody.
  A. As Against Third Persons.

B. As Between Parents.
IV. Visitation Rights.
V. Wishes of Child.
VI. Discretion of Trial Court.
VII. Findings of Fact.
VIII. Effect of Verdicts, Separation Agreements and Consent Judgments.

I. IN GENERAL.

Editor's Note. *— Some of the cases cited below were decided under former G.S. 50-13, which prior to its repeal in 1967 dealt with custody and maintenance of children in actions for divorce.*

Visitation and child support rights are independent rights accruing primarily to the benefit of the minor child and one is not, and may not be made, contingent upon the other. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

Jurisdiction. — When a divorce action is instituted, the court acquires jurisdiction over the children born to the marriage, and may hear and determine questions as to the custody and maintenance of the children both before and after final decree of divorce. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

Custody Proceedings Are Continuing. — There is no requirement that each successive custody hearing starts with a "clean slate" and that the court cannot rely on the record previously generated. To the contrary, custody proceedings generally are continuing in nature. Best v. Best, 81 N.C. App. 337, 344 S.E.2d 363 (1986), overruled on other grounds, Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994).

A judgment awarding custody is based upon the conditions found to exist at the time it is entered. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

Simultaneous Adoption and Custody Actions. — Because the legislature has enunciated a public policy that every child should have a permanent plan of care, because adoption is more likely than a custody proceeding between non-parents to result in a permanent plan of care and because the superior court has jurisdiction over adoptions, that court's jurisdiction supersedes that of the district court with regard to the custody of a child the subject of a simultaneous adoption and custody proceeding. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

In the absence of an order of consolidation when the same child is the subject of a simultaneous custody and adoption proceeding, both the superior and district courts do not have continuing jurisdiction to fully adjudicate the respective issues before them. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

The filing of an adoption petition in the superior court divests the district court of jurisdiction to adjudicate issues of custody with regard to a child who is the subject of an adoption petition. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

Upon the entry of an interlocutory order of adoption by the superior court, the jurisdiction of the district court with regard to the custody of the child who is the subject of the interlocutory order is in abeyance until such time as the interlocutory decree is vacated, the adoption petition is dismissed, or a final decree of adoption is entered. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

Recommendation of Guardian Ad Litem. — Pursuant to G.S. 7A-640 [see now G.S. 7B-901 and G.S. 7B-2501], the court may consider the recommendation of a guardian ad litem concerning the needs of a juvenile. In re Gwaltney, 68 N.C. App. 686, 315 S.E.2d 750 (1984).

Mother Not Entitled to Proceeds of Forfeited Bond. — A bond posted by father in custody dispute was deemed to be an appearance bond designed to guarantee his appearance before the court and as a penalty in the event of his failure to appear, and under N.C. Const., Art. IX, § 7 the county board of education was entitled to the clear proceeds of its forfeiture. Mussallam v. Mussallam, 321 N.C. 504, 364 S.E.2d 364, rehearing denied, 321 N.C. 116, 367 S.E.2d 915 (1988).

Provisions in Custody Orders. — Provisions directing the parties to cooperate with one another and to refrain from conduct that will be detrimental to the child are commonly included in custody orders. Watkins v. Watkins, 120 N.C. App. 475, 462 S.E.2d 687 (1995), appeal dismissed, 343 N.C. 128, 468 S.E.2d 795 (1996).

Rights of Parents to Childrens' Records. — Trial court properly ordered that a mother share a child's school and medical records with the father, as G.S. 50-13.2(b) provided that each parent have equal access to the records of the minor child involving the health, education, and welfare of the child. Young v. Young, 169 N.C. App. 31, 609 S.E.2d 795, 2005 N.C. App. LEXIS 539 (2005).

Collateral estoppel effect of findings in domestic violence protective order entered under G.S. 50B-1(a), finding that the mother was responsible for the incident, collaterally estopped the finding in the custody case that the father was responsible for the incident; when the protective order was not appealed the collateral legal consequences of that order became final, precluding reconsideration of the order in the custody action under G.S. 50-13.2. Doyle v. Doyle, 176 N.C. App. 547, 626 S.E.2d 845, 2006 N.C. App. LEXIS 517 (2006).

Trial court erred in a custody case in finding that the father had committed domestic violence because, in a prior domestic violence case, the court specifically found that the father had not committed domestic violence; G.S. 50-13.2(a) required the court in a custody case to consider domestic violence, but collateral estoppel prevented the court in the custody case from making findings which were contrary to the findings in the prior domestic violence action. Simms v. Simms, — N.C. App. —, 673 S.E.2d 753, 2009 N.C. App. LEXIS 249 (2009).

Applied in State v. Wrenn, 16 N.C. App. 411, 191 S.E.2d 913 (1972); Powell v. Powell, 25 N.C. App. 695, 214 S.E.2d 808 (1975); Stanback v. Stanback, 31 N.C. App. 174, 229 S.E.2d 693 (1976); Hamlin v. Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981); Regan v. Smith, 131 N.C. App. 851, 509 S.E.2d 452 (1998); McDuffie v. Mitchell, 155 N.C. App. 587, 573 S.E.2d 606, 2002 N.C. App. LEXIS 1580 (2002); In re T.H.T., 185 N.C. App. 337, 648 S.E.2d 519, 2007 N.C. App. LEXIS 1812 (2007).

Cited in Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983); Prescott v. Prescott, 83 N.C. App. 254, 350 S.E.2d 116 (1986); Mussallam v. Mussallam, 321 N.C. 504, 364 S.E.2d 364 (1988); Ray v. Ray, 103 N.C. App. 790, 407 S.E.2d 592 (1991); Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993); In re Duncan, 112 N.C. App. 196, 435 S.E.2d 121 (1993); Westneat v. Westneat, 113 N.C. App. 247, 437 S.E.2d 899 (1994); Vann v. Vann, 128 N.C. App. 516, 495 S.E.2d 370 (1998); Penland v. Harris, 135 N.C. App. 359, 520 S.E.2d 105 (1999); Montgomery v. Montgomery, 136 N.C. App. 435, 524 S.E.2d 360, 2000 N.C. App. LEXIS 19 (2000); Mohr v. Mohr, 155 N.C. App. 421, 573 S.E.2d 729, 2002 N.C. App. LEXIS 1590 (2002); Senner v. Senner, 161 N.C. App. 78, 587 S.E.2d 675, 2003 N.C. App. LEXIS 1976 (2003); Faulkenberry v. Faulkenberry, 169 N.C. App. 428, 610 S.E.2d 237, 2005 N.C. App. LEXIS 688 (2005); Perdue v. Fuqua, — N.C. App. —, 673 S.E.2d 145, 2009 N.C. App. LEXIS 210 (2009).

II. WELFARE OF CHILD.

The welfare of the child is the paramount consideration in custody matters. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966); Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967); Williams v. Williams, 18 N.C. App. 635, 197 S.E.2d 629 (1973); Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974); Harrington v. Harrington, 286 N.C. 260, 210 S.E.2d 190 (1974); Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

The best interest and welfare of the child is the paramount consideration in determining the visitation rights, as well as in determining the right to custody, and neither of these rights should be permitted to jeopardize the best interest and welfare of the child. In re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

Although at one time under the common law the father was generally entitled to the custody of minor children, the courts at the present time almost invariably adhere to the principle that the welfare or best interest of the child is the paramount consideration. This was the rule adhered to by North Carolina courts for many years, and is now prescribed by this section. Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

The child's welfare is the principal consideration in determining custody matters. In re Morrison, 6 N.C. App. 47, 169 S.E.2d 228 (1969).

The primary consideration in custody cases is the welfare of the child or children involved. Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969).

An order for custody of a minor child cannot be affirmed without a clear indication that it rested on a determination of what would be in the child's best interest. That is the paramount consideration in custody cases. In re DiMatteo, 62 N.C. App. 571, 303 S.E.2d 84 (1983).

And the Polar Star by Which Court Is Guided. — The welfare of the child is the polar star by which the discretion of the court is to be guided. In re Lewis, 88 N.C. 31 (1883); Brake v. Brake, 228 N.C. 609, 46 S.E.2d 643 (1948); Finley v. Sapp, 238 N.C. 114, 76 S.E.2d 350 (1953); Thomas v. Thomas, 259 N.C. 461, 130 S.E.2d 871 (1963); Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966); Chriscoe v. Chriscoe, 268 N.C. 554, 151 S.E.2d 33 (1966); In re Pitts, 2 N.C. App. 211, 162 S.E.2d 524 (1968); Greer v. Greer, 5 N.C. App. 160, 167 S.E.2d 782 (1969); In re Moore, 8 N.C. App. 251, 174 S.E.2d 135 (1970); Jarman v. Jarman, 14 N.C. App. 531, 188 S.E.2d 647, cert. denied, 281 N.C. 622, 190 S.E.2d 465 (1972); In re Cox, 17 N.C. App. 687, 195 S.E.2d 132, cert. denied, 283 N.C. 585, 196 S.E.2d 809 (1973); Paschall v. Paschall, 21 N.C. App. 120, 203 S.E.2d 337 (1974); Mathews v. Mathews, 24 N.C. App. 551, 211 S.E.2d 513 (1975); Pruneau v. Sanders, 25 N.C. App. 510, 214 S.E.2d 288, cert. denied, 287 N.C. 664, 216 S.E.2d 911 (1975); Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

The welfare of the child is controlling in determining the right to custody of the child as between its divorced parents. Hardee v. Mitchell, 230 N.C. 40, 51 S.E.2d 884 (1949).

This section expresses the policy of the State that the best interest and welfare of the child is the paramount and controlling factor to guide the judge in determining the custody of a child.

In re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

As the Determining Factor. — The children of the marriage become the wards of the court, and their welfare is the determining factor in custody proceedings. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965); Greer v. Greer, 5 N.C. App. 160, 167 S.E.2d 782 (1969).

The welfare of the children is the determining factor in custody proceedings, and an award of custody based on that factor will be upheld when supported by competent evidence. In re Poole, 8 N.C. App. 25, 173 S.E.2d 545 (1970).

And the Guiding Principle. — The guiding principle to be used by the court in a custody hearing is the welfare of the children involved. While this guiding principle is clear, decision in particular cases is often difficult, and necessarily a wide discretion is vested in the trial judge. He has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion. Greer v. Greer, 5 N.C. App. 160, 167 S.E.2d 782 (1969); Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971); Falls v. Falls, 52 N.C. App. 203, 278 S.E.2d 546, cert. denied, 304 N.C. 390, 285 S.E.2d 831 (1981).

The trial court should primarily be concerned with the welfare of the child in deciding which party before it should be charged with the enormous responsibilities of custodianship of the child. In re Kowalzek, 37 N.C. App. 364, 246 S.E.2d 45, cert. denied, 295 N.C. 734, 248 S.E.2d 863 (1978).

In a custody proceeding, it is not the function of the court to punish or reward a parent by withholding or awarding custody of minor children; the function of the court in such a proceeding is to diligently seek to act for the best interests and welfare of the minor child. In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969).

The best interest of the child is the overriding factor in custody determinations. Wilson v. Williams, 42 N.C. App. 348, 256 S.E.2d 516 (1979).

Joint custody and any other custody award must include findings of fact which support such determination of child's best interests. Witherow v. Witherow, 99 N.C. App. 61, 392 S.E.2d 627 (1990).

Considered in Light of All Surrounding Circumstances. — The best interest of the child, in light of all the surrounding circumstances, is the paramount consideration which must guide the court in awarding custody of a minor child. Campbell v. Campbell, 63 N.C. App. 113, 304 S.E.2d 262, cert. denied, 309 N.C. 460, 307 S.E.2d 362 (1983).

Tender Years Presumption Abolished. — Trial court erred in entering a custody order concerning the parties' child; the trial court improperly relied on the tender years presumption in granting custody to the mother, as that presumption had been abolished, and G.S. 50-13.2(a) required that the custody decision be based solely on the best interests of the child, and G.S. 8C-1, Rule 201(b) did not allow the trial court to take judicial notice of the assumptions underlying an abolished doctrine in order to resurrect the doctrine. Greer v. Greer, 175 N.C. App. 464, 624 S.E.2d 423, 2006 N.C. App. LEXIS 183 (2006).

The trial judge is entrusted by this section with the delicate and difficult task of choosing an environment which will, in his judgment, best encourage full development of the child's physical, mental, emotional, moral and spiritual faculties. In re Peal, 305 N.C. 640, 290 S.E.2d 664 (1982).

Any evidence of child abuse is of the utmost concern in determining whether the grant of custody to a particular party will best promote the interest and welfare of the child, and any evidence of such abuse must be resolved by the trial court in its findings of fact. Dixon v. Dixon, 67 N.C. App. 73, 312 S.E.2d 669 (1984).

Evidence of paternity may properly be considered in determining the best interests of the children. Surles v. Surles, 113 N.C. App. 32, 437 S.E.2d 661 (1993).

A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997).

Acts of Domestic Violence Between Parties. — Trial court's best interests of the children determination under G.S. 50-13.2(a) was supported by its findings of fact, including its finding that the father had "body slammed" the mother 20 to 50 times during the marriage, and threatened to punch his brother-in-law in the nose. Hall v. Hall, 188 N.C. App. 527, 655 S.E.2d 901, 2008 N.C. App. LEXIS 202 (2008).

III. RIGHT OF PARENTS TO CUSTODY.

A. As Against Third Persons.

Due Process. — If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause. Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997).

Conduct inconsistent with a parent's protected status, which need not rise to the statutory level warranting termination of parental rights, would result in application of the "best interest of the child" test without offending the Due Process Clause. Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997).

Child's biological mother voluntarily relinquished her paramount parental right to make decisions under the due process clause when she entered into a parenting agreement with her former domestic partner to hold herself, the partner, and the child out as a family unit. The voluntary relinquishment of rights was inconsistent with her paramount rights under the due process clause. Mason v. Dwinnell, 190 N.C. App. 209, 660 S.E.2d 58, 2008 N.C. App. LEXIS 908 (2008).

Parents Have Legal Right to Custody of Their Children. — Parents, including the mother of an illegitimate child, have the legal right to have the custody of their children unless clear and cogent reasons exist for denying them this right. This right is not absolute, and it may be interfered with or denied, but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interest and welfare of the children clearly require it. In re Jones, 14 N.C. App. 334, 188 S.E.2d 580 (1972).

Where one parent is dead, the surviving parent has a natural and legal right to the custody and control of the parties' minor children. This right is not absolute, and it may be interfered with or denied, but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it. In re Griffin, 6 N.C. App. 375, 170 S.E.2d 84 (1969); In re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971); Vaughn v. Tyson, 14 N.C. App. 548, 188 S.E.2d 614 (1972).

Where mother abandons any claim she may have to the custody of her daughter, father alone has the natural and legal right to the custody of the child, unless for substantial and sufficient reasons the interest and welfare of the child require that he be denied that right. Roberts v. Short, 6 N.C. App. 419, 169 S.E.2d 910 (1969).

The mother of an illegitimate child is its natural guardian, and as such, has a legal right to its custody, care and control, if she is a suitable person, even though others may offer more material advantages in life for the child. But this rule is not absolute, and the custody of an illegitimate child may be taken from the mother and placed elsewhere when it clearly and manifestly appears that the best interests and welfare of the child demand it. Wall v. Hardee, 240 N.C. 465, 82 S.E.2d 370 (1954).

Absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail. Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994).

Which Will Be Interfered with Only When Clearly Required. — Where one parent is dead, the surviving parent has a natural and legal right to custody and control of the parties' minor children. This right is not absolute, but it may be interfered with or denied only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it. Comer v. Comer, 61 N.C. App. 324, 300 S.E.2d 457 (1983).

For Parent's Misconduct or Child's Welfare. — The law presumes that the best interests of a child will be served by committing it to the custody of a parent, when the parent is a suitable person; this presumption is not overcome merely by showing that some third person can give the child better care and greater comforts and protection than the parent. A parent's right to custody of a child may be forfeited only by misconduct or by other facts which substantially affect the child's welfare. In re Jones, 14 N.C. App. 334, 188 S.E.2d 580 (1972).

But Child's Welfare Is the Paramount Consideration. — While the law presumes that the best interest of a child will be served by committing it to the custody of a parent, when the parent is a suitable person, the welfare of the child is the paramount consideration to which all other factors, including common-law preferential rights of the parents, must be deferred or subordinated. Plemmons v. Stiles, 65 N.C. App. 341, 309 S.E.2d 504 (1983).

And Parent's Love Must Yield to Child's Best Interests. — The child's welfare is the paramount consideration, and a parent's love must yield to another if, after judicial investigation, it is found that the best interest of the child is subserved thereby. Greer v. Greer, 5 N.C. App. 160, 167 S.E.2d 782 (1969).

The "paramount consideration" and "polar star" which have long governed and guided the discretion of the trial judges are the welfare and needs of the child, not the persons seeking his or her custody, and even parental love must yield to the promotion of those higher interests. In re Peal, 305 N.C. 640, 290 S.E.2d 664 (1982).

The natural parent is presumed to be the appropriate custodian of his or her child, as opposed to third persons, and should not be deprived of custody merely because the child could be better cared for in a material sense. In re Kowalzek, 37 N.C. App. 364, 246 S.E.2d 45, cert. denied, 295 N.C. 734, 248 S.E.2d 863 (1978).

But This Presumption May Be Rebutted. — While it is presumed that it is in the child's best interest to be placed with a natural parent, this presumption may be rebutted by a circumstance which would substantially affect the child. Wilson v. Williams, 42 N.C. App. 348, 256 S.E.2d 516 (1979).

The primary concern of the trial court in a custody matter, as mandated by subsection (a) of this section, is the welfare of the child, and this concern outweighs the presumption favoring the award of custody to a natural parent. In re Gwaltney, 68 N.C. App. 686, 315 S.E.2d 750 (1984).

The presumption in favor of the natural parents is rebuttable. Best v. Best, 81 N.C. App. 337, 344 S.E.2d 363 (1986), overruled on other grounds, Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994).

Although there is a rebuttable presumption in favor of a natural parent, it is not necessary to prove unfitness in order to overcome the presumption. Black v. Glawson, 114 N.C. App. 442, 442 S.E.2d 79 (1994).

A court must award custody based only upon the best interest and welfare of the child. A court must have discretion to determine the best interest of a child, and should not be restricted to awarding custody to a natural parent in the absence of a finding of unfitness. Black v. Glawson, 114 N.C. App. 442, 442 S.E.2d 79 (1994).

It is not necessary to prove a natural parent unfit in order to award custody to a third party. Black v. Glawson, 114 N.C. App. 442, 442 S.E.2d 79 (1994).

Custody May Be Granted to Third Person for Sufficient Reasons. — The welfare of the infants themselves is the polar star by which the courts are to be guided to a right conclusion, and therefore they may, within certain limits, exercise a sound discretion for the benefit of the child, and in some cases will order it into the custody of a third person for good and sufficient reasons. Roberts v. Short, 6 N.C. App. 419, 169 S.E.2d 910 (1969); Campbell v. Campbell, 63 N.C. App. 113, 304 S.E.2d 262, cert. denied, 309 N.C. 460, 307 S.E.2d 362 (1983); Phillips v. Choplin, 65 N.C. App. 506, 309 S.E.2d 716 (1983).

A child's former care giver stated a claim as against the child's father for custody of the child, where the father's former companion alleged that the father had taken actions inconsistent with his protected status as a parent, including that the father had placed the child in his parents' care and that they could not properly care for the child's diabetes, resulting in hospitalization and potentially serious and permanent health consequences, and that the father had relinquished care of the child to others, including herself, on numerous occasions. Ellison v. Ramos, 130 N.C. App. 389, 502 S.E.2d 891 (1998), appeal dismissed, 349 N.C. 356, 517 S.E.2d 891 (1998).

Fitness of Parent. — Mother's convictions for driving while intoxicated and child's developmental problems were significant and relevant to issue of mother's fitness as a parent because they indicated her inability to care for the child adequately and to provide for the child's welfare; additionally, the facts that she had substance abuse problems, did not respect authority, was unable to recognize her child's developmental problems, and was incapable of caring for the child's welfare supported the conclusion that she was an unfit parent. Raynor v. Odom, 124 N.C. App. 724, 478 S.E.2d 655 (1996).

The State failed to show that the father was unfit, as against the child's grandparents, to have custody of his child where he testified that if he were awarded custody of the child he would be willing to prohibit his brother, who was convicted for taking indecent liberties with a minor, from staying at his house and interacting with the child; where his own convictions were too remote to affect his fitness or were unrelated thereto; where he already had considerable experience in taking care of children; where his boss of 13 years and his volunteer supervisor, both described him as responsible, dependable, reliable and hardworking; and where he actively engaged in legal proceedings for approximately two years, evidencing a long-term commitment to attaining custody. Adams v. Tessener, 141 N.C. App. 64, 539 S.E.2d 324, 2000 N.C. App. LEXIS 1289 (2000).

Parent Need Not Be Found Unfit. — Although there is a traditional preference for biological parents, the welfare of the child is the paramount consideration to which all other factors, including common-law preferential rights of the parents must be deferred or subordinated, and the trial judge's discretion is such that he is not required to find a natural parent unfit for custody as a prerequisite to awarding custody to a third person. Comer v. Comer, 61 N.C. App. 324, 300 S.E.2d 457 (1983).

The trial judge is not required to find a natural parent unfit for custody as a prerequisite to awarding custody to a third person. In re Kowalzek, 37 N.C. App. 364, 246 S.E.2d 45, cert. denied, 295 N.C. 734, 248 S.E.2d 863 (1978); Plemmons v. Stiles, 65 N.C. App. 341, 309 S.E.2d 504 (1983); In re Gwaltney, 68 N.C. App. 686, 315 S.E.2d 750 (1984).

While the fitness of a natural parent is of paramount significance in determining the best interests of the child in custody contests, it is not always determinative in itself. It is entirely possible that a natural parent may be a fit and proper person to care for the child, but that all other circumstances dictate that the best interests of the child would be served by placing custody in a third party. In re Kowalzek, 37 N.C. App. 364, 246 S.E.2d 45, cert. denied, 295 N.C. 734, 248 S.E.2d 863 (1978).

Fitness and Actions of Parent in Relationship with Domestic Partner Relevant. — While a district court could have concluded that the fitness of a child's biological mother warranted that she have sole custody, the district court was not required to do so where evidence indicated that the mother had voluntarily relinquished her due process rights to solely make decisions in the child's life, intended that her former domestic partner become a de facto parent, and the partner had established a significant bond with the child. Mason v. Dwinnell, 190 N.C. App. 209, 660 S.E.2d 58, 2008 N.C. App. LEXIS 908 (2008).

Temporary Relinquishment of Custody. — There are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody; however, to preserve the constitutional protection of parental interests in such a situation, the parent should notify the custodian upon relinquishment of custody that it is temporary and avoid conduct inconsistent with the protected parental interests. Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997).

In making custody decisions between a parent and a grandparent or other third party, the court must balance two doctrines. The first, the "parental right" doctrine, holds that ordinarily and in the absence of particular circumstances, the custody of a child should be given to the parent in preference to the grandparent, if the parent is found to be fit to have custody and can supply a proper home. The second doctrine, the "best interests of the child" doctrine, holds that custody should be awarded in accordance with the best interests of the child regardless of the fitness of the parents. Campbell v. Campbell, 63 N.C. App. 113, 304 S.E.2d 262, cert. denied, 309 N.C. 460, 307 S.E.2d 362 (1983).

To Whom Custody May Be Awarded. — If the mother and the father are both fit and proper persons to have custody of children, under ordinary circumstances the court would then proceed to determine whether the best interest, health and welfare of the children would be served by awarding custody to the mother or father. If not, then the court must deal with someone or an agency over whom the court has control. But an order awarding custody, in effect, to third persons who are not parties to the proceeding, not a public institution, and not bound by the court's order, must be reversed. Boone v. Boone, 8 N.C. App. 524, 174 S.E.2d 833 (1970).

Award of Custody to Grandparents. — Where the custody of a minor child was awarded to the mother in a divorce proceeding, and subsequently, both parents, who were deemed proper and fit persons to have the custody of such child, moved out of the State, and the child was left by the mother with the child's maternal grandparents, residents of the State and highly proper persons to rear the child, upon petition of the father for custody of the child the court had authority under this section to order that the child continue in the custody of the grandparents. Walker v. Walker, 224 N.C. 751, 32 S.E.2d 318 (1944).

Where grandmother was a good housekeeper and showed the ability to care for the children the trial court erred in denying and dismissing grandmother's petition for custody on the basis of its "serious concerns" about her parenting skills because of problems experienced by her daughter. Smith v. Alleghany County Dep't of Social Servs., 114 N.C. App. 727, 443 S.E.2d 101, cert. denied, 337 N.C. 696, 448 S.E.2d 533 (1994).

Where there are unusual circumstances and the best interests of the child justify such action, the court may refuse to award custody to either the mother or father and instead award the custody of the child to its grandparents or others. In re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

For case affirming order transferring custody to paternal grandmother and awarding visitation rights to both mother and father, see Best v. Best, 81 N.C. App. 337, 344 S.E.2d 363 (1986), overruled on other grounds, Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994).

Grandparents' Rights When Family Intact. — Under G.S. 50-13.1(a), 50-13.2(b1), 50-13.2A, 50-13.5(j), a grandparent's right to visitation arises either in the context of an ongoing custody proceeding or where the minor child is in the custody of a stepparent or a relative—the "intact family" rule; in a case that does not involve adoption by a stepparent or other relative, a grandparent must prove that the child's family is not intact before the grandparent can intervene to request visitation with his grandchild—G.S. 50-13.1(a), 50-13.2(b1), 50-13.2A, 50-13.5(j) does not grant grandparents the right to sue for visitation when no custody proceeding is ongoing and the minor children's family is intact. Eakett v. Eakett, 157 N.C. App. 550, 579 S.E.2d 486, 2003 N.C. App. LEXIS 729 (2003).

Socioeconomic status of paternal grandmother, who intervened in custody case, was irrelevant to issue of mother's fitness as a parent. Raynor v. Odom, 124 N.C. App. 724, 478 S.E.2d 655 (1996).

It is only when the custody of a child is "in issue" or "being litigated" that the grandparents are entitled to relief pursuant to subsection (b1). Fisher v. Fisher, 124 N.C. App. 442, 477 S.E.2d 251 (1996).

Domestic Partner Denied Custody, Parental Status, and Reinstatement of Visitation Schedule. — Trial court properly denied defendant's claims for joint custody, recognition of parental status, and reinstatement of the original visitation schedule because plaintiff, defendant's former domestic partner, did not engage in conduct inconsistent with plaintiff's constitutionally protected status as the legal parent and did not allow defendant to function as a parent. Estroff v. Chatterjee, 190 N.C. App. 61, 660 S.E.2d 73, 2008 N.C. App. LEXIS 905 (2008).

Award to Department of Social Services. — For case involving sexual abuse of daughters by father, in which children were adjudicated abused and neglected, and in which award of custody to the department of social services, with mother being given physical custody of one daughter and liberal visitation with the other daughter, who was placed with her grandmother, pending review in 60 days, was approved, see In re Gwaltney, 68 N.C. App. 686, 315 S.E.2d 750 (1984).

Foster Parents Have No Standing to Bring Custody Action. — Nothing in the language of G.S. 48-9.1(1) gives foster parents standing to contest the department's or agency's exercise of its rights as legal custodian; therefore, foster parents are without standing to bring an action seeking custody of minor child placed in their home by defendant. Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981); In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

But Custody May Be Awarded to Foster Parents. — Having acquired subject matter jurisdiction, trial court, guided by the best interests of the child, had broad dispositional powers, including the power to award legal custody of child to its foster parents. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

The case of Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981) does not prohibit the transfer of legal care, custody and control of a foster child to its foster parents. Oxendine stands for the proposition that foster parents have no standing to bring a custody action pursuant to G.S. 50-13.2 et seq. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Intervention by Foster Parents. — In proceeding brought by DSS in which custody was put in issue by guardian ad litem and natural father, trial court did not err in permitting child's foster parents to intervene. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986), distinguishing Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

It was improper for a trial court to apply a G.S. 50-13.2(a) best interest analysis to a domestic partner's application for joint custody without first determining that a natural parent's conduct was inconsistent with her constitutionally protected status as a parent. Heatzig v. MacLean, 191 N.C. App. 451, 664 S.E.2d 347, 2008 N.C. App. LEXIS 1480 (2008), review denied, appeal dismissed, 362 N.C. 681, 670 S.E.2d 564 (2008).

Claim for Custody Held Not Frivolous. — Where there was no indication at trial that the grandparents in fact did not wish to obtain custody of the children or that their claim was made in bad faith, the fact that the grandparents had originally asked for visitation did not make their later claim for custody violative of G.S. 1A-1, Rule 11. Kerns v. Southern, 100 N.C. App. 664, 397 S.E.2d 651 (1990).

Remand Where Custody Awarded to One Who Was Not a Party. — While the court, upon proper findings and conclusions, may award the custody of a minor child to any such person, agency or institution as will best promote the interest and welfare of the child, where the court awarded custody of the child to one who was not a party to the proceeding, the proceeding would be remanded with directions that the trial court issue the necessary notices and orders to make such individual a party to the action, to the end that the court would have effective jurisdiction over her person. In re Edwards, 25 N.C. App. 608, 214 S.E.2d 215 (1975).

Reversal of Award to Third Party. — Where in an initial custody determination, the trial court conducted the "best interest and welfare" analysis, and based solely on that analysis, awarded custody of the minor child to defendant (friend of mother who had cared for child since birth) rather than the plaintiff/father, the child's natural parent, the award of custody on this basis was error and must be reversed. Lambert v. Riddick, 120 N.C. App. 480, 462 S.E.2d 835 (1995).

B. As Between Parents.

Conviction of Abandonment Did Not Preclude Award of Custody. — The fact that father had been convicted of abandonment of his children and ordered to provide for their support did not preclude the court from finding, upon a hearing of a subsequent motion for the custody of the children in a divorce action, that father was a fit and suitable person to have custody of the children, when there was uncontradicted evidence upon the hearing that father had a good reputation in the community in which he lived. Thomas v. Thomas, 259 N.C. 461, 130 S.E.2d 871 (1963).

Effect of Prior Order of Incompetence. — In a controversy between husband and wife for custody of minor children of the marriage, it is error for the trial court to award custody to the husband on the sole ground that the wife has prior to that time been judged mentally incompetent. A prior court order which judicially declares a parent to be incompetent is not sufficient in and of itself to establish a parent's present unfitness to have a child or children;

rather, this section requires a full, factual determination of all the circumstances in the case before a proper order may be entered by the court. Price v. Price, 42 N.C. App. 66, 255 S.E.2d 652 (1979).

Relevance of Evidence of Adultery. — The court committed prejudicial error in refusing to allow plaintiff to introduce evidence of defendant's adultery at a hearing on a custody motion. While evidence of adultery does not impel a finding of unfitness of the adulterous parent, it is relevant upon an inquiry of fitness of a person for the purpose of awarding custody of minor children to him or to her. Darden v. Darden, 20 N.C. App. 433, 201 S.E.2d 538 (1974); Hunt v. Hunt, 29 N.C. App. 380, 224 S.E.2d 270 (1976). See also, In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969).

Joint Legal Custody Appropriate. — In addition to findings regarding parties' financial status and what would best serve interests of children, court had before it plaintiff's admission that she indeed thought defendant to be fit and proper person as stated in her verified reply to defendant's answer and counterclaim. Thus, joint legal custody was appropriate. Witherow v. Witherow, 99 N.C. App. 61, 392 S.E.2d 627 (1990).

Joint Legal Authority. — Trial court erred in dividing decision-making responsibilities between the parties after awarding joint legal custody because the trial court had not made the necessary findings of fact to warrant a division of joint legal authority; the trial court's mere findings that the parties had a tumultuous relationship did not satisfy the required findings. Hall v. Hall, 188 N.C. App. 527, 655 S.E.2d 901, 2008 N.C. App. LEXIS 202 (2008).

The fact that mother's paramour had been living with mother and minor child since the parties' separation was insufficient, standing alone, to determine custody; the court must consider all the facts of the case and decide the issue in the best interests of the child. Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

Award Where Both Parents Are Found Fit — Generally. — When there has been a finding that both parents are fit and suitable to have custody, the judge's order is conclusive when supported by evidence. Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969), overruled on other grounds, 55 N.C. App. 250, 285 S.E.2d 281 (1982).

Same — Award to Father. — When the court finds that both parties are fit and proper persons to have custody, and then adjudges that it is in the best interest of the child for the father to have custody, such holding will be upheld; but it must be supported by competent evidence. Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

When the court finds that both parties are fit and proper persons to have custody of the children involved, and then finds that it is in the best interests of the children for the father to have custody of said children, such holding will be upheld when it is supported by competent evidence. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966); Boone v. Boone, 8 N.C. App. 524, 174 S.E.2d 833 (1970).

Where the evidence was sufficient to support the court's finding that father was a suitable person to have custody of his son and that the best interests of the child would be served by awarding the child's custody to him, order awarding the custody to the father was proper, even though the evidence would also have supported a finding that the child's mother was a fit and suitable person and that the best interests of the child would be served by awarding custody to her. In re White, 262 N.C. 737, 138 S.E.2d 516 (1964).

Age of Parents. — All else being equal, a 55-year-old person has a shorter remaining life span than a 33-year-old person and the consideration of continuity and stability in the life of a child will logically lead a judge to consider the age of a parent. Consideration of all aspects of both parents' lives, including the potential for continuity and stability, is necessary to promote the governmental interest of granting custody on the best interests of the child. Phelps v. Phelps, 337 N.C. 344, 446 S.E.2d 17, rehearing denied, 337 N.C. 807, 449 S.E.2d 750 (1994).

A passing comment about a party's age, when determining a child's best interest in accordance with the statute, does not constitute an unconstitutional classification in violation of a party's equal protection rights. Phelps v. Phelps, 337 N.C. 344, 446 S.E.2d 17, rehearing denied, 337 N.C. 807, 449 S.E.2d 750 (1994).

Award to Father on Finding of Changed Circumstances. — Trial judge did not abuse his discretion by ruling that a material change in circumstances had occurred with the increased age of younger child, who had been awarded previously to the mother, since the child indicated clearly his desire to stay with his father, who also had custody of his elder brother. In re Peal, 305 N.C. 640, 290 S.E.2d 664 (1982).

Where father failed to offer evidence of mother's adultery at divorce trial, but after the divorce moved for a change of custody on that ground, the trial court's reassignment of custody of the child to father due to a material change of circumstances since the date of the divorce was not erroneous merely because the crucial circumstances, e.g., the mother's adultery, existed before divorce. The child should not be placed in the custody of an unfit parent merely because the other parent failed to introduce evidence at the proper stage of the litigation. Paschall v. Paschall, 21 N.C. App. 120, 203 S.E.2d 337 (1974).

Award to Father on Condition That Physical Custody Be in Grandparents. — Where the court's conclusions that the mother was an unfit person to have custody of the children and that the father was a fit and suitable person to have their custody was supported by the findings, but neither the father nor the paternal grandparents had a suitable home for the children, and that the maternal grandparents, with whom the children were then living, had such a home, an order awarding the custody of the children to the father on condition that the physical custody of the children be vested in their maternal grandparents and that the father pay for their support would not be disturbed on appeal, the welfare of the children being the determinative factor in the award of custody. Thomas v. Thomas, 259 N.C. 461, 130 S.E.2d 871 (1963).

Award of Custody to Father Held Proper. — Trial court did not err in concluding that it would be in the best interest of minor child for her custody to be placed with defendant father where, pursuant to separation agreement, plaintiff mother gave defendant custody of the child and agreed to assist with medical and dental bills on behalf of the child; the child had lived with defendant at all times since her birth and lived solely with defendant since the parties' separation; plaintiff rarely visited the child following the parties' separation; and plaintiff admitted that defendant had done a good job of looking after the child since their separation. Ingle v. Ingle, 53 N.C. App. 227, 280 S.E.2d 460 (1981).

Findings on Award of Custody to Mother Held Sufficient. — Findings that the parties had been married and divorced, that the wife was a person of good character, resident in this State, that the husband was financially responsible, and that the best interest of the minor child of the marriage would be promoted by awarding its custody to the wife were sufficient to sustain a decree awarding its custody to her and requiring the husband to make contributions for the support of the child. Hardee v. Mitchell, 230 N.C. 40, 51 S.E.2d 884 (1949).

Award to Mother Upheld. — Where the trial court found, upon supporting evidence, that the mother was now a stable, fit, and suitable custodian of her children, and that their best interests required that their custody be awarded to her, the Supreme Court would affirm the award of custody. Spence v. Durham, 283 N.C. 671, 198 S.E.2d 537 (1973), cert. denied, 415 U.S. 918, 94 S. Ct. 1417, 39 L. Ed. 2d 473 (1974).

Custody of Child Upheld Where Father Never Visited. — Where plaintiff mother had had de facto custody of five-year old child since his birth, and defendant, who had acknowledged paternity of the child when he was there, had not visited the child in a substantial length of time, nor had he requested visitation privileges or custody, formal award of custody to mother would be upheld. Craig v. Kelley, 89 N.C. App. 458, 366 S.E.2d 249 (1988).

Illegitimate Child. — As to the custody of an illegitimate child, see Jolly v. Queen, 264 N.C. 711, 142 S.E.2d 592 (1965).

By its plain language, G.S. 50-13.2(a) clearly abrogates the common-law presumption vesting custody of an illegitimate child in the child's mother. Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41, 2003 N.C. LEXIS 605 (2003), cert. denied, 540 U.S. 1177, 124 S. Ct. 1407, 158 L. Ed. 2d 78 (2004).

Illegitimate child's father who has acknowledged his paternity under G.S. 110-132(a) and whose conduct is consistent with his right to care for and control his child has a right to custody of his illegitimate child legally equal to that of the child's mother, and, pursuant to G.S. 50-13.2, if the best interest of the child is served by placing the child in the father's custody, he is to be awarded custody of that child. Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41, 2003 N.C. LEXIS 605 (2003), cert. denied, 540 U.S. 1177, 124 S. Ct. 1407, 158 L. Ed. 2d 78 (2004).

As the common-law rule that custody of an illegitimate child presumptively vested in the mother was abrogated by G.S. 50-13.2(a), the trial court properly applied the "best interest of the child" standard in awarding custody to the child's father, who had acknowledged his paternity under G.S. 110-132(a), paid child support without a court order, and provided that child with a stable and structured life. Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41, 2003 N.C. LEXIS 605 (2003), cert. denied, 540 U.S. 1177, 124 S. Ct. 1407, 158 L. Ed. 2d 78 (2004).

In applying the best interest of the child standard to award joint custody of an illegitimate child to the parents, district court applied the correct standard as between the parents, because the common law presumption in favor of awarding custody of the illegitimate child to the mother was abrogated by G.S. 50-13.2 and the case law. David v. Ferguson, 160 N.C. App. 89, 584 S.E.2d 102, 2003 N.C. App. LEXIS 1665 (2003).

For case as to former preference that mother be given custody, see Spence v. Durham, 283 N.C. 671, 198 S.E.2d 537 (1973), cert. denied, 415 U.S. 918, 94 S. Ct. 1417, 39 L. Ed. 2d 473 (1974).

IV. VISITATION RIGHTS.

Court May Divide Custody Between Parents or Award General Custody Subject to Visitation Privileges. — The trial court has discretionary power either to divide custody between contending parents for alternating periods, or to award general custody to one parent, subject to visitation privileges in favor of the unsuccessful parent. Griffin v. Griffin, 237 N.C. 404, 75 S.E.2d 133 (1953).

The standard by which the court is guided in visitation matters is the child's best interest. Kerns v. Southern, 100 N.C. App. 664, 397 S.E.2d 651 (1990).

Burden of Proof. — Grandparents seeking visitation rights had the burden of proving that the award of visitation was in the best interest of the children; therefore, where trial judge reversed the burden, so that the mother had to prove that the visitation was bad for the children, the judge was in error. Kerns v. Southern, 100 N.C. App. 664, 397 S.E.2d 651 (1990).

Findings as to Visitation. — To support an award of visitation rights, the judgment of the trial court should contain findings of fact which sustain the conclusion of law that the party is a fit person to visit the child and that such visitation rights are in the best interest of the child. Montgomery v. Montgomery, 32 N.C. App. 154, 231 S.E.2d 26 (1977); In re Kowalzek, 37 N.C. App. 364, 246 S.E.2d 45, cert. denied, 295 N.C. 734, 248 S.E.2d 863 (1978); In re Jones, 62 N.C. App. 103, 302 S.E.2d 259 (1983).

Where the trial judge specifically considered a child's best interests in determining custody and visitation in accordance with G.S. 50-13.2(a) and the evidence supported the trial court's findings, the trial court did not abuse its discretion by ordering visitation between the minor child and the father. Pass v. Beck, 156 N.C. App. 597, 577 S.E.2d 180, 2003 N.C. App. LEXIS 196 (2003), cert. denied, 357 N.C. 252, 582 S.E.2d 277 (2003).

Order for Professional Consultation Within Court's Discretion. — Where trial court found defendant's contact with his minor child had been minimal, although he was fit and proper to have visitation rights, consultation with plaintiff and defendant by a third-party professional could benefit the court in awarding specific visitation rights; therefore, there was no abuse of discretion in the court's ordering the consultation prior to its consideration of visitation rights. Rawls v. Rawls, 94 N.C. App. 670, 381 S.E.2d 179 (1989).

When Visitation May Be Denied. — A parent's right of visitation with his or her child is a natural and legal right, and when awarding custody of a child to another, the court should not deny a parent's right of visitation at appropriate times unless the parent has by conduct forfeited the right or unless the exercise of the right would be detrimental to the best interest and welfare of the child. In re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

Courts are generally reluctant to deny all visitation rights to the divorced parent of a child of tender age, but it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare. Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967).

The grandmother did not have standing under this section to seek visitation with her grandchildren, where the children had been adopted by their biological aunt and her husband, and custody was not an issue. Hill v. Newman, 131 N.C. App. 793, 509 S.E.2d 226 (1998).

Determination of Visitation Rights May Not Be Delegated. — If the court finds that the parent has by conduct forfeited the right of visitation or if the court finds that the exercise of the right would be detrimental to the best interest and welfare of the child, the court may, in its discretion, deny a parent the right of visitation with, or access to, his or her child; but the court may not delegate this authority to the custodian. In re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

Court Should Safeguard Visitation Rights by Provision in Order. — If the court does not find that a parent has by conduct forfeited the right of visitation and does not find that the exercise of the right would be detrimental to the best interest and welfare of the child, the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place and conditions under which such visitation rights may be exercised. In re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

Enforcement of Visitation Orders. — Trial judges in this State have authority to enforce orders providing for visitation by the methods set forth in this section, that is, by contempt proceedings and by injunction. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

Receipt of Support May Not Be Conditioned on Visitation. — A trial judge does not have authority to condition a minor child's receipt of support paid by the noncustodial parent on compliance with court-ordered visitation allowed the noncustodial parent by ordering that child support paid by defendant be placed in escrow if minor child fails or refuses to abide by the visitation privileges allowed defendant. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

District court was authorized to grant the father of an illegitimate child visitation privileges and to punish the mother for refusing to allow the father to visit his illegitimate child. Conley v. Johnson, 24 N.C. App. 122, 210 S.E.2d 88 (1974).

Grant of Visitation Rights to Homosexual Father. — The trial court did not err in granting a father who was homosexual unsupervised overnight visitation rights with his minor son. Woodruff v. Woodruff, 44 N.C. App. 350, 260 S.E.2d 775 (1979).

Grandparents May Not Be Awarded Visitation Rights When Custody Is Not in Issue. — While subsection (b1) of this section authorizes the court to provide for the visitation rights of grandparents when the custody of minor children is being litigated, it does not authorize the court to enter such an order when the custody of the children is not in issue. Moore v. Moore, 89 N.C. App. 351, 365 S.E.2d 662 (1988).

This section and G.S. 50-13.5 and 50-13.2A must be read in conjunction with G.S. 50-13.1(a) so as to harmonize them and give effect to a consistent legislative policy. Under them, a grandparent's right to visitation arises either in the context of an ongoing custody proceeding or where the minor child is in the custody of a stepparent or a relative. McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995).

Standing to Seek Grandparent Visitation. — Mother's motion to dismiss grandparents' motion for visitation was properly denied because, although the parents had entered into a consent judgment in the underlying child custody dispute, the custody of the child was still "in issue" and "being litigated" by the parents when the grandparents moved to intervene, and thus, under G.S. 50-13.2(b1), the grandparents had standing to intervene at the time; the resolution of the custody dispute between the parents did not wipe out the grandparents' claim. Quesinberry v. Quesinberry, — N.C. App. —, 674 S.E.2d 775, 2009 N.C. App. LEXIS 449 (2009).

Grandparent Had No Rights to Proceed. — There are four statutes in North Carolina which permit a grandparent to maintain an action for custody or visitation of a minor child, and although plaintiff, mother of the deceased father of the two minor children, did not specify under which statute she filed, it was clear that she had no right to proceed under G.S.G.S. 50-13.1(a), this section, 50-13.2A, or 50-13.5(j). Shaut v. Cannon, 136 N.C. App. 834, 526 S.E.2d 214, 2000 N.C. App. LEXIS 158 (2000).

Grandparents Had Right to Intervene in Pending Custody Action. — In a child custody action, the order granting intervention to the maternal grandparents on ground there was a pending matter regarding future visitation before the court was proper; because the issue of the mother's visitation was still pending, the custody of the child was still "in issue" and was "being litigated" by the parents. Smith v. Barbour, — N.C. App. —, 671 S.E.2d 578, 2009 N.C. App. LEXIS 109 (2009).

Insufficient Findings to Support Order for Grandparent Visitation. — Remand of order granting grandparent visitation was necessary because the trial court made no explanation in its findings of fact as to why it determined that it was preferable to take the majority of the grandparents' vacation visitation time out of mother's custodial time; moreover, it was unclear that the trial court considered the possible interaction between the parents' consent judgment and its order awarding visitation to the grandparents. Quesinberry v. Quesinberry, — N.C. App. —, 674 S.E.2d 775, 2009 N.C. App. LEXIS 449 (2009).

As parents with lawful custody of their children have the prerogative of determining with whom they shall associate. Moore v. Moore, 89 N.C. App. 351, 365 S.E.2d 662 (1988).

V. WISHES OF CHILD.

Wishes of Child of Sufficient Age Are Entitled to Weight. — The wishes of a child of sufficient age to exercise discretion in choosing a custodian are entitled to considerable weight when the contest is between the parents, but are not controlling. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966); In re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971); Falls v. Falls, 52 N.C. App. 203, 278 S.E.2d 546, cert. denied, 304 N.C. 390, 285 S.E.2d 831 (1981).

A child may be a competent witness and ought to be examined in that character. Indeed, being the party mainly concerned, he has a right to make a statement to the court as to his feelings and wishes upon the matter. This ought to be allowed serious consideration by the court, in the exercise of its discretion. Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969), overruled on other grounds, Stephenson v. Stephenson, 55 N.C. App. 250, 285 S.E.2d 281 (1982).

In making the weighty choice of awarding custody, the judge may properly consider the preference or wishes of a child of suitable age and discretion. In re Peal, 305 N.C. 640, 290 S.E.2d 664 (1982).

As to the courts' consideration of the wishes of a child of suitable age, see also In re Gwaltney, 68 N.C. App. 686, 315 S.E.2d 750 (1984).

Because Child's Wishes Will Aid Determination of His Best Interests. — The child's wishes will be one factor considered by the court in determining his custody, usually not because of any legal right in the child to have his wishes granted, but because the consideration of such wishes will aid the court in making a custodial decree which is for the best interests and welfare of the child. Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

But Such Wishes Are Not Controlling. — When a child has reached the age of discretion, the court may consider the preference or wishes of the child to live with a particular person. A child has attained an age of discretion when it is of an age and capacity to form an intelligent or rational view on the matter. The expressed wish of a child of discretion is, however, never controlling upon the court, since the court must yield in all cases to what it considers to be the child's best interests, regardless of the child's personal preference. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

Although the preference of a child of discretion would seem to have its greatest weight when the controversy is between the parents and both are fit persons, the child's wishes are only entitled to consideration and are not controlling. Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

And Weight to Be Given Child's Testimony Is for the Court. — A child has a right to have his testimony heard. However, the weight to be attached to such testimony is within the discretion of the trial judge. Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969), overruled on other grounds, Stephenson v. Stephenson, 55 N.C. App. 250, 285 S.E.2d 281 (1982).

Lack of Findings as to Child's Preferences Insufficient to Upset Award. — Failure of the court to include a finding as to the preferences of the minor child is insufficient to upset its order of award of custody. Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

Ten Year Old. — A child's preference as to who shall have his custody is not controlling; however, the trial judge should consider the wishes of a 10-year-old child in making his determination. In re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

Where the contest is between a parent and one not connected by blood to the child, the desire of the child will not ordinarily prevail over the natural right of the parent, unless essential to the child's welfare. In re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

VI. DISCRETION OF TRIAL COURT.

Determining the custody of minor children is never the province of a jury; it is that of the judge of the court in which the proceeding is pending. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

The question of custody is one addressed to the trial court. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

Trial Judge Is Vested with Broad Discretion. — The trial judge, who has the opportunity to see and hear the parties and the witnesses, is vested with broad discretion in cases involving custody of children. Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974); Pruneau v. Sanders, 25 N.C. App. 510, 214 S.E.2d 288, cert. denied, 287 N.C. 664, 216 S.E.2d 911 (1975); Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977); Sheppard v. Sheppard, 38 N.C. App. 712, 248 S.E.2d 871 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 34 (1979); In re Peal, 305 N.C. 640, 290 S.E.2d 664 (1982).

While the welfare of the child is always to be treated as the paramount consideration, wide discretionary power is necessarily vested in the trial court in reaching decisions in particular cases. Griffin v. Griffin, 237 N.C. 404, 75 S.E.2d 133 (1953); Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967); In re Moore, 8 N.C. App. 251, 174 S.E.2d 135 (1970); Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

The trial court has broad discretion in deciding child custody cases. Paschall v. Paschall, 21 N.C. App. 120, 203 S.E.2d 337 (1974).

The trial judge is vested with broad discretion in child custody cases. The "paramount consideration" which limits this discretion is the welfare and needs of the children. Phillips v. Choplin, 65 N.C. App. 506, 309 S.E.2d 716 (1983).

The trial judge is vested with broad discretion in child custody cases, and that discretion must be exercised to serve the welfare and needs of the children. Woncik v. Woncik, 82 N.C. App. 244, 346 S.E.2d 277 (1986).

And His Decision Will Not Be Upset Absent Abuse. — The decision to award custody of a minor is vested in the discretion of the trial judge, who has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion. In re Pitts, 2 N.C. App. 211, 162 S.E.2d 524 (1968); In re Morrison, 6 N.C. App. 47, 169 S.E.2d 228 (1969); In re Moore, 8 N.C. App. 251, 174 S.E.2d 135 (1970); In re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971); Jarman v. Jarman, 14 N.C. App. 531, 188 S.E.2d 647, cert. denied, 281 N.C. 622, 190 S.E.2d 465 (1972); In re Cox, 17 N.C. App. 687, 195 S.E.2d 132, cert. denied, 283 N.C. 585, 196 S.E.2d 809 (1973); King v. Demo, 40 N.C. App. 661, 253 S.E.2d 616 (1979); Wilson v. Williams, 42 N.C. App. 348, 256 S.E.2d 516 (1979); Comer v. Comer, 61 N.C. App. 324, 300 S.E.2d 457 (1983); Campbell v. Campbell, 63 N.C. App. 113, 304 S.E.2d 262, cert. denied, 309 N.C. 460, 307 S.E.2d 362 (1983); Plemmons v. Stiles, 65 N.C. App. 341, 309 S.E.2d 504 (1983).

Where trial judge enters a custody order that in his judgment is in the best interest of the child, the appellate division should not reverse that judgment and hold, as a matter of law, that the trial judge was obliged to have reached a different opinion, in the absence of a clear showing of abuse of discretion. Decisions in custody cases are never easy, and the trial judge has the opportunity to see the parties in person and to hear the witnesses. He can detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges. Newsome v. Newsome, 42 N.C. App.

416, 256 S.E.2d 849 (1979).

If Supported by Competent Evidence. — The trial judge's decision as to custody will not be upset, in the absence of a clear abuse of discretion, if his findings are supported by competent evidence. Sheppard v. Sheppard, 38 N.C. App. 712, 248 S.E.2d 871 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 34 (1979); Comer v. Comer, 61 N.C. App. 324, 300 S.E.2d 457 (1983).

The question of custody is one addressed to the trial court, and the court's decision will be upheld if supported by competent evidence. Roberts v. Short, 6 N.C. App. 419, 169 S.E.2d 910 (1969); Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

The trial judge is present where he can observe and hear the parties and their witnesses, and ordinarily his decision on custody will be upheld if supported by competent evidence. In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969).

Instead of applying an inflexible rule, the court must consider all facts of the case and decide the issue in accordance with the best interests of the child. Paschall v. Paschall, 21 N.C. App. 120, 203 S.E.2d 337 (1974).

Discretion to Allow Grandparent's Visitation Rights. — Although the trial judge determined that the appellant-defendant would continue to have primary custody of the children, it was entirely within the trial judge's discretion to allow the grandparents' visitation rights based on the best interest of the children. Kerns v. Southern, 100 N.C. App. 664, 397 S.E.2d 651 (1990).

Nature of Evidence. — An order for custody should be entered only after the most careful consideration, and only after the court has had the benefit of more reliable evidence than is usually afforded by affidavits. In re Griffin, 6 N.C. App. 375, 170 S.E.2d 84 (1969).

VII. FINDINGS OF FACT.

Trial Court Must Make Findings of Fact. — To support an award of custody, the judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child. Montgomery v. Montgomery, 32 N.C. App. 154, 231 S.E.2d 26 (1977); Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981); Story v. Story, 57 N.C. App. 657, 291 S.E.2d 923 (1982).

The court erred in not permitting the parties to a "joint custody" agreement to present extrinsic evidence of the parties' understanding of the meaning of those terms and their intent at the time of the agreement before determining whether the plaintiff wife had breached the agreement by failing to take steps to help the son who had drug abuse problems, thereby excusing the defendant husband from paying alimony. Patterson v. Taylor, 140 N.C. App. 91, 535 S.E.2d 374, 2000 N.C. App. LEXIS 1035 (2000).

Before awarding custody of a child to a particular party, the trial court must conclude as a matter of law that the award of custody to that particular party will best promote the interest and welfare of the child. Findings of fact as to the characteristics of the competing parties must be made to support the necessary conclusion of law. These findings may concern physical, mental, or financial fitness or any other factors brought out in the evidence and relevant to the issue of the welfare of the child. Steele v. Steele, 36 N.C. App. 601, 244 S.E.2d 466 (1978).

To support an award of custody, the judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child; the conclusion of law determinative of the custody is not, therefore, that the person gaining custody is a fit and proper person to have custody, but which party will best promote the interest and welfare of the child. Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

Which Must Be More Than Mere Conclusory Statements. — A custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child, and custody orders are routinely vacated where the findings of fact consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interests of the child to award custody to that person. Dixon v. Dixon, 67 N.C. App. 73, 312 S.E.2d 669 (1984).

And Must Resolve Questions Raised by Evidence. — Findings bearing on the party's fitness to have care, custody and control of the child and findings as to the best interests of the child must resolve all questions raised by the evidence pertaining thereto. Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

But the trial judge is not required to find all the facts shown by the evidence. It is sufficient if enough material facts are found to support the judgment. In re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971); Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

Findings of Fact Insufficient. — Without a finding of a substantial change of circumstances, a modification based solely on the ground that the defendant mother was overprotective was improper. Benedict v. Coe, 117 N.C. App. 369, 451 S.E.2d 320 (1994).

The trial court erred in amending the custody decree based on a finding of substantial change in circumstances where it found only that the proposed relocation of the mother after her remarriage would adversely affect the relationship between the father and his child but made no other findings about the effect of the proposed relocation on the child and on the child's best interests. Evans v. Evans, 138 N.C. App. 135, 530 S.E.2d 576, 2000 N.C. App. LEXIS 536 (2000).

Trial court erred in entering a custody order which prohibited a father from owning or possessing firearms until the children were emancipated; the trial court failed to make required findings pursuant to G.S. 50-13.2(a) on whether the safety of the children was endangered by the father's possession of firearms. Martin v. Martin, 167 N.C. App. 365, 605 S.E.2d 203, 2004 N.C. App. LEXIS 2177 (2004).

Findings Supported by the Evidence. — Trial court did not err in awarding primary physical custody of the children to the husband under G.S. 50-13.2(a); by placing the children in the husband's physical custody, the children remained in the home and community where they had been raised, the husband demonstrated his ability to care for the children, and some of the husband's extended family lived nearby and could help with the children. Evans v. Evans, 169 N.C. App. 358, 610 S.E.2d 264, 2005 N.C. App. LEXIS 609 (2005).

Court's findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child. Story v. Story, 57 N.C. App. 509, 291 S.E.2d 923 (1982).

Only One Finding. — While a court had the power under G.S. 7B-903 to enter an order transferring the custody of a minor child from her father to her mother, there was no evidence in the record in a proceeding on the parties' cross-motions for contempt that supported the finding that transferring custody to the mother was in the child's best interests. The court made only one finding, that the child missed the two people in her life who had neglected her, which was not a basis for not allowing custody to remain with the father, the trial court had a right under G.S. 50-13.2(a) to consider, but did not consider, acts of domestic violence by the child's stepfather toward her mother when determining the child's best interests, and the trial court had no right to take custody away from the father simply because he was unmarried. In re H.S.F., 177 N.C. App. 193, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

Failure to Make Findings Is Error. — It is error for the court granting a decree of divorce to award the custody of a child without findings of fact from which it could be determined that the order was adequately supported by competent evidence and was for the best interest of the child. Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967).

Trial court erred in granting permanent custody of a child to the child's natural parent, who had extremely limited contact with the child before the other parent's death, because it was speculative to assess what the quality of their relationship would be after a four-month "get acquainted" period during which temporary custody had been granted to the child's grandparents. McRoy v. Hodges, 160 N.C. App. 381, 585 S.E.2d 441, 2003 N.C. App. LEXIS 1790 (2003).

And Will Necessitate Remand. — When the trial court fails to find facts so that the reviewing court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967); In re Moore, 8 N.C. App. 251, 174 S.E.2d 135 (1970); Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971); Hampton v. Hampton, 29 N.C. App. 342, 224 S.E.2d 197 (1976); In re Kowalzek, 37 N.C. App. 364, 246 S.E.2d 45, cert. denied, 295 N.C. 734, 248 S.E.2d 863 (1978); Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

An order awarding custody of a child to the father, without any findings of fact other than a recital that the court had previously awarded custody to the father in a proceeding under former G.S. 17-39, was fatally defective, and the case would be remanded for detailed findings of fact. Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967).

Court's Findings Are Conclusive If Supported by Evidence. — The findings of the trial court in regard to the custody of children are conclusive when supported by competent evidence. Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967); In re Moore, 8 N.C. App. 251, 174 S.E.2d 135 (1970); Hampton v. Hampton, 29 N.C. App. 342, 224 S.E.2d 197 (1976).

Findings of fact by the trial court in a proceeding to determine the custody of a minor child ordinarily are conclusive when based on competent evidence. Griffin v. Griffin, 237 N.C. 404, 75 S.E.2d 133 (1953).

In a hearing to determine the right to custody of the children of the marriage, the court's findings of fact are conclusive if supported by competent evidence. Thomas v. Thomas, 259 N.C. 461, 130 S.E.2d 871 (1963).

And Are Binding on the Appellate Courts. — The trial judge's findings of fact in custody orders are binding on the appellate courts if supported by competent evidence. Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974).

And Will Not Be Disturbed Thereby. —

The court's findings of fact as to the care and custody of children will not be disturbed when supported by competent evidence, even though the evidence be conflicting. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967); In re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

The normal rule in regard to the custody of children is that where there is competent evidence to support a judge's finding of fact, a judgment supported by such findings will not be disturbed on appeal; however, the facts found must be adequate for the appellate court to determine that the judgment is substantiated by competent evidence. Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

Even When Evidence Is Conflicting. — The findings of the trial judge regarding custody and support are conclusive when supported by competent evidence, even when the evidence is conflicting, the standard for disturbing the trial judge's decision on appeal being a clear showing of abuse of discretion. Dixon v. Dixon, 67 N.C. App. 122, 312 S.E.2d 669 (1984).

Conclusory Statements Held Inadequate. — For a case setting forth a visitation order and holding that order to be conclusive and not supported by adequate findings of fact, see Kerns v. Southern, 100 N.C. App. 664, 397 S.E.2d 651 (1990).

But an order may contain extensive findings and still be fatally defective when not supported by the evidence. Dixon v. Dixon, 67 N.C. App. 122, 312 S.E.2d 669 (1984).

Use of Fifth Amendment Privilege. — Father could not take advantage of the presumption that it is in the best interest of the child to be in the custody of his natural parent by introducing evidence of his fitness and then invoking his Fifth Amendment privilege against self-incrimination when questioned about his illegal drug activity. Qurneh v. Colie, 122 N.C. App. 553, 471 S.E.2d 433 (1996).

Where the father failed to make a showing of fitness and the court could not determine his fitness because of his assertion of the Fifth Amendment, the court acted properly in dismissing his claim for custody. Qurneh v. Colie, 122 N.C. App. 553, 471 S.E.2d 433 (1996).

Best Interests of the Child. — G.S. 50-13.2(a) and G.S. 7B-1110 both require a court to make findings of fact as to a child's best interests. In re Papathanassiou, — N.C. App. —, 671 S.E.2d 572, 2009 N.C. App. LEXIS 108 (2009).

VIII. EFFECT OF VERDICTS, SEPARATION AGREEMENTS AND CONSENT JUDGMENTS.

Verdict in Divorce Action Is Not Controlling. — The verdict in a divorce action can be an important factor in the judge's consideration of an award of custody, but it is not legally controlling. It is merely one of the circumstances for him to consider, along with all other relevant factors. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

Findings and Conclusions Not Required for Child Consent Judgments. — While G.S. 1A-1, Rule 52 and this section mandate findings of fact and conclusions when a court adjudicates child custody, child consent judgments need not contain such findings of fact and conclusions of law, and consenting parties waive their right to have the court adjudicate the merits of the case. Buckingham v. Buckingham, 134 N.C. App. 82, 516 S.E.2d 869, 1999 N.C. App. LEXIS 657 (1999), cert. denied, 351 N.C. 100, 540 S.E.2d 353 (1999).

Nor Are Separation Agreements and Consent Judgments Based Thereon. — Valid separation agreements, including consent judgments based on such agreements with respect to marital rights, are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children. Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963); Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

While the marital and property rights of the parties under the provisions of a valid separation agreement cannot be ignored or set aside by the court without the consent of the parties, such agreements are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children. Soper v. Soper, 29 N.C. App. 95, 223 S.E.2d 560 (1976).

And Court Is Not Precluded Thereby from Acting Under This Section. — A deed of separation between husband and wife containing an agreement for the custody of their minor child does not preclude the court, upon granting a decree for absolute divorce in a suit brought subsequent to the deed of separation, from awarding the custody of the child in accordance with this section. In re Albertson, 205 N.C. 742, 172 S.E. 411 (1934).

The fact that petitioner agreed when separation took place between herself and her husband that the custody of their child should remain with the father was not binding on the court. Finley v. Sapp, 238 N.C. 114, 76 S.E.2d 350 (1953).

As no agreement between spouses will deprive the court of its inherent and statutory authority to protect the interests and provide for the welfare of infants. The parties may bind themselves by separate agreement or by a consent judgment, but they cannot thus withdraw the children of the marriage from the protective custody of the court. State v. Duncan, 222 N.C. 11, 21 S.E.2d 822 (1942); Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963).

Provisions in a deed of separation for support of the minor children of the marriage, entered as a consent judgment by the court, cannot deprive the court of its inherent and statutory authority to protect the interests and provide for the welfare of the infants; therefore, judgment increasing the allowance for the minor children upon findings of a change of circumstances warranting such increase would be affirmed. Bishop v. Bishop, 245 N.C. 573, 96 S.E.2d 721 (1957).

The child is not a party to a separation agreement, and the parents cannot contract away the jurisdiction of the court, which is always alert in the discharge of its duty towards its wards, the children of the State whose personal property interests require protection. State v. Duncan, 222 N.C. 11, 21 S.E.2d 822 (1942).

It is the court's duty to award custody in accordance with the best interests of the child, and no agreement, consent or condition between the parents can interfere with this duty or bind the court. Spence v. Durham, 283 N.C. 671, 198 S.E.2d 537 (1973), cert. denied, 415 U.S. 918, 94 S. Ct. 1417, 39 L. Ed. 2d 473 (1974).

But provisions of a valid separation agreement, and a consent judgment based thereon, cannot be ignored or set aside by the court without the consent of the parties. Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963); Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

A valid separation agreement cannot be ignored or set aside by the court without the consent of the parties. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

And Parties Are Bound Thereby Until Court Orders Otherwise. — Where judgment by confession purported to grant custody of child to one party, this judgment did not deprive the district court of jurisdiction to determine custody, but the parties, having agreed to it, were bound by its provisions until the court made some order for custody. Pierce v. Pierce, 58 N.C. App. 815, 295 S.E.2d 247 (1982).

Presumption as to Amount Mutually Agreed upon in Separation Agreement. — Where parties to a separation agreement agree upon the amount of the support and maintenance of their minor children, there is a presumption, in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable, and upon motion for an increase in such allowance, a court is not warranted in ordering an increase in the absence of any evidence of a change of conditions. Soper v. Soper, 29 N.C. App. 95, 223 S.E.2d 560 (1976).

There is a presumption, in the absence of evidence to the contrary, that the amount mutually agreed upon in a separation agreement is just and reasonable. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

Party to Separation Agreement Not Precluded from Bringing Action. — When a case is properly before it, the court has the duty to award custody in accordance with the best interests of the child, and no agreement, consent or condition between the parents can interfere with this duty or bind the court. Thus, the existence of a valid separation agreement containing provisions relating to the custody and support of minor children does not prevent one of the parties to the agreement from instituting an action for a judicial determination of those same matters. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

Where judgment by confession placed custody issue before the court so that it retained jurisdiction to determine custody, it was error not to abate the subsequent action for custody. Pierce v. Pierce, 58 N.C. App. 815, 295 S.E.2d 247 (1982).

Effect of Custody Award on Consent Judgment. — Where a consent judgment in an action for a divorce a mensa operated as a gift to the wife of an estate in the husband's land, the fact that the court awarded custody of the children did not affect it. Morris v. Patterson, 180 N.C. 484, 105 S.E. 25 (1920).

Trial court did not abuse its discretion in awarding joint custody to both parties. Church v. Church, 119 N.C. App. 436, 458 S.E.2d 732 (1995).

§ 50-13.2A. Action for visitation of an adopted grandchild.

A biological grandparent may institute an action or proceeding for visitation rights with a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights. A court may award visitation rights if it determines that visitation is in the best interest of the child. An order awarding visitation rights shall contain findings of fact which support the determination by the judge of the best interest of the child. Procedure, venue, and jurisdiction shall be as in an action for custody. (1985, c. 575, s. 2.)

CASE NOTES

There is a reasonable basis for the classification elicited in this section, and therefore, the classification does not violate the equal protection guarantees of either the State or federal Constitutions. Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

This section must be read in pari materia with § 50-13.7(a), which therefore requires a showing of a substantial change of circumstances. Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

Trial court did not err in allowing grandparents to intervene in adoption proceeding pursuant to this section without holding a preliminary evidentiary hearing to determine whether a substantial relationship existed between the movants and grandchildren, where the trial judge addressed the issue of whether the grandparents had a right to intervene based on the pleadings before it, and without the necessity of a preliminary hearing the trial court made a preliminary determination that the grandparents had a right to intervene. Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

Grandparent Had No Right to Proceed. — There are four statutes in North Carolina which permit a grandparent to maintain an action for custody or visitation of a minor child, and although plaintiff, mother of the deceased father of the two minor children, did not specify under which statute she filed, it was clear that she had no right to proceed under G.S.G.S. 50-13.1(a), 50-13.2(b1), this section, or 50-13.5(j). Shaut v. Cannon, 136 N.C. App. 834, 526 S.E.2d 214, 2000 N.C. App. LEXIS 158 (2000).

Standing to Bring Action Based on Substantial Relationship. — The grandmother had standing under this section to seek visitation rights with her grandchildren, where the children were adopted by their biological aunt and her husband, and the grandmother had a substantial relationship with the children, in that she had helped raise them from birth and they had lived with her for eight months prior to the adoption. Hill v. Newman, 131 N.C. App. 793, 509 S.E.2d 226 (1998).

Evidence held sufficient to support the trial court's conclusion that grandparents had established a substantial relationship with their grandchildren. Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

Grandparents' Rights When Family Intact. — Under G.S. 50-13.1(a), 50-13.2(b1), 50-13.2A, 50-13.5(j), a grandparent's right to visitation arises either in the context of an ongoing custody proceeding or where the minor child is in the custody of a stepparent or a relative—the "intact family" rule; in a case that does not involve adoption by a stepparent or other relative, a grandparent must prove that the child's family is not intact before the grandparent can intervene to request visitation with his grandchild—G.S. 50-13.1(a), 50-13.2(b1), 50-13.2A, 50-13.5(j) does not grant grandparents the right to sue for visitation when no custody proceeding is ongoing and the minor children's family is intact. Eakett v. Eakett, 157 N.C. App. 550, 579 S.E.2d 486, 2003 N.C. App. LEXIS 729 (2003).

Custody Must Be at Issue. — Sections 50-13.2, 50-13.5, and this section must be read in conjunction with G.S. 50-13.1(a) so as to harmonize them and give effect to a consistent legislative policy. Under them, a grandparent's right to visitation arises either in the context of an ongoing custody proceeding or where the minor child is in the custody of a stepparent or a relative. McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995).

There existed substantial change of circumstances when visitation rights of grandparents arbitrarily terminated by the natural mother when the grandparents had established a continuing substantial relationship with their grandchildren since the entry of earlier custody order, and based upon that, the court found sufficient facts to justify its conclusion that it was in the best interest of the grandchildren to maintain a continuing relationship with the grandparents through the granting of visitation privileges. Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

Where adoption of two grandchildren by stepfather not finalized until one month after the entry of the judgment awarding grandparents visitation, whatever rights he was to gain in becoming an adoptive parent had not vested at the time of the hearing, and therefore the adjudication of the issues before the court did not require his presence in the suit. Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

Trial court's findings of fact held to establish fitness of the grandparents and that the welfare of the children would be subserved by granting them visitation. Hedrick v.

Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

Cited in Ray v. Ray, 103 N.C. App. 790, 407 S.E.2d 592 (1991); Fisher v. Fisher, 124 N.C. App. 442, 477 S.E.2d 251 (1996); Smith v. Barbour, — N.C. App. —, 671 S.E.2d 578, 2009 N.C. App. LEXIS 109 (2009); Perdue v. Fuqua, — N.C. App. —, 673 S.E.2d 145, 2009 N.C. App. LEXIS 210 (2009).

§ 50-13.3. Enforcement of order for custody.

(a) An order providing for the custody of a minor child is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A, Contempt, of the General Statutes.

Notwithstanding the provisions of G.S. 1-294, an order pertaining to child custody which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for child custody until the appeal is decided, if justice requires.

(b) Any court of this State having jurisdiction to make an award of custody of a minor child in an action or proceeding therefor, shall have the power of injunction in such action or proceeding as provided in Article 37 of Chapter 1 of the General Statutes and G.S. 1A-1, Rule 65. (1967, c. 1153, s. 2; 1969, c. 895, s. 16; 1977, c. 711, s. 26; 1983, c. 530, s. 2.)

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under subsection (a) of this section as it read prior to the 1977 amendment, which subsection formerly provided for punishment as for contempt of the "willful disobedience" of custody orders.*

Jurisdiction. — Under North Carolina case law, matters of custody, which include visitation rights under this section, are pending until the death of one of the parties or until the child reaches the age of majority. The hands of the courts would be effectively tied if they had no jurisdiction to enforce the orders they enter. Beck v. Beck, 64 N.C. App. 89, 306 S.E.2d 580 (1983).

Only Willful Disobedience May Be Punished. — A failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is willful, which imports knowledge and a stubborn resistance. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Trial Court Must Find Defendant Possessed Means to Comply. — In order to punish by contempt proceedings, the trial court must find as a fact that the defendant possessed the means to comply with orders of the court during the period when he was in default. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

One does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Finding as to Present Ability to Comply. — In a contempt proceeding for violation of a custody order, no specific finding was required of the trial court as to the defendant's present ability to comply with the order, although there was in fact plenary evidence introduced to justify such a finding. Lee v. Lee, 37 N.C. App. 371, 246 S.E.2d 49 (1978).

Where the court enters judgment as for civil contempt, the court must not only find failure to comply with the order, but must also find that the defendant presently possesses the means to comply. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Appealability of Contempt Order Where Punishment Is Withheld. — Plaintiff was entitled to appeal the order of the trial court finding that she was in contempt of child custody orders, even though the trial court withheld punishment and only made the findings a part of the record, since to withhold punishment without further limitation is to retain the right to impose it in the future. Under such circumstances, the order holding the plaintiff in contempt affected a substantial right and was therefore appealable. Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978).

Review of Findings of Fact. — In proceedings for contempt, the facts found by the judge are not reviewable except for the purpose of passing upon their sufficiency to warrant the judgment. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

In contempt proceedings, the judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment. Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978).

Review in contempt proceedings is limited to whether there is competent evidence to support findings of fact and whether findings support conclusions of law. Walleshauser v. Walleshauser, 100 N.C. App. 594, 397 S.E.2d 371 (1990).

In contempt proceedings, findings by the trial court with regard to whether a party willfully and without sufficient legal excuse or justification violated the terms of a custody order are conclusive on appeal when supported by competent evidence. Lee v. Lee, 37 N.C. App. 371, 246 S.E.2d 49 (1978).

Payment of Counsel Fees. — The court is vested with broad power when it is authorized to punish "as for contempt." This power includes the authority for a district court judge to require one whom he has found in willful contempt of court for failure to comply with a child support order entered pursuant to G.S. 50-13.1 et seq., to pay reasonable counsel fees to opposing counsel as a condition to being purged of contempt. Blair v. Blair, 8 N.C. App. 61, 173 S.E.2d 513 (1970).

Visitation and child support rights are independent rights accruing primarily to the benefit of the minor child and one is not, and may not be made, contingent upon the other. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

Receipt of Support May Not Be Conditioned on Visitation. — A trial judge does not have authority to condition a minor child's receipt of support paid by the noncustodial parent on compliance with court-ordered visitation allowed the noncustodial parent by ordering that child support paid by defendant be placed in escrow if minor child fails or refuses to abide by the visitation privileges allowed defendant. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

Enforcement of Visitation Orders. — Trial judges in this State have authority to enforce orders providing for visitation by the methods set forth in this section, that is, by contempt proceedings and by injunction. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

No Authority to Modify Father's Visitation Rights. — The trial court was without authority to transform a show cause hearing on the matter of a wife's alleged contempt in failing to comply with a custody order, on its own motion and without notice to the wife, into a hearing on the issue of modification of the father's visitation rights as set forth in prior orders. Lee v. Lee, 37 N.C. App. 371, 246 S.E.2d 49 (1978).

Finding of Contempt Supported by Competent Evidence. — Where competent evidence supported trial court's findings of defendant's failure to comply with previous visitation order and of his present ability to comply with the order, these findings were conclusive on appeal and also supported conclusion of law that defendant was in contempt of visitation order. Walleshauser v. Walleshauser, 100 N.C. App. 594, 397 S.E.2d 371 (1990).

Violation of Order Pending Appeal. — While an appeal from an order providing for the custody of a minor child removes the cause from the trial court to the appellate court, and while pending the appeal the trial court is without jurisdiction to punish for contempt, the taking of an appeal does not authorize a violation of the custody order. If the custody order is upheld by the appellate court, the violation may be inquired into when the cause is remanded to the trial court. Sturdivant v. Sturdivant, 31 N.C. App. 341, 229 S.E.2d 318 (1976).

Applied in Morris v. Morris, 42 N.C. App. 222, 256 S.E.2d 302 (1979); Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983); Ruth v. Ruth, 158 N.C. App. 123, 579 S.E.2d 909, 2003 N.C. App. LEXIS 948 (2003).

Cited in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972); Mather v. Mather, 70 N.C. App. 106, 318 S.E.2d 548 (1984); McLemore v. McLemore, 89 N.C. App. 451, 366 S.E.2d 495 (1988); Rosero v. Blake, 150 N.C. App. 250, 563 S.E.2d 248, 2002 N.C. App. LEXIS 509 (2002).

§ 50-13.4. Action for support of minor child.

(a) Any parent, or any person, agency, organization or institution having custody of a minor child, or bringing an action or proceeding for the custody of such child, or a minor child by his guardian may institute an action for the support of such child as hereinafter provided.

(b) In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child. In the absence of pleading and proof that the circumstances otherwise warrant, parents of a minor, unemancipated child who is the custodial or noncustodial parent of a child shall share this primary liability for their grandchild's support with the minor parent, the court determining the proper share, until the minor parent reaches the age of 18 or becomes emancipated. If both the parents of the child requiring support were unemancipated minors at the time of the child's conception, the parents of both minor parents share primary liability for their grandchild's support until both minor parents reach the age of 18 or become emancipated. If only one parent of the child requiring support was an unemancipated minor at the time of the child's conception, the parents of both parents are liable for any arrearages in child support owed by the adult or emancipated parent until the other parent reaches the age of 18 or becomes emancipated. In the absence of pleading and proof that the circumstances otherwise warrant, any other person, agency, organization or institution standing in loco parentis shall be secondarily liable for such support. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. The judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support. However, the judge may not order support to be paid by a person who is not the child's parent or an agency, organization or institution standing in loco parentis absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing. The preceding sentence shall not be construed to prevent any court from ordering the support of a child by an agency of the State or county which agency may be responsible under law for such support.

The judge may order responsible parents in a IV-D establishment case to perform a job search, if the responsible parent is not incapacitated. This includes IV-D cases in which the responsible parent is a noncustodial mother or a noncustodial father whose affidavit of parentage has been filed with the court or when paternity is not at issue for the child. The court may further order the responsible parent to participate in work activities, as defined in 42 U.S.C. § 607, as the court deems appropriate.

(c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case. Payments ordered for the support of a minor child shall be on a monthly basis, due and payable on the first day of each month. The requirement that orders be established on a monthly basis does not affect the availability of garnishment of disposable earnings based on an obligor's pay period.

The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section. However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines. If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.

Payments ordered for the support of a child shall terminate when the child reaches the age of 18 except:

(1) If the child is otherwise emancipated, payments shall terminate at that time;

(2) If the child is still in primary or secondary school when the child reaches age 18, support payments shall continue until the child graduates, otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress towards graduation, or reaches age 20, whichever comes first, unless the court in its discretion orders that payments cease at age 18 or prior to high school graduation.

In the case of graduation, or attaining age 20, payments shall terminate without order by the court, subject to the right of the party receiving support to show, upon motion and with notice to the opposing party, that the child has not graduated or attained the age of 20.

If an arrearage for child support or fees due exists at the time that a child support obligation terminates, payments shall continue in the same total amount that was due under the terms of the previous court order or income withholding in effect at the time of the support obligation. The total amount of these payments is to be applied to the arrearage until all arrearages and fees are satisfied or until further order of the court.

(c1) Effective July 1, 1990, the Conference of Chief District Judges shall prescribe uniform statewide presumptive guidelines for the computation of child support obligations of each parent as provided in Chapter 50 or elsewhere in the General Statutes and shall develop criteria for determining when, in a particular case, application of the guidelines would be unjust or inappropriate. Prior to May 1, 1990 these guidelines and criteria shall be reported to the General Assembly by the Administrative Office of the Courts by delivering copies to the President Pro Tempore of the Senate and the Speaker of the House of Representatives. The purpose of the guidelines and criteria shall be to ensure that payments ordered for the support of a minor child are in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case. The guidelines shall include a procedure for setting child support, if any, in a joint or shared custody arrangement which shall reflect the other statutory requirements herein.

Periodically, but at least once every four years, the Conference of Chief District Judges shall review the guidelines to determine whether their application results in appropriate child support award amounts. The Conference may modify the guidelines accordingly. The Conference shall give the Department of Health and Human Services, the Administrative Office of the Courts, and the general public an opportunity to provide the Conference with information relevant to the development and review of the guidelines. Any modifications of the guidelines or criteria shall be reported to the General Assembly by the Administrative Office of the Courts before they become effective by delivering copies to the President Pro Tempore of the Senate and the Speaker of the House of Representatives. The guidelines, when adopted or modified, shall be provided to the Department of Health and Human Services and the Administrative Office of the Courts, which shall disseminate them to the public through local IV-D offices, clerks of court, and the media.

Until July 1, 1990, the advisory guidelines adopted by the Conference of Chief District Judges pursuant to this subsection as formerly written shall operate as presumptive guidelines and the factors adopted by the Conference of Chief District Judges pursuant to this subsection as formerly written shall constitute criteria for varying from the amount of support determined by the guidelines.

(d) In non-IV-D cases, payments for the support of a minor child shall be ordered to be paid to the person having custody of the child or any other proper person, agency, organization or institution, or to the State Child Support Collection and Disbursement Unit, for the benefit of the child. In IV-D cases, payments for the support of a minor child shall be ordered to be paid to the State Child Support Collection and Disbursement Unit for the benefit of the child.

(d1) For child support orders initially entered on or after January 1, 1994, the immediate income withholding provisions of G.S. 110-136.5(c1) shall apply.

(e) Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein, or a security interest in or possession of real property, as the court may order. The court may order the transfer of title to real property solely owned by the obligor in payment of arrearages of child support so long as the net value of the interest in the property being transferred does not exceed the amount of the arrearage being satisfied. In every case in which payment for the support of a minor child is ordered and alimony or postseparation support is also ordered, the order shall separately state and identify each allowance.

(e1) In IV-D cases, the order for child support shall provide that the clerk shall transfer the case to another jurisdiction in this State if the IV-D agency requests the transfer on the basis that the obligor, the custodian of the child, and the child do not reside in the jurisdiction in which the order was issued. The IV-D agency shall provide notice of the transfer to the obligor by delivery of written notice in accordance with the notice requirements of Chapter 1A-1, Rule 5(b) of the Rules of Civil Procedure. The clerk shall transfer the case to the jurisdiction requested by the IV-D agency, which shall be a jurisdiction in which the obligor, the custodian of the child, or the child resides. Nothing in this subsection shall be construed to prevent a party from contesting the transfer.

(f) Remedies for enforcement of support of minor children shall be available as herein provided.

(1) The court may require the person ordered to make payments for the support of a minor child to secure the same by means of a bond, mortgage or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the execution of an assignment of wages, salary or other income due or to become due.

(2) If the court requires the transfer of real or personal property or an interest therein as provided in subsection (e) as a part of an order for payment of support for a minor child, or for the securing thereof, the court may also enter an order which shall transfer title as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(3) The remedy of arrest and bail, as provided in Article 34 of Chapter 1 of the General Statutes, shall be available in actions for child-support payments as in other cases.

(4) The remedies of attachment and garnishment, as provided in Article 35 of Chapter 1 of the General Statutes, shall be available in an action for child-support payments as in other cases, and for such purposes the child or person bringing an action for child support shall be deemed a creditor of the defendant. Additionally, in accordance with the provisions of G.S. 110-136, a continuing wage garnishment proceeding for wages due or to become due may be instituted by motion in the original child support proceeding or by independent action through the filing of a petition.

(5) The remedy of injunction, as provided in Article 37 of Chapter 1 of the General Statutes and G.S. 1A-1, Rule 65, shall be available in actions for child support as in other cases.

(6) Receivers, as provided in Article 38 of Chapter 1 of the General Statutes, may be appointed in action for child support as in other cases.

(7) A minor child or other person for whose benefit an order for the payment of child support has been entered shall be a creditor within the meaning of Article 3A of Chapter 39 of the General Statutes pertaining to fraudulent conveyances.

(8) Except as provided in Article 15 of Chapter 44 of the General Statutes, a judgment for child support shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments and may include provisions for periodic payments.

(9) An order for the periodic payments of child support or a child support judgment that provides for periodic payments is enforceable by proceedings for civil contempt, and disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A of the General Statutes.

Notwithstanding the provisions of G.S. 1-294, an order for the payment of child support which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for child support until the appeal is decided, if justice requires.

(10) The remedies provided by Chapter 1 of the General Statutes, Article 28, Execution; Article 29B, Execution Sales; and Article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for child support as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in Article 16 of Chapter 1C of the General Statutes.

(11) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available.

(g) An individual who brings an action or motion in the cause for the support of a minor child, and the individual who defends the action, shall provide to the clerk of the court in which the action is brought or the order is issued, the individual's social security number.

(h) Child support orders initially entered or modified on and after October 1, 1998, shall contain the name of each of the parties, the date of birth of each party, and the court docket number. The Administrative Office of the Courts shall transmit to the Department of Health and Human Services, Child Support Enforcement Program, on a timely basis, the information required to be included on orders under this subsection and the social security number of each party as required under subsection (g) of this section. (1967, c. 1153, s. 2; 1969, c. 895, s. 17; 1975, c. 814; 1977, c. 711, s. 26; 1979, c. 386, s. 10; 1981, c. 472; c. 613, ss. 1, 3; 1983, c. 54; c. 530, s. 1; 1985, c. 689, s. 17; 1985 (Reg. Sess., 1986), c. 1016; 1989, c. 529, ss. 1, 2; 1989 (Reg. Sess., 1990), c. 1067, s. 2; 1993, c. 335, s. 1; c. 517, s. 5; 1995, c. 319, s. 9; c. 518, s. 1; 1997-433, ss. 2.1(a), 2.2, 4.4, 7.1; 1997-443, ss. 11A.118(a), 11A.122; 1998-17, s. 1; 1998-176, s. 1; 1999-293, ss. 3, 4; 1999-456, s. 13; 2001-237, s. 1; 2003-288, s. 1; 2008-12, s. 1.)

Local Modification. — Person: 1967, c. 848, s. 2.

Cross References. — As to actions for custody and support, see also G.S. 50-13.5 and notes thereunder. As to the maintenance of certain actions as independent actions, see G.S. 50-19. For the North Carolina Child Support Guidelines, effective August 1, 1991, see the

Annotated Rules of North Carolina. As to liens on real and personal property of persons owing past due child support, see G.S. 44-86. As to discharge of liens on property of persons owing past due child support, see G.S. 44-87. As to legislation deleting the June 30, 1998 expiration date for all enactments and amendments by Session Laws 1997-443, see the editor's note under G.S. 44-86.

Editor's Note. — Session Laws 1995, c. 319, which amended this section, in s. 12 provides that this act applies to civil actions filed on or after October 1, 1995, and shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995.

This section, prior to the amendment by Session Laws 1995, c. 319, read as follows: "**Action for support of minor child.**

(a) Any parent, or any person, agency, organization or institution having custody of a minor child, or bringing an action or proceeding for the custody of such child, or a minor child by his guardian may institute an action for the support of such child as hereinafter provided.

(b) In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child, and any other person, agency, organization or institution standing in loco parentis shall be secondarily liable for such support. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. The judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support. However, the judge may not order support to be paid by a person who is not the child's parent or an agency, organization or institution standing in loco parentis absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing. The preceding sentence shall not be construed to prevent any court from ordering the support of a child by an agency of the State or county which agency may be responsible under law for such support.

(c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1). However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines. If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.

Payments ordered for the support of a child shall terminate when the child reaches the age of 18 except:

(1) If the child is otherwise emancipated, payments shall terminate at that time;

(2) If the child is still in primary or secondary school when the child reaches age 18, support payments shall continue until the child graduates, otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress towards graduation, or reaches age 20, whichever comes first, unless the court in its discretion orders that payments cease at age 18 or prior to high school graduation.

In the case of graduation, or attaining age 20, payments shall terminate without order by the court, subject to the right of the party receiving support to show, upon motion and with notice to the opposing party, that the child has not graduated or attained the age of 20.

(c1) Effective July 1, 1990, the Conference of Chief District Judges shall prescribe uniform statewide presumptive guidelines for the computation of child support obligations of each parent as provided in Chapter 50 or elsewhere in the General Statutes and shall develop criteria for determining when, in a particular case, application of the guidelines would be unjust or inappropriate. Prior to May 1, 1990 these guidelines and criteria shall be reported to the General Assembly by the Administrative Office of the Courts by delivering copies to the President Pro Tempore of the Senate and the Speaker of the House of Representatives. The purpose of the guidelines and criteria shall be to ensure that payments ordered for the support of a minor child are in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case. The guidelines shall include a procedure for setting child support, if any, in a joint or shared custody arrangement which shall reflect the other statutory requirements herein.

Periodically, but at least once every four years, the Conference of Chief District Judges shall review the guidelines to determine whether their application results in appropriate child support award amounts. The Conference may modify the guidelines accordingly. The Conference shall give the Department of Human Resources, the Administrative Office of the Courts, and the general public an opportunity to provide the Conference with information relevant to the development and review of the guidelines. Any modifications of the guidelines or criteria shall be reported to the General Assembly by the Administrative Office of the Courts before they become effective by delivering copies to the President Pro Tempore of the Senate and the Speaker of the House of Representatives. The guidelines, when adopted or modified, shall be provided to the Department of Human Resources and the Administrative Office of the Courts, which shall disseminate them to the public through local IV-D offices, clerks of court, and the media.

Until July 1, 1990, the advisory guidelines adopted by the Conference of Chief District Judges pursuant to this subsection as formerly written shall operate as presumptive guidelines and the factors adopted by the Conference of Chief District Judges pursuant to this subsection as formerly written shall constitute criteria for varying from the amount of support determined by the guidelines.

(d) Payments for the support of a minor child shall be ordered to be paid to the person having custody of the child or any other proper person, agency, organization or institution, or to the court, for the benefit of such child.

(d1) For child support orders initially entered on or after January 1, 1994, the immediate income withholding provisions of G.S. 110-136.5(c1) shall apply.

(e) Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein, or a security interest in or possession of real property, as the court may order. In every case in which payment for the support of a minor child is ordered and alimony or alimony pendente lite is also ordered, the order shall separately state and identify each allowance.

(f) Remedies for enforcement of support of minor children shall be available as herein provided.

(1) The court may require the person ordered to make payments for the support of a minor child to secure the same by means of a bond, mortgage or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the execution of an assignment of wages, salary or other income due or to become due.

(2) If the court requires the transfer of real or personal property or an interest therein as provided in subsection (e) as a part of an order for payment of support for a minor child, or for the securing thereof, the court may also enter an order which shall transfer title as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(3) The remedy of arrest and bail, as provided in Article 34 of Chapter 1 of the General Statutes, shall be available in actions for child-support payments as in other cases.

(4) The remedies of attachment and garnishment, as provided in Article 35 of Chapter 1 of the General Statutes, shall be available in an action for child-support payments as in other cases, and for such purposes the child or person bringing an action for child support shall be deemed a creditor of the defendant. Additionally, in accordance with the provisions of G.S. 110-136, a continuing wage garnishment proceeding for wages due or to become due may be instituted by motion in the original child support proceeding or by independent action through the filing of a petition.

(5) The remedy of injunction, as provided in Article 37 of Chapter 1 of the General Statutes and G.S. 1A-1, Rule 65, shall be available in actions for child support as in other cases.

(6) Receivers, as provided in Article 38 of Chapter 1 of the General Statutes, may be appointed in action for child support as in other cases.

(7) A minor child or other person for whose benefit an order for the payment of child support has been entered shall be a creditor within the meaning of Article 3 of Chapter 39 of the General Statutes pertaining to fraudulent conveyances.

(8) A judgment for child support shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past due periodic payments may by motion in the cause or by a separate action be

reduced to judgment which shall be a lien as other judgments.

(9) An order for the periodic payments of child support is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A of the General Statutes.

Notwithstanding the provisions of G.S. 1-294, an order for the payment of child support which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for child support until the appeal is decided, if justice requires.

(10) The remedies provided by Chapter 1 of the General Statutes, Article 28, Execution; Article 29B, Execution Sales; and Article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for child support as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in Article 16 of Chapter 1C of the General Statutes.

(11) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available."

Effect of Amendments. — Session Laws 2008-12, s. 1, effective October 1, 2008, deleted the last sentence in subsection (g), which read: "The child support order shall contain the social security number of the parties as evidenced in the support proceeding"; and, in subsection (h), deleted "the social security number of each party," following "date of birth of each party" in the first sentence, and added "and the social security number of each party as required under subsection (g) of this section" at the end of the second sentence.

Legal Periodicals. — For survey of 1972 case law on child support and pre-Chapter 48A consent judgments, see 51 N.C.L. Rev. 1091 (1973).

For survey of 1976 case law on domestic relations, see 55 N.C.L. Rev. 1018 (1977).

For note on the remedy of garnishment in child support, see 56 N.C.L. Rev. 169 (1978).

For survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

For survey of 1981 family law, see 60 N.C.L. Rev. 1379 (1982).

For comment discussing the status of the presumption of purchase money resulting trust for wives in light of Mims v. Mims, 305 N.C. 41, 286 S.E.2d 779 (1982), see 61 N.C.L. Rev. 576 (1983).

For note, "Plott v. Plott: Use of a Formula to Determine Parental Child Support Obligations — A Continuation of Inconsistent and Inequitable Decisions?," see 64 N.C.L. Rev. 1378 (1986).

For note on child support provisions as a limit on the doctrine of necessaries, in light of Alamance County Hosp. v. Neighbors, 315 N.C. 362, 338 S.E.2d 87 (1986), see 65 N.C.L. Rev. 1308 (1987).

For note, "Legislating Responsibility: North Carolina's New Child Support Enforcement Acts," see 65 N.C.L. Rev. 1354 (1987).

For article, "Using Hindsight to Change Child Support Obligations: A Survey of Retroactive Modification and Reimbursement of Child Support in North Carolina," see 10 Campbell L. Rev. 111 (1987).

For article, "Equating a Stepparent's Rights and Liabilities Vis-A-Vis Custody, Visitation and Support upon Dissolution of the Marriage with Those of the Natural Parent — An Equitable Solution to a Growing Dilemma?," see 17 N.C. Cent. L.J. 1 (1988).

For comment, "The Seventeen Percent Solution: Formula Guidelines for Determining Child Support Awards Arrive in North Carolina," see 18 N.C. Cent. L.J. 209 (1989).

For note, "Hendricks v. Sanks: One Small Step for the Continued Parental Support of Disabled Children Beyond the Age of Majority in North Carolina," see 80 N.C.L. Rev. 2094 (2002).

CASE NOTES

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I. IN GENERAL.

Editor's Note. — *A number of the cases cited below were decided under former G.S. 50-13, which dealt with custody and maintenance of children in actions for divorce, and former G.S. 50-16, which dealt with actions for alimony without divorce.*

State Policy. — It is the policy of this State that both parents have a duty to support their minor children. Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151, cert. denied, 329 N.C. 499, 407 S.E.2d 538 (1991).

Public Policy. — The public policy of this state encourages settlement agreements and supports the inclusion of a provision for the recovery of attorney's fees in settlement agreements. Bromhal v. Stott, 341 N.C. 702, 462 S.E.2d 219 (1995).

History of Section. — For discussion of the history of this section, see Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991).

Provisions in Chapter 110 Prevail over This Chapter. — The legislature did not intend for this chapter to control all actions for child support. Reading this chapter together with Chapter 110, the more specific provisions of Chapter 110 dealing with the procedure for determining and enforcing support obligations of a father who voluntarily acknowledges paternity prevails over any conflicting procedure in this chapter for determining and enforcing custody and support of minor children. Wake County ex rel. Horton v. Ryles, 112 N.C. App. 754, 437 S.E.2d 404 (1993).

Subsection (a) does not specify that it requires judicial determination of custody before its provision can be utilized by a person or agency bringing an action for support. Craig v. Kelley, 89 N.C. App. 458, 366 S.E.2d 249 (1988).

Visitation and child support rights are independent rights accruing primarily to the benefit of the minor child and one is not, and may not be made, contingent upon the other. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

Support Exemption. — Section 105-149 has been repealed in apparent effort by General Assembly to bring North Carolina's personal income tax laws into conformity with the 1984 revisions of federal tax statutes. Under federal law, custodial parent, not parent paying primary support, is entitled to claim support exemption for child under circumstances such as are present here. However, federal law also provides that custodial parent may waive right to claim exemption. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Trial court may order custodial parent to waive right to claim federal and state tax exemptions. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Court order assigning federal and state tax dependency exemptions to payor of child support for all income tax purposes was valid. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Mentally Retarded Children. — North Carolina trial court properly exercised jurisdiction over a father's action seeking modification of a New Jersey trial court's order requiring the father to pay child support for a mentally retarded child who was born in 1964, after the child and her mother moved to North Carolina and the father moved to Maryland, and the trial court's judgment that the father's request for an order terminating his obligation to pay child support had to be granted, pursuant to G.S. 50-13.4(c), was affirmed on appeal. Lombardi v. Lombardi, 157 N.C. App. 540, 579 S.E.2d 419, 2003 N.C. App. LEXIS 740 (2003).

The Child Support Guidelines should not be used to determine the support obligation of a stepparent, secondarily liable for a child's needs. Duffey v. Duffey, 113 N.C. App. 382, 438 S.E.2d 445 (1994).

Support and Counsel Fees Pendente Lite on Husband's Denial of Paternity. — Where, upon wife's motion in the cause to require defendant to provide support for the minor child of the marriage, made after decree of absolute divorce, husband filed an affidavit denying paternity, and at his instance the issue was transferred to the civil issue docket, the trial court had the discretionary power to order defendant to provide for support of the child and counsel fees pendente lite. Winfield v. Winfield, 228 N.C. 256, 45 S.E.2d 259 (1947).

The requirement that a voluntary assumption of support be reduced to writing, imposed on those who are secondarily liable under subsection (b) of this section, does not apply to parents of unemancipated minors who have had a child, for they are primarily liable for support of the infant. Whitman v. Kiger, 139 N.C. App. 44, 533 S.E.2d 807, 2000 N.C. App. LEXIS 816 (2000), aff'd, 353 N.C. 360, 543 S.E.2d 476 (2001).

Applied in Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969); Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970); Williams v. Williams, 12 N.C. App. 170, 182 S.E.2d 667 (1971); Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Carter v. Carter, 13 N.C. App. 648, 186 S.E.2d 684 (1972); Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975); Brady v. Brady, 24 N.C. App. 663, 211 S.E.2d 823 (1975); Tidwell v. Booker, 27 N.C. App. 435, 219 S.E.2d 648 (1975); Amaker v. Amaker, 28 N.C. App. 558, 221 S.E.2d 917 (1976); County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979); Williams v. Williams, 42 N.C. App. 163, 256 S.E.2d 401 (1979); Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979); Gordon v. Gordon, 46 N.C. App. 495, 265 S.E.2d 425 (1980); Lane v. Aetna Cas. & Sur. Co., 48 N.C. App. 634, 269 S.E.2d 711 (1980); In re Register, 303 N.C. 149, 277 S.E.2d 356 (1981); Hardee v. Hardee, 59 N.C. App. 465, 297 S.E.2d 606 (1982); Wolfe v. Wolfe, 64 N.C. App. 249, 307 S.E.2d 400 (1983); Champion v. Champion, 64 N.C. App. 606, 307 S.E.2d 827 (1983); Rustad v. Rustad, 68 N.C. App. 58, 314 S.E.2d 275 (1984); Stevens v. Stevens, 68 N.C. App. 234, 314 S.E.2d 786 (1984); Wilkes County ex rel. Child Support Enforcement Agency ex rel Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984); Bennett v. Bennett, 71 N.C. App. 424, 322 S.E.2d 439 (1984); Toney v. Toney, 72 N.C. App. 30, 323 S.E.2d 434 (1984); Massey v. Massey, 71 N.C. App. 753, 323 S.E.2d 451 (1984); Appelbe v. Appelbe, 75 N.C. App. 197, 330 S.E.2d 57 (1985); State ex rel. Pender County Child Support Enforcement Agency ex rel Crews v. Parker, 319 N.C. 354, 354 S.E.2d 501 (1987); Koufman v. Koufman, 97 N.C. App. 227, 388 S.E.2d 207 (1990); Hall v. Hall, 107 N.C. App. 298, 419 S.E.2d 371 (1992); Rose v. Rose, 108 N.C. App. 90, 422 S.E.2d 446 (1992); Thomas v. Thomas, 134 N.C. App. 591, 518 S.E.2d 513 (1999); Leary v. Leary, 152 N.C. App. 438, 567 S.E.2d 834, 2002 N.C. App. LEXIS 912 (2002); Holland v. Holland, 169 N.C. App. 564, 610 S.E.2d 231, 2005 N.C. App. LEXIS 674 (2005); Guilford County ex rel. Holt v. Puckett, 191 N.C. App. 693, 664 S.E.2d 362, 2008 N.C. App. LEXIS 1471 (2008); New Enforcement ex rel. Dillon v. Rains, — N.C. App. —, 666 S.E.2d 800, 2008 N.C. App. LEXIS 1736 (2008).

Cited in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971); Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971); Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972); Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972); Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973); Stanback v. Stanback, 31 N.C. App. 174, 229 S.E.2d 693 (1976); Roberson v. Roberson, 40 N.C. App. 193, 252 S.E.2d 237 (1979); Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979); Oxendine v. Catawba County Dep't of Social Servs., 49 N.C. App. 571, 272 S.E.2d 417 (1980); Falls v. Falls, 52 N.C. App. 203, 278 S.E.2d 546 (1981); Harper v. Harper, 50 N.C. App. 394, 273 S.E.2d 731 (1981); Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981); Wilkes County ex rel. Child Support Enforcement Agency ex rel Nations v. Gentry, 63 N.C. App. 432, 305 S.E.2d 207 (1983); State v. Caudill, 68 N.C. App. 268, 314 S.E.2d 592 (1984); Miller v. Kite, 69 N.C. App. 679, 318 S.E.2d 102 (1984); Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865 (1984); Rice v. Rice, 81 N.C. App. 247, 344 S.E.2d 41 (1986); In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404 (1986); North Carolina Baptist Hosps. v. Harris, 319 N.C. 347, 354 S.E.2d 471 (1987); Smith v. Davis, 88 N.C. App. 557, 364 S.E.2d 156 (1988); Williams v. Williams, 97 N.C. App. 118, 387 S.E.2d 217 (1990); In re Roberson, 97 N.C. App. 277, 387 S.E.2d 668 (1990); McBride v. McBride, 334 N.C. 124, 431 S.E.2d 14 (1993); Fitch v. Fitch, 115 N.C. App. 722, 446 S.E.2d 138 (1994); Allen v. Piedmond Transp. Servs., Inc., 116 N.C. App. 234, 447 S.E.2d 835 (1994); Moyer v. Moyer, 122 N.C. App. 723, 471 S.E.2d 676 (1996); Taylor v. Taylor, 128 N.C. App. 180, 493 S.E.2d 819 (1997); Glass v. Glass, 131 N.C. App. 784, 509 S.E.2d 236 (1998); Vann v. Vann, 128 N.C. App. 516, 495 S.E.2d 370 (1998); Willard v. Willard, 130 N.C. App. 144, 502 S.E.2d 395 (1998); Brewer v. Brewer, 139 N.C. App. 222, 533 S.E.2d 541, 2000 N.C. App. LEXIS 901 (2000); In re Estate of Lunsford, 143 N.C. App. 646, 547 S.E.2d 483, 2001 N.C. App. LEXIS 326 (2001); Miller v. Miller, 153 N.C. App. 40, 568 S.E.2d 914, 2002 N.C. App. LEXIS 1070 (2002); McKinney v. Richitelli, 357 N.C. 483, 586 S.E.2d 258, 2003 N.C. LEXIS 1097 (2003).

II. INSTITUTION OF ACTION.

Judicial Determination of Custody. — Subsection (a) does not specify that it requires judicial determination of custody before its provisions can be utilized by person or agency bringing action for support. Thus, where mother in her proceeding for modification of support order also requested a formal adjudication of custody, which request was granted, plaintiff met the custody requirements of subsection (a). Craig v. Kelley, 89 N.C. App. 458, 366 S.E.2d 249 (1988).

Custodial Parent as Real Party in Interest. — If the custodial parent provides support which the other parent is legally obligated to provide, then the custodial parent is a real party in interest in an action to recover the support so provided. Griffith v. Griffith, 38 N.C. App. 25, 247 S.E.2d 30, cert. denied, 296 N.C. 106, 249 S.E.2d 804 (1978).

Although plaintiff alleged that he was the father of the child, he did not allege that he had custody, therefore under the provisions of this section, only a parent who has custody of a minor child may bring an action for its support. Becton v. George, 90 N.C. App. 607, 369 S.E.2d 366 (1988).

Required Notice Deemed Waived. — Where both parties introduced evidence on the reasonable needs of the children and the relative ability of each parent to pay support for the children, the defendant's failure to give proper notice of his request that a hearing be conducted regarding these issues was waived and the trial court was required to find facts and enter conclusions on this evidence. Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991); Rose v. Rose, 108 N.C. App. 90, 422 S.E.2d 446 (1992).

Notice for Hearing. — This section does not identify any time restrictions for making the request for a hearing described in subsection (c). However, to effectuate the purpose of this section, any party in a pending action requesting a variance from the guidelines must, unless the request is made in the original pleadings, give at least ten days written notice as required by G.S. 50-13.5(d)(1). Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991).

There is no limitation as to time within which actions for the support of legitimate children must be commenced. County of Lenoir ex rel. Cogdell v. Johnson, 46 N.C. App. 182, 264 S.E.2d 816 (1980).

Motion in Cause. — Plaintiff-husband, as a parent seeking custody, could seek to have his child support obligation determined through a motion in the cause in the divorce action. He was not precluded from doing so by the fact that the court had not previously entered orders in that action relating to child support. Bottomley v. Bottomley, 82 N.C. App. 231, 346 S.E.2d 317 (1986).

Discovery Held Overbroad. — For a case in which it was held that plaintiff's discovery request in a child-support case was overbroad and should have been limited by the trial court, see Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991), appeal dismissed, 331 N.C. 286, 417 S.E.2d 254 (1992).

Prayer for Increase in Support Actually Action Under this Section. — Although plaintiff's complaint prayed for an increase in child support based upon a substantial change in circumstances, plaintiff's action was in fact brought pursuant to subsection (a) of this section because the amount sought to be increased was paid pursuant to a non-judicial separation agreement; plaintiff was actually asking the Court to enter an original award of child support. Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991), appeal dismissed, 331 N.C. 286, 417 S.E.2d 254 (1992).

III. LIABILITY FOR SUPPORT.

Subsection (b) imposes primary liability upon both father and mother to support a minor child. Plott v. Plott, 313 N.C. 63, 326 S.E.2d 863 (1985).

Subsection (b) of this section, as amended in 1981, does not diminish a father's responsibilities. Rather, it enlarges a mother's responsibilities by making both parents primarily liable for the support of their children. Alamance County Hosp. v. Neighbors, 315 N.C. 362, 338 S.E.2d 87 (1986).

Equal Duty of Support Is Rule Rather Than Exception. — Today, the equal duty of both parents to support their children is the rule rather than the exception is virtually all states. Plott v. Plott, 313 N.C. 63, 326 S.E.2d 863 (1985).

Both parents have equal support duties under the law, absent pleading and proof that circumstances otherwise warrant. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983), modified on other grounds, 313 N.C. 63, 326 S.E.2d 863 (1985).

Support for minor children is an obligation shared by both parents according to their relative abilities to provide support and the reasonable needs and estate of the child. Boyd v. Boyd, 81 N.C. App. 71, 343 S.E.2d 581 (1986).

But Equal Financial Contributions Are Not Necessarily Required. — Subsection (b) of this section provides that both mothers and fathers share primary liability for the support of their minor children, thus imposing an equal legal duty on the parent of each gender. However, subsection (b) neither mandates equal financial contributions nor requires any contribution from either party where it is proved that the circumstances otherwise warrant. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983), modified on other grounds, 313 N.C. 63, 326 S.E.2d 863 (1985).

Equal legal duty to support does not impose an equal financial contribution by both parties. Plott v. Plott, 313 N.C. 63, 326 S.E.2d 863 (1985).

Equal duty to support does not necessarily mean that the amount of child support is to be automatically divided equally between the parties. Rather, the amount of each parent's obligation varies in accordance with their respective financial resources. Plott v. Plott, 313 N.C. 63, 326 S.E.2d 863 (1985).

Equal Financial Contributions Not Imposed Where Unfair or Burdensome. — The parental obligation for child support is not primarily an obligation of the father but is one shared by both parents. This equal duty to support, however, does not impose upon both parties an equal financial contribution when such an allocation would be unfair or place too great a burden on a party. Plott v. Plott, 313 N.C. 63, 326 S.E.2d 863 (1985).

Discretion of Court as to Amount and Source of Support. — The trial court has considerable discretion in determining whether and in what amounts the party from whom support is sought may be ordered to provide it. Therefore, the trial court has a duty to exercise an informed and considered discretion with respect to the support obligation of the parties. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983), modified on other grounds, 313 N.C. 63, 326 S.E.2d 863 (1985).

Amount of Each Party's Contribution Determined on Case-by-Case Basis. — The amount of each party's contribution to child support is generally determined by the judge on a case-by-case basis. The judge must evaluate the circumstances of each family and also consider certain statutory requirements in fixing the amount of child support. Subsection (c) of this section mandates that the trial judge consider the certain factors in setting child support amounts. Plott v. Plott, 313 N.C. 63, 326 S.E.2d 863 (1985).

Relative Ability to Pay May Be Considered. — Although Session Laws 1981, c. 613 had the effect of changing the previous rule that the mother was only secondarily liable for child support, in all other relevant respects involving the relative ability or inability of the mother and father to provide such support, the relevant statutory provisions remained unchanged. Therefore, other circumstances may properly be considered, including the relative ability of the parties to pay. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983), modified on other grounds, 313 N.C. 63, 326 S.E.2d 863 (1985).

It was apparent from the record that the trial court considered both the existence and structure of appellee's trust fund and appellant's income as an ophthalmologist in making its determination that appellant should contribute one-half of child's necessary and actual expenses. It concluded that a father in an established ophthalmologic practice, and who had a 1991 income of at least $88,000 was able to contribute half of his child's support. Munn v. Munn, 112 N.C. App. 151, 435 S.E.2d 74 (1993).

Consideration of Ability to Pay — Procedure. — Defendant's contention that summary judgment was improper because he was financially unable to make the child support payments called for in the agreement would be relevant only to future payments and could be considered only after the defendant had filed a motion in the cause for the trial court to set an amount of child support which differs from that in the separation agreement. Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151, cert. denied, 329 N.C. 499, 407 S.E.2d 538 (1991).

Voluntary Unemployment. — Trial court order finding that mother was obligated to pay child support to her ex-husband for their three minor children who resided with the ex-husband, which was based on a deviation from the North Carolina Child Support Guidelines, was error; although the deviation was supported by the evidence in that the mother was voluntarily unemployed and had cash reserves to meet her financial obligations of the children, the amount awarded was not supported by any evidence. Roberts v. McAllister, 174 N.C. App. 369, 621 S.E.2d 191, 2005 N.C. App. LEXIS 2490 (2005), appeal dismissed, — N.C. —, 629 S.E.2d 608 (2006).

Determination of Relative Ability. — The relative ability of the parties to contribute under subsections (b) and (c) of this section cannot depend solely on the determination of monthly available income after expenses. Rather, it must be reflective of all the relevant circumstances, including the relative hardship to each parent in contributing to the reasonable needs of the child. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983), modified on other grounds, 313 N.C. 63, 326 S.E.2d 863 (1985).

Stepparent in Loco Parentis. — If an individual assumes the status of in loco parentis, he is secondarily liable to the child's natural parents for the support of that child, and if the needs of the child exceed the ability of the child's natural parents to meet those needs, then and only then is the individual in loco parentis secondarily responsible for the deficiency. Duffey v. Duffey, 113 N.C. App. 382, 438 S.E.2d 445 (1994).

By signing a separation agreement in which he agreed to pay child support to plaintiff, stepparent voluntarily and in writing extended his status of in loco parentis and gave the court the authority to order that support be paid. Duffey v. Duffey, 113 N.C. App. 382, 438 S.E.2d 445 (1994).

Child's Needs and Hardship to Each Parent Must Be Considered. — Enforcement of each parent's statutory duty to contribute child support depends on the urgency of the needs of the child and the relative hardship to each parent in contributing to these needs. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983), modified on other grounds, 313 N.C. 63, 326 S.E.2d 863 (1985).

Children with Property of Their Own. — There is nothing in the statute to suggest any legislative intent to change the firmly established rule that the supporting parent who can do so remains obligated to support his or her minor children, even though they may have property of their own. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

Although trial court found as a fact that each child had an estate in excess of $300,000.00, the separate incomes and estates of children did not diminish or relieve the obligation of the defendant father to support his children, even though former husband's income was about $37,000.00. Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991).

Education Needs of Child. — Although public funding may have been available for special education needs of child, but was not sought by custodial parent, court did not err in requiring noncustodial parent to pay costs of child's educational expenses in proportion to parent's gross income. Sikes v. Sikes, 98 N.C. App. 610, 391 S.E.2d 855 (1990), aff'd, 330 N.C. 595, 411 S.E.2d 588 (1992).

Mother had to continue paying child support under subdivision (c)(2) of this section for her son who had turned 18 where, although he would not be able to receive a standard high school diploma because he had Down's Syndrome, his teacher and school counselor showed that his attendance at the school was in his best interests, that he would continue to benefit in the future from the curriculum, and that he was making satisfactory academic progress toward a non-traditional graduation. Hendricks v. Sanks, 143 N.C. App. 544, 545 S.E.2d 779, 2001 N.C. App. LEXIS 294 (2001).

Apportionment of Costs Is Not Required Where One Parent Is Unable to Assist in Support. — Although apportionment of the costs of a child's support between his father and mother according to their respective means and responsibilities is statutorily authorized, it is not required where the mother is financially unable to assist the father with the support of their son. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983), modified on other grounds, 313 N.C. 63, 326 S.E.2d 863 (1985).

Support of Child Legitimated Under § 49-12. — Where the reputed father of a child marries the child's mother after its birth, under G.S. 49-12 such child is deemed legitimate just as if it had been born in lawful wedlock, and such child is a minor child of the marriage; thus, the father may be required to furnish support for such child upon motion made either before or after decree of divorce. Carter v. Carter, 232 N.C. 614, 61 S.E.2d 711 (1950).

Primary Liability of Father Under Former Provisions. — For cases as to father's primary liability and mother's secondary liability to support their children, prior to the amendment by Session Laws 1981, c. 613, see Bailey v. Bailey, 127 N.C. 474, 37 S.E. 502 (1900); Sanders v. Sanders, 167 N.C. 319, 83 S.E. 490 (1914); Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976); Hicks v. Hicks, 34 N.C. App. 128, 237 S.E.2d 307 (1977); Coble v. Coble, 44 N.C. App. 327, 261 S.E.2d 34 (1979), rev'd on other grounds, 300 N.C. 708, 268 S.E.2d 185 (1980); Flippin v. Jarrell, 301 N.C. 108, 270 S.E.2d 482 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981); In re Register, 303 N.C. 149, 277 S.E.2d 356 (1981).

As to mother's standing formerly to bring claim for loss of child's services and medical expenses, based upon her formerly secondary support obligation, prior to the amendment by Session Laws 1981, c. 613, see Flippin v. Jarrell, 301 N.C. 108, 270 S.E.2d 482 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Father's Reduction in Payments as Evidence He Had Not Met Obligations. — Where judge found that mother provided no evidence that she was entitled to payment of back child support, the evidence did not support the judge's finding; there was evidence that father had not met his child support obligations where father testified that in 1985, he reduced the amount of the payments due to a decrease in salary. Correll v. Allen, 94 N.C. App. 464, 380 S.E.2d 580 (1989).

Equitable Estoppel Did Not Bar Claim for Past Support. — Even assuming that on some set of facts equitable estoppel might properly bar a claim for child support arrears, it was inapplicable where husband, seeking to rely on equitable estoppel, could not show that, in good faith reliance on the conduct of his ex-wife, he had changed his position for the worse; the only change made in his position was the retention to his benefit of money owed for the support of his children. Griffin v. Griffin, 96 N.C. App. 324, 385 S.E.2d 526 (1989).

Applicability of Doctrine of "Necessaries". — Although the normal vehicle today for enforcing the obligation of support is undoubtedly the payment of court-ordered support pursuant to statute, the common law provided another vehicle through the so-called doctrine of "necessaries." North Carolina accepts this process for enforcing a parent's obligation to support minor children. Alamance County Hosp. v. Neighbors, 315 N.C. 362, 338 S.E.2d 87 (1986).

Support Obligation of Noncustodial Parent. — Under new child Support Guidelines an adjustment in support obligation of noncustodial parent is reduced only when each parent has child for more than 33 percent of year. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Right of Third Party to Recover for "Necessaries" Furnished to Child. — Because a child's right to support continues unimpaired despite the divorce of his or her parents, the right of a third party provider of goods or services to claim against the noncustodial parent also continues, unimpaired by contracts or judicial decrees or orders affecting the relations between the parents. Alamance County Hosp. v. Neighbors, 315 N.C. 362, 338 S.E.2d 87 (1986).

The payment of court-ordered child support does not bar a third party from seeking reimbursement directly from a noncustodial parent for "necessaries" provided to that parent's minor child. However, because the third party provider's right to recover against the parent is based upon the child's right to support, the third party provider must still show that the services or goods provided were legal "necessaries" and that the parent against whom relief is sought has failed or refused to provide them. In this context, any payment a noncustodial parent has made for the support of his or her child would be a factor for the trial judge to consider in deciding whether the parent has in fact met the obligation to support that child. Alamance County Hosp. v. Neighbors, 315 N.C. 362, 338 S.E.2d 87 (1986).

Non-Biological Parents. — The court will not impose the burden of child support on a non-biological parent who has not voluntarily assumed such an obligation. Pott v. Pott, 126 N.C. App. 285, 484 S.E.2d 822 (1997).

Persons Standing in Loco Parentis. — Although support of a child ordinarily is a parental obligation, other persons standing in loco parentis may also acquire a duty to support the child; thus, in a case where custodial father and child had believed him to be the father of the child, the duty of support should have accompanied the right to custody. Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997).

Parents of Unemancipated Minors Primarily Responsible for Grandchildren's Support. — The statutory language of this section, coupled with the legislative intent, imposes primary responsibility for an infant born to unemancipated minors on the minors' parents (i.e. the infant's grandparents). Whitman v. Kiger, 139 N.C. App. 44, 533 S.E.2d 807, 2000 N.C. App. LEXIS 816 (2000), aff'd, 353 N.C. 360, 543 S.E.2d 476 (2001).

IV. AMOUNT OF SUPPORT.

A. In General.

History and Purpose of Guidelines. — As of July 1, 1991, the State adopted guidelines based on income-sharing approach for determining child support. These guidelines were promulgated by Conference of Chief District Judges in accordance with subsection (c1) of this section. Income-sharing formulas ignore problem of attempting to determine cost of raising a child and are based instead on assumption that each parent will contribute all of his or her income to one fund. Then the formulas provide method for equitably dividing income among family members. Income-sharing formulas seeking to equalize financial burden of divorce so that all family members experience about same proportional reduction in standard of living after divorce. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Constitutionality of Guidelines. — Child Support Guidelines (2002) did not violate substantive due process; the state had a compelling interest in regulating child support obligations, and through establishing a rebuttable presumption with regard to the guidelines under G.S. 50-13.4(c), the act was narrowly drawn. Row v. Row, 185 N.C. App. 450, 650 S.E.2d 1, 2007 N.C. App. LEXIS 1803 (2007).

Effective Date of Guidelines. — At time support order was entered in June, 1989, the Guidelines in subsection (c1) of this section were only advisory in nature. The Guidelines became presumptive as of October 1, 1989. New presumptive guidelines became effective July 1, 1990. Therefore, at the time, (June 1989) order was entered, trial judge was neither required to follow nor refer to advisory guidelines in order. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Use of Guidelines to Determine Support Proper. — Where parents' combined gross income was $11,980, below the $20,000 per month threshold, the trial court was permitted to use the child support guidelines and require the husband to continue paying $1,521 per month in child support. Francis v. Francis, 169 N.C. App. 442, 612 S.E.2d 141, 2005 N.C. App. LEXIS 647 (2005).

The amount of a parent's child support obligation is determined by application of the Child Support Guidelines. Barham v. Barham, 127 N.C. App. 20, 487 S.E.2d 774 (1997), aff'd, 347 N.C. 570, 494 S.E.2d 763 (1998).

Guidelines Are Not Mandatory But Advisory. — An examination and interpretation of subsection (c1) as written clearly indicates that the guidelines prescribed by the Conference of Chief District Court Judges are not mandatory and binding but rather advisory in nature. Morris v. Morris, 92 N.C. App. 359, 374 S.E.2d 441 (1988), decided prior to later amendments to subsection (c1).

Deviation From Guidelines. — According to the statute, the trial court has the discretion to deviate from the presumptive guidelines in only two situations: (1) when application does not meet or exceeds the reasonable needs of the child; or (2) when application would be unjust or inappropriate. Guilford County ex rel. Child Support Enforcement Agency ex rel. Easter v. Easter, 120 N.C. App. 260, 461 S.E.2d 798 (1995), modified, 344 N.C. 166, 473 S.E.2d 6 (1996).

A trial court may deviate from the Guidelines when it finds, by the greater weight of the evidence, application of the Guidelines: (1) would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support; or (2) would be otherwise unjust or inappropriate. Barham v. Barham, 127 N.C. App. 20, 487 S.E.2d 774 (1997), aff'd, 347 N.C. 570, 494 S.E.2d 763 (1998).

Although the trial court properly considered the father's settlement trust to be non-recurring income when making its child support order, the case was remanded because the trial court failed to make specific findings regarding the reasonable needs of the child when it deviated from the North Carolina Child Support Guidelines. Spicer v. Spicer, 168 N.C. App. 283, 607 S.E.2d 678, 2005 N.C. App. LEXIS 260 (2005).

North Carolina Child Support Guidelines were inapplicable because the combined monthly adjusted gross income of the parents exceeded $20,000; thus, the trial court was required to make a case-by-case determination. Consequently, the trial court was not bound by the Guidelines in determining the father's child support obligations. Diehl v. Diehl, 177 N.C. App. 642, 630 S.E.2d 25, 2006 N.C. App. LEXIS 1180 (2006).

In considering a father's motion to modify child support, the trial court did not err in deviating only slightly from the guidelines; the guidelines were constitutional, and the slight deviation was not manifestly unsupported by reason. Row v. Row, 185 N.C. App. 450, 650 S.E.2d 1, 2007 N.C. App. LEXIS 1803 (2007).

Trial Court's Methodology Proper. — Even if the father had assigned error to the methodology employed by the trial court, there was no error in the trial court's determination process under circumstances in which both parties maintained full-time employment and earned average monthly incomes in excess of $10,000; the trial court's findings of fact included an updated analysis of the child's total reasonable needs while in the mother's care, the mother's pro rata share of the parties' gross income, and the mother's pro rata share of the child's reasonable needs while in her custody. Pascoe v. Pascoe, — N.C. App. —, 645 S.E.2d 156, 2007 N.C. App. LEXIS 1124 (2007).

The child support guidelines were held inapplicable and child support was determined by assessing the particular facts of the case where a father's monthly income was $15,181; the denial of a father's motion to reduce child support was affirmed where the trial court acknowledged the father's income decrease, considered the father's family related expenses and support obligations, and determined, based on the father's net income of over $5,000 per month, that a reduction in child support from the original amount of $2,500 was unwarranted. Trevillian v. Trevillian, 164 N.C. App. 223, 595 S.E.2d 206, 2004 N.C. App. LEXIS 661 (2004).

Deviation from Guidelines Improper. — Trial court's findings that mother's live-in boyfriend earned $16.61 per hour and worked forty hours a week was insufficient to support the decision to deviate from the Child Support Guidelines. State ex rel. Carteret Child Support Enforcement Office ex rel. Horne v. Horne, 127 N.C. App. 387, 489 S.E.2d 431 (1997).

Automatic Support Increases. — Provision in judgment by confession ordering automatic child support increases based upon the C.P.I. was void where it did not contain the requirements for a valid annual adjustment formula in Falls v. Falls, 52 N.C. App. 203, 278 S.E.2d 546, cert. denied, 304 N.C. 390, 285 S.E.2d 831 (1981). Snipes v. Snipes, 118 N.C. App. 189, 454 S.E.2d 864 (1995).

The determination of child support must be done in such way as to result in fairness to all parties. Walker v. Walker, 38 N.C. App. 226, 247 S.E.2d 615 (1978); Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983), modified on other grounds, 313 N.C. 63, 326 S.E.2d 63, 326 S.E.2d 863 (1985).

Ultimate Objective. — While it is the legal obligation of the father (now father and mother) to provide for the support of his minor children, and while the welfare of the child is a primary consideration in matters of custody and maintenance, yet common sense and common justice dictate that the ultimate object in such matters is to secure support commensurate with the needs of the child and the ability of the father to meet the needs. Holt v. Holt, 29 N.C. App. 124, 223 S.E.2d 542 (1976).

No precise formula exists to assist the court in determining a fair support award, and the uniqueness of each divorce renders a precedent almost valueless. Plott v. Plott, 313 N.C. 63, 326 S.E.2d 863 (1985).

Request for Variance from Child Support Guidelines. — Section 50-13.4 does not identify any time restrictions for making the request for a hearing. However, to effectuate the purpose of that statute, any party in a pending action requesting a variance from the guidelines must, unless the request is made in the original pleadings, give at least ten days written notice as required by this section. Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991).

In deviating from child support guidelines, the trial court was required to make findings of fact as to the criteria that justified varying from the guidelines and the basis of the amount ordered; the court committed error because its findings were insufficient to meet this requirement. Gowing v. Gowing, 111 N.C. App. 613, 432 S.E.2d 911 (1993).

Failure to follow the presumptive child-support guidelines prescribed pursuant to subsection (c1) required that a support order be reversed; the guidelines were not mentioned in the order and the order did not make reference to any of the factors used to vary a support payment from the presumptive amounts. Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991).

In child support action, trial court must first determine primary liability for minor child's support under subsection (b). The court then determines the actual amount of support necessary to meet the minor child's reasonable needs pursuant to subsection (c). McLemore v. McLemore, 89 N.C. App. 451, 366 S.E.2d 495 (1988).

Deviation from Guidelines in Special Needs Case. — The trial court erred in simply halving the mother's child support obligation when she was no longer liable for the support of one of the two children; the court was required to hold a hearing and make findings of fact when it deviated from the Child Support Guidelines, and, considering the second child's special needs, an amount higher than one-half of the original total might have been more appropriate. Hendricks v. Sanks, 143 N.C. App. 544, 545 S.E.2d 779, 2001 N.C. App. LEXIS 294 (2001).

Ability to Pay and Needs of Child Must Be Considered. — Ordinarily, in entering a judgment for the support of a minor child, the ability to pay, as well as the needs of such child, will be taken into consideration. Bishop v. Bishop, 245 N.C. 573, 96 S.E.2d 721 (1957); Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963); Coggins v. Coggins, 260 N.C. 765, 133 S.E.2d 700 (1963).

In providing for the support of minor children, the ability of the father (or mother) to pay, as well as the needs of the children, must be taken into consideration by the court. Martin v. Martin, 263 N.C. 86, 138 S.E.2d 801 (1964).

In determining the amount of support, the court must take into consideration the needs of the children and the ability of the defendant to pay during the time for which reimbursement is sought. Hicks v. Hicks, 34 N.C. App. 128, 237 S.E.2d 307 (1977).

An order for child support must be based not only on the needs of the child, but also on the ability of the father (or mother) to meet the needs. Poston v. Poston, 40 N.C. App. 210, 252 S.E.2d 240 (1979).

In order to be fair and just, the court entering an order for child support must consider not only the needs of the child, but also the abilities of the parents to provide support. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983), modified on other grounds, 313 N.C. 63, 326 S.E.2d 863 (1985).

An order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. Atwell v. Atwell, 74 N.C. App. 231, 328 S.E.2d 47 (1985).

Computing the amount of child support is normally an exercise of sound judicial discretion, requiring the judge to review all of the evidence before him. Absent a clear abuse of discretion, a judge's determination of what is a proper amount of support will not be disturbed on appeal. Plott v. Plott, 313 N.C. 63, 326 S.E.2d 863 (1985).

The trial court's findings lacked the necessary specificity to justify its deviation from child support guidelines, where it failed to make any findings regarding the child's reasonable needs, including his education, maintenance, or accustomed standard of living. State ex rel. Fisher v. Lukinoff, 131 N.C. App. 642, 507 S.E.2d 591 (1998).

When Ability to Pay Determined. — A party's ability to pay child support is determined by the party's ability to pay at the time the award is made or modified. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

As Basis of Order for Child Support. — An order for child support under this section must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child, and (2) the relative ability of the parties to provide that amount. Coble v. Coble, 300 N.C. 708, 268 S.E.2d 185 (1980); In re Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981); Dishmon v. Dishmon, 57 N.C. App. 657, 292 S.E.2d 293 (1982); In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982); Byrd v. Byrd, 62 N.C. App. 438, 303 S.E.2d 205 (1983); Campbell v. Campbell, 63 N.C. App. 113, 304 S.E.2d 262, cert. denied, 309 N.C. 460, 307 S.E.2d 362 (1983); Newman v. Newman, 64 N.C. App. 125, 306 S.E.2d 540, cert. denied, 309 N.C. 822, 310 S.E.2d 351 (1983).

Along with Other Relevant Facts. — A court, when entering an order for support, should take into account the needs of the child, the resources of the parties and any other facts relevant to the case. McCall v. McCall, 61 N.C. App. 312, 300 S.E.2d 591 (1983).

Using disposable income (net income after expenses) is a way to fairly reflect the parties relative ability to contribute proportionately to support of the child. Savani v. Savani, 102 N.C. App. 496, 403 S.E.2d 900 (1991).

With Reference to the Special Circumstances of the Parties. — What amount is reasonable for a child's support is to be determined with reference to the special circumstances of the particular parties. Warner v. Latimer, 68 N.C. App. 170, 314 S.E.2d 789 (1984).

Judge's consideration of the factors contained in subsection (c) of this section is not guided by any magic formula. Plott v. Plott, 313 N.C. 63, 326 S.E.2d 863 (1985).

Vacation of Support Order Absent Evidence as to Parent's Ability to Pay and Child's Needs. — An order for child support will necessarily be vacated where there is no evidence offered as to a party's ability to pay or where there is no evidence as to the child's needs and expenses. Dixon v. Dixon, 67 N.C. App. 73, 312 S.E.2d 669 (1984).

Parent's Circumstances Must Be Evaluated. — The amount of each parent's contribution to the support of the child is based upon the trial court's evaluation of each parent's circumstances, including a determination of certain factors mandated by subsection (c) of this section. Boyd v. Boyd, 81 N.C. App. 71, 343 S.E.2d 581 (1986).

Alimony and Child Support Considered Together. — Trial court reasonably could have concluded that the wife's alimony award needed to be increased because the wife's reasonable expenses had increased after the husband was no longer obligated to pay child support because the parties, minor child had turned 18-years-old. The original alimony award calculated the wife's reasonable expenses by attributing some of those expenses to the minor child, but the wife's reasonable expenses increased when the minor child attained the age of majority and those expenses were no longer attributed to the minor child. Harris v. Harris, 188 N.C. App. 477, 656 S.E.2d 316, 2008 N.C. App. LEXIS 228 (2008).

"Cost Sharing" Formula Improper. — Use of any cost-sharing formula by a trial judge is now improper in North Carolina. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

"Cost-sharing" approach to child support awards embodied in the Franks formula criticized by North Carolina Court of Appeals when applied to case arising before July 1, 1990, effective date of this section. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Under this section and § 50-13.7, party's ability to pay child support is ordinarily determined by party's actual income at time the support award is made or modified. However, if there is a finding by the trial court that the party was acting in bad faith by deliberately depressing his or her income or otherwise disregarding the obligation to pay child support, then the party's capacity to earn may be the basis for the award. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Interest in Corporations or Partnerships and Nontaxable Income Relevant. — The value and nature of defendant's interest in any partnerships or corporations and the terms of any trust of which he might be the beneficiary, as well as the amount of income, including non-taxable, deferred or declined income, flowing therefrom, would all bear relevance to child support proceeding. Shaw v. Cameron, 125 N.C. App. 522, 481 S.E.2d 365 (1997).

Encumbered Cash Reserve Funds of Corporation. — The trial court's exclusion of plaintiff's corporation's encumbered cash reserve funds in its calculation of child support was prejudicial error. Barham v. Barham, 127 N.C. App. 20, 487 S.E.2d 774 (1997), aff'd, 347 N.C. 570, 494 S.E.2d 763 (1998).

Exclusive Ownership or Control of Estate Irrelevant. — Any judgment rendered against defendant setting an amount of child support would be dependent in significant part upon the amount of his income and the nature of his estate, whether exclusively owned or controlled by defendant, or jointly with others. Shaw v. Cameron, 125 N.C. App. 522, 481 S.E.2d 365 (1997).

Estate and Earnings of Both Husband and Wife Must Be Considered. — The court must consider not only the needs of the wife and children, but also the estate and earnings of both husband and wife. Roberts v. Roberts, 38 N.C. App. 295, 248 S.E.2d 85 (1978); Walker v. Tucker, 69 N.C. App. 607, 317 S.E.2d 923 (1984).

Order which contained no findings of fact regarding plaintiff's earnings or employment status was not supported by sufficient findings of fact. Smith v. Smith, 103 N.C. App. 488, 405 S.E.2d 912 (1991).

Ordinarily, Present Earnings Should Be Basis for Award. — In determining the ability of the father (or mother) to support the child, the court ordinarily should examine the father's (or mother's) present earnings, rather than select the earnings for a single year in the past and use that as the basis for an award. Holt v. Holt, 29 N.C. App. 124, 223 S.E.2d 542 (1976).

If father (or mother) is honestly and in good faith engaged in a business to which he is properly adapted, and is making a good faith effort to earn a reasonable income, the award for child support should be based on the amount which defendant is earning when the award is made. Holt v. Holt, 29 N.C. App. 124, 223 S.E.2d 542 (1976).

Ordinarily, father's (or mother's) ability to pay is determined by his income at the time the award is made if father (or mother) is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably. Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976); Whitley v. Whitley, 46 N.C. App. 810, 266 S.E.2d 23 (1980).

The general rule is that the ability of a party to pay child support is determined by that person's income at the time the award is made. Atwell v. Atwell, 74 N.C. App. 231, 328 S.E.2d 47 (1985).

The ability of the supporting spouse to pay is ordinarily determined by his or her income at the time the award is made. Plott v. Plott, 313 N.C. 63, 326 S.E.2d 863 (1985).

But capacity to earn may be the basis of an award if it is based upon a proper finding that father (or mother) is deliberately depressing his income or indulging himself in excessive spending because of a disregard of his obligation to provide reasonable support for his spouse and children. Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976).

A person's capacity to earn income may be made the basis of an award if there is a finding that the party deliberately depressed his or her income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child. Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991).

Under this section and G.S. 50-13.7, father's (or mother's) ability to pay child support is normally determined by his actual income at the time the award is made or modified. If, however, there is a finding that father (or mother) is deliberately depressing his income or otherwise acting in deliberate disregard of his obligation to provide reasonable support for his child, his capacity to earn may be made the basis of the award. Under these circumstances, his motion to reduce the amount of child support will be denied. Goodhouse v. DeFravio, 57 N.C. App. 124, 290 S.E.2d 751 (1982).

When the trial court makes a finding that a party deliberately depressed his or her income, then the party's capacity to earn or his potential income may be used to determine the child support obligation. McDonald v. Taylor, 106 N.C. App. 18, 415 S.E.2d 81 (1992).

Where plaintiff took early retirement at age 51, with a 3 year old daughter to support, chose to remain unemployed, despite having many skills, and there was testimony that plaintiff could earn at least $20,000 without decreasing his retirement benefits, the trial court properly based child support award on plaintiff's potential income. Osborne v. Osborne, 129 N.C. App. 34, 497 S.E.2d 113 (1998).

Finding Where Award Is Based on Capacity to Earn. — To base an award for child support on capacity to earn rather than actual earnings, there should be a finding based on evidence that father (or mother) is failing to exercise his capacity to earn because of a disregard of his obligation to provide reasonable support for his spouse and children. Holt v. Holt, 29 N.C. App. 124, 223 S.E.2d 542 (1976); Stanley v. Stanley, 51 N.C. App. 172, 275 S.E.2d 546, cert. denied, 303 N.C. 182, 280 S.E.2d 454, appeal dismissed, 454 U.S. 959, 102 S. Ct. 496, 70 L. Ed. 2d 374 (1981).

Only where there are findings, based on competent evidence, to support a conclusion that the supporting spouse or parent is deliberately depressing his or her income to avoid family responsibilities can the "earning capacity" rule be applied. Whitley v. Whitley, 46 N.C. App. 810, 266 S.E.2d 23 (1980); Atwell v. Atwell, 74 N.C. App. 231, 328 S.E.2d 47 (1985).

A party's capacity to earn income may become the basis of an award if it is found that the party deliberately depressed its income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

When calculating the child support obligation owed by a parent, a showing of bad faith income depression by the parent is a mandatory prerequisite for imputing income to that parent. Sharpe v. Nobles, 127 N.C. App. 705, 493 S.E.2d 288 (1997).

Must Be Sufficient Evidence of Proscribed Intent. — A trial court's conclusion underlying imposition of the earnings capacity rule must be based upon evidence that the actions which reduced the party's income were not taken in good faith. There must be sufficient evidence of the proscribed intent. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Consideration of Spouse's Capacity to Earn Held Error. — Trial court could not consider father's capacity to earn in computing his income where the evidence indicated that he lost his job due to no fault of his own, and the court's order contained no findings that he had deliberately stopped working to avoid his support obligations. Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991).

Support Should Not Have Been Based on Earning Capacity. — Where there was no evidence that defendant was engaging in any tactics to avoid paying child support, defendant had purchased a substantial amount of farm equipment for use in his farming operation, and he had experienced a net loss from farming for the last three years but had made a profit from this business in the past, the evidence pointed to a genuine effort by defendant to engage in his chosen profession and to support his family as well; therefore, the case was remanded so the court could make a determination based upon defendant's present earnings instead of his earning capacity. Cameron v. Cameron, 94 N.C. App. 168, 380 S.E.2d 121 (1989).

Wrongful Inclusion of Future Personal Expenditures. — Where trial court includes personal expenditures not yet made by party with no concrete plans to make such an expenditure, award entered cannot possibly reflect the relative abilities of parties to pay support at that time. Witherow v. Witherow, 99 N.C. App. 61, 392 S.E.2d 627 (1990).

Determination of trial court not necessary to make finding of bad faith in reduction of income where the party seeking support modification was the custodial parent was not supported by current case law, nor was the trial court correct in concluding that when a custodial parent sought a change of child support based upon a reduction in income, that custodial parent had to request the court to make a finding of fact as to his or her "good faith." Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Father's cost-free housing was properly considered to be a form of gross-income, and thus, recurring income for purposes of making a child support award. Spicer v. Spicer, 168 N.C. App. 283, 607 S.E.2d 678, 2005 N.C. App. LEXIS 260 (2005).

The inclusion of a gift when calculating a defendant's income for child support purposes was an error, where there was no evidence on the part of defendant's parents that such a gift would be reoccurring. Sloan v. Sloan, 87 N.C. App. 392, 360 S.E.2d 816 (1987).

But Gift Rent and Vehicle Payments by Mother's Father Should Have Been Included in Support Obligation. — Trial court erred in failing to include the mother's gift income as attributable income in calculating a father's child support obligation; the payment of the mother's vehicle and rent payments by her father totaled $1,890, which should have been included in calculating income in the child support order. State v. Williams, — N.C. App. —, 635 S.E.2d 495, 2006 N.C. App. LEXIS 2142 (2006).

Non-interest Bearing Demand Note Not by Itself a Gift. — The fact that no demand had been made on a non-interest bearing demand note from defendant's parents did not render it a gift, and the trial court's finding that the transaction was a gift was erroneous. Sloan v. Sloan, 87 N.C. App. 392, 360 S.E.2d 816 (1987).

Third-party contributions may be used to support a deviation from North Carolina Child Support Guidelines, even where third parties are under no legal obligation to make such payments. Guilford County ex rel. Child Support Enforcement Agency ex rel. Easter v. Easter, 344 N.C. 166, 473 S.E.2d 6 (1996).

Personal injury settlement, paid on a one-time, non-recurring basis met the definition of "non-recurring income" and thus, was properly considered by the trial court when making a child support award. Spicer v. Spicer, 168 N.C. App. 283, 607 S.E.2d 678, 2005 N.C. App. LEXIS 260 (2005).

Earnings of Child. — In a case involving child support payments, the trial court erred in refusing to admit the children's tax returns into evidence, the only information concerning the estate and earnings of the children. Sloan v. Sloan, 87 N.C. App. 392, 360 S.E.2d 816 (1987).

Education and Insurance Expenses. — Defendant's argument that provisions to pay for higher education and to provide life and health insurance were not in the nature of child support was not without merit. Smith v. Smith, 121 N.C. App. 334, 465 S.E.2d 52 (1996).

Disability Checks Received on Behalf of Child. — Trial court properly refused to consider a disability check received by disabled defendant on child's behalf as defendant's income in figuring his obligation, but erred in allowing defendant to receive the money for his own use. Sain v. Sain, 134 N.C. App. 460, 517 S.E.2d 921 (1999).

Adoption Assistance Payments. — Adoption assistance payments received by the parties were resources for the parties' adopted children, and thus could not be set off against the father's child support obligation. Gaston County v. Miller, 168 N.C. App. 577, 608 S.E.2d 101, 2005 N.C. App. LEXIS 332 (2005).

Medical insurance premiums paid by a parent on behalf of a child are actual expenditures which must be considered in computing retroactive child support. Lawrence v. Tise, 107 N.C. App. 140, 419 S.E.2d 176 (1992).

Failure of the trial court to treat a portion of mother's premiums as an actual expenditure for the purposes of calculating retroactive support was not error, because there was no evidence in the record to support a finding on the portion of the premiums for the joint policy attributable only to coverage of the child. In the absence of such evidence, the trial court would only be speculating as to the child's share of the cost, and this it could not do. Lawrence v. Tise, 107 N.C. App. 140, 419 S.E.2d 176 (1992).

Consideration of Health Insurance Coverage Erroneous. — According to former subdivision (c1)(6) of this section, the trial court was not allowed to vary the presumptive amount of child support based upon the "provision of health insurance coverage;" therefore, by varying the presumptive guideline amount because of the defendant's maintenance of health insurance on the plaintiff and the children, the trial court acted in violation of this section. Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991).

Reconsideration of Alimony or Child Support After Equitable Distribution. — Section 50-20 (f) obviously contemplates that child support order may precede equitable distribution order. No child support order is ever final and delaying child support order in lengthy case until after equitable distribution issue was decided would have prolonged an already long-pending case. Trial court's decision to enter child support order prior to determination of equitable distribution issue was under the statute. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Amount of Award Is Within Trial Court's Discretion. — Once an award is found to be justified, the amount lies within the trial court's discretion and will not be disturbed absent manifest abuse. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

Amount Should Be Fair and Not Confiscatory. — An order for the maintenance of a child should be in an amount that is fair and not confiscatory in light of the parent's earning ability. Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983), modified on other grounds, 313 N.C. 63, 326 S.E.2d 863 (1985). See also, Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963).

Allowance Should Be Made for Parent's Living Expenses. — In determining the amount of an order for the support of children, a reasonable allowance should be made for the living expenses of their father (or mother) in the light of his earnings. Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963).

Dividing Parent's Income by Number of Dependents Is Disapproved. — Fixing the amount of support for minor children by dividing the income of their father (or mother) by the number of people dependent upon him for support is not approved. Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963).

Conduct of Parties May Be Considered. — In addition to the factors enumerated in subsection (c) of this section, the trial court may consider the conduct of the parties, the equities of the given case, and any other relevant facts in determining child support. Warner v. Latimer, 68 N.C. App. 170, 314 S.E.2d 789 (1984).

This section clearly allows the trial court to consider other facts of the particular case in arriving at the amount of defendant's share of support in an action for reimbursement. Thus, while the defendant's ability to pay and his earning capacity are factors to be considered, they are not controlling. The court may also consider the conduct of the parties and the equities of the case. Stanley v. Stanley, 51 N.C. App. 172, 275 S.E.2d 546, cert. denied, 303 N.C. 182, 280 S.E.2d 454, appeal dismissed, 454 U.S. 959, 102 S. Ct. 496, 70 L. Ed. 2d 374 (1981).

Improper Use of Earning Capacity Rule. — Trial court erred in modifying a father's child support obligation pursuant to G.S. 50-13.4; the trial court found that while the father reduced his income, he did not act in bad faith, and a finding of bad faith was required to apply the earning capacity rule under N.C. Child Support Guidelines, 2003 Ann. R. N.C. 33, 35. Cook v. Cook, 159 N.C. App. 657, 583 S.E.2d 696, 2003 N.C. App. LEXIS 1528 (2003).

Findings and Conclusions of Law Required. — In setting amounts for child support, where the trial court sits without a jury, the judge is required to find the facts specially and state separately its conclusions of law thereon, and to direct the entry of the appropriate judgment. Dishmon v. Dishmon, 57 N.C. App. 657, 292 S.E.2d 293 (1982).

Trial court erred in failing to make findings regarding the reasonable needs of a child for support, or regarding its refusal to award support for the time between the filing of suit for support and the entry of the support order. State ex rel. Gillikin v. McGuire, 174 N.C. App. 347, 620 S.E.2d 899, 2005 N.C. App. LEXIS 2364 (2005).

Findings Must Indicate Consideration of Needs and Earnings. — Conclusions of law must be based upon factual findings specific enough to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, and accustomed standard of living of both the child and the parents. Dishmon v. Dishmon, 57 N.C. App. 657, 292 S.E.2d 293 (1982).

Findings as to Child's Past and Present Expenses Required. — In order to determine the reasonable needs of the child, the trial court must hear evidence and make findings of specific fact on the child's actual past expenditures and present reasonable expenses. Atwell v. Atwell, 74 N.C. App. 231, 328 S.E.2d 47 (1985).

Minor child's hospitalization and its resulting costs constituted a substantial change in circumstances. Thus case was remanded to take into account the parties' abilities to provide support for the minor child's medical expenses and to enter an order modifying the support order. Lawrence v. Nantz, 115 N.C. App. 478, 445 S.E.2d 87 (1994).

Award Where Father Has Substantial Income. — In an action for child support, the court, in making its award, should keep in mind that children of a man of substantial income are entitled to live accordingly. McLeod v. McLeod, 43 N.C. App. 66, 258 S.E.2d 75, cert. denied, 298 N.C. 807, 261 S.E.2d 920 (1979).

Credit for Voluntary Expenditures. — As to granting of credit towards payment of court-ordered child support for voluntary expenditures, see Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

The trial court has a wide discretion in deciding initially whether justice requires that a credit be given under the facts of each case and then in what amount the credit is to be awarded. The better view allows credit when equitable considerations exist which would create an injustice if credit were not allowed. Evans v. Craddock, 61 N.C. App. 438, 300 S.E.2d 908 (1983).

Expenses During Visitation. — Credit is not likely to be appropriate for frivolous expenses or for expenses incurred in entertaining or feeding the child during visitation periods. Evans v. Craddock, 61 N.C. App. 438, 300 S.E.2d 908 (1983).

Whether credit is allowed for time spent in visitation with the noncustodial parent depends on the facts of the particular case and is a matter within the court's discretion, as the fact that a child spends a certain amount of time with one parent does not necessarily mean that his reasonable and necessary living expenses are incurred proportionally. Gibson v. Gibson, 68 N.C. App. 566, 316 S.E.2d 99 (1984).

Trial court's use of one-third of mother's total fixed expenses to establish reasonable needs of child was neither unfair nor impermissible where the expense figures in mother's affidavit of financial status included expenses only for herself and the child, as she had not remarried, and furthermore, where the trial court not only found that mother's living expenses were reasonable, but also reduced several of the figures on the affidavit before making that finding, and where, with the exception of the amount of scheduled visitation, father presented no evidence on which the court could have based other findings regarding the child's expenses and needs. Gibson v. Gibson, 68 N.C. App. 566, 316 S.E.2d 99 (1984).

Parties Cannot Consent to Improperly Based Order. — The parties, by their consent, cannot enable a trial judge to enter an order not based upon consideration of the several factors listed in subsection (c) of this section and G.S. 50-16.5(a). Williamson v. Williamson, 20 N.C. App. 669, 202 S.E.2d 489 (1974).

Method of Payment Is Within Discretion of Court. — In utilizing the provision in subsection (e) of this section that payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein as the court may order, the trial court is vested with broad discretion, and is not limited to ordering any one of the designated methods of payment. In keeping with the court's powers, an order under this section will be upheld barring an abuse of that discretion. Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706, cert. denied, 322 N.C. 330, 368 S.E.2d 875 (1988).

Trial court's creation of a trust consisting of certain real and personal property owned by the parties in order to secure payment of alimony and child support was a proper exercise of its discretion in applying the provisions of subsection (e) of this section and G.S. 50-16.7(a) and (c) and would be affirmed. Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706, cert. denied, 322 N.C. 330, 368 S.E.2d 875 (1988).

Amount Not Excessive. — Where defendant earned one hundred thirty-two dollars ($132.00) a week and had monthly expenses in the amount of fifty-two dollars ($52.00), the court's order for defendant to pay one hundred dollars ($100.00) per month in child support was not an abuse of discretion; defendant had been paying plaintiff one hundred dollars ($100.00) per week voluntarily for several months prior to the hearing, had testified that he would continue to do so, and the court had made extensive findings regarding the child's needs, the parents' estates and earnings, etc. Rawls v. Rawls, 94 N.C. App. 670, 381 S.E.2d 179 (1989).

Yearly support payment of $37,871.89 held not excessive where payor earned about $200,000.00 per year and where family enjoyed very high standard of living prior to dissolution of marriage and where court found, based on payor's testimony, that payor could pay any amount court might order up to and including $71,318.04. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Improper Reduction of Child Support Payments. — Reducing child support payments by subtracting amount of money calculated to represent what custodial parent saves in expenses while the child is visiting with noncustodial parent was improper. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Consideration of Shared Custody Justified. — Fact that defendant had sole custody of one of the children and furnished the child's sole support, while defendant contributed to the support of the two children in plaintiff's custody, clearly justified the trial court's consideration of the shared custody factor; trial court was not required to make findings as to how or why this custody arrangement rendered guidelines adopted pursuant to subsection (c1) inapplicable where the guidelines provided for support payments to be based upon the noncustodial parent's gross income. Morris v. Morris, 92 N.C. App. 359, 374 S.E.2d 441 (1988).

Imputed Income. — Where there was no evidence that defendant, who worked for a school system as a psychologist, intentionally depressed his income or otherwise engaged in bad faith, the trial court erred by imputing income to defendant for four weeks during the school district summer recess. Ellis v. Ellis, 126 N.C. App. 362, 485 S.E.2d 82 (1997).

Trial court erred in calculating a father's child support obligation under G.S. 50-13.4(c) by imputing to the father income based solely on a statement of income made to a bankruptcy court 18 months earlier under circumstances in which the trial court's order was devoid of findings that the father was deliberately depressing his income or indulging in excessive spending to avoid support. State v. Williams, — N.C. App. —, 635 S.E.2d 495, 2006 N.C. App. LEXIS 2142 (2006).

Trial court's determination that a husband, who worked as a school teacher, could continue to earn a minimum amount each month from a grading business was reasonably based on the court's findings of fact regarding the husband's actual earnings during the year prior to the hearing. Hartsell v. Hartsell, 189 N.C. App. 65, 657 S.E.2d 724, 2008 N.C. App. LEXIS 428 (2008).

Sufficient Findings by the Court. — In spite of trial court's failure to make finding as to husband's net income, court's findings regarding gross income of husband and wife along with wife's net income and children's expenses was sufficient to satisfy requirement under this section that court give due regard to parties' estates, earnings, conditions and standard of living in setting child support. Sikes v. Sikes, 98 N.C. App. 610, 391 S.E.2d 855 (1990), aff'd, 330 N.C. 595, 411 S.E.2d 588 (1992).

Income of Business in which Defendant Held Controlling Interest. — Court neither abused its discretion nor imputed income to defendant when it allocated to him the amount of income earned by the business in which he held 51% and controlled disbursement of corporate funds. Cauble v. Cauble, 133 N.C. App. 390, 515 S.E.2d 708 (1999).

Use of Accrual Figures. — Use of accrual figures in the trial court's calculations was reflective of an appropriate level of gross income available to the defendant and not manifestly unsupported by reason. Cauble v. Cauble, 133 N.C. App. 390, 515 S.E.2d 708 (1999).

Financial Affidavits. — On appeal from a motion to modify child support, the court would not consider information outside a father's financial affidavit, i.e., expert testimony, to determine his expenses for the children; the father had sworn to the truthfulness and completeness of his affidavit, and the parties' affidavits were competent evidence on which the trial court was allowed to rely in determining the expenses of the parties' children. Row v. Row, 185 N.C. App. 450, 650 S.E.2d 1, 2007 N.C. App. LEXIS 1803 (2007).

Court's findings were insufficient to support awarding no support under subsection (c) since the court failed to determine what were the reasonable needs of the minor child for health, education, and maintenance. McLemore v. McLemore, 89 N.C. App. 451, 366 S.E.2d 495 (1988).

In an action seeking an increase in child support over the amount set forth in separation agreement, order which contained no specific findings with respect to the actual past or present expenses incurred for the support of the children was insufficient to support the court's conclusion that the reasonable needs of the children amounted to $2,800.00 per month. Holderness v. Holderness, 91 N.C. App. 118, 370 S.E.2d 602 (1988).

Where the trial court made no findings whatsoever with respect to the parties' "estates, earnings, conditions, [and] accustomed standard of living" for the year 1984, its award of retroactive child support would be vacated since it was not based on sufficient findings pertaining to the year 1984. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Trial court erred in ruling it had no authority to modify the income tax deduction provision of the parties' separation agreement as they requested a recalculation of child support, obliging the trial court to apply the entirety of the guidelines, including not only the worksheets, but also the commentary. Ticconi v. Ticconi, 161 N.C. App. 730, 589 S.E.2d 371, 2003 N.C. App. LEXIS 2270 (2003).

Refusal to Consider Reduction in Income. — Trial court erred in concluding that reduction in income of father, the custodial parent, due to leaving employment to return to school, could not be considered on motion to increase plaintiff's child support obligations. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Remand to Allow Court to Make Findings. — Appellate court remanded case to allow trial court to make findings concerning the reasonable needs of child, the relative ability of the parents to support the child, and a determination of whether a variation from the Guidelines was appropriate on these grounds. Brooker v. Brooker, 133 N.C. App. 285, 515 S.E.2d 234 (1999).

Mother admitted that clearly, the trial court did not use all of the expenses listed in the parties' financial affidavits; without more explanation, it was impossible to determine on appeal where the figures used by the trial court came from at all. Moreover, although the trial court's child support order did contain certain historical costs associated with the children, it included no findings as to the individual costs and expenses the trial court expected to be associated with each child in the future, and, while the trial court did make findings regarding the parents' particular estates, earnings, conditions, and accustomed standard of living, those were insufficient to remedy the absence of findings explaining the reasonable needs of the children; accordingly, the case was remanded for further findings of fact regarding the amount of child support awarded. Diehl v. Diehl, 177 N.C. App. 642, 630 S.E.2d 25, 2006 N.C. App. LEXIS 1180 (2006).

Findings Unsupported by Evidence. — Judge erred by ordering mother to pay four hundred eighty dollars ($480.00) per month in child support; the figures of five hundred dollars ($500.00) and four hundred eighty dollars ($480.00) were not supported by any evidence in the record on appeal and, despite the absence of mother's financial records, the judge could have determined the child's reasonable needs through evidence offered by father; however, the figures the judge arrived at were unsupported by father's testimony, and were not supported by any of the previous orders entered in the case. Correll v. Allen, 94 N.C. App. 464, 380 S.E.2d 580 (1989).

Reduction of Income on Return to School. — Trial court erred in concluding reduction in income of father, custodial parent, due to leaving employment to return to school, could not be considered on motion to increase plaintiff's child support obligations. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Accustomed Standard of Living. — Where the trial court unequivocally disregarded the principle that the accustomed standard of living is a factor to be considered and, instead based alimony on the standard of living the parties maintained after the divorce there was prejudicial error. Barham v. Barham, 127 N.C. App. 20, 487 S.E.2d 774 (1997), aff'd, 347 N.C. 570, 494 S.E.2d 763 (1998).

Change in Circumstances Not Shown. — Where the trial court found that defendant voluntarily quit his job, willfully and intentionally depressed his income, and failed to meet his burden of proof in showing a substantial change of circumstances, the court entered a judgment against defendant denying his motion to reduce child support by reason of substantial change of circumstances. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

B. Effect of Separation Agreements, Consent Judgments and Arbitration Awards.

Separation Agreements Are Not Binding on the Court. — Valid separation agreements, including consent judgments with respect to marital rights based on such agreements, are not final and binding as to the amount to be provided for the support and education of minor children. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966), decided under former § 50-13.

Valid separation agreements relating to marital and property rights of the parties are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children. Perry v. Perry, 33 N.C. App. 139, 234 S.E.2d 449, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

And Cannot Deprive the Court of Its Authority. — Separation agreement dealing with the custody and the support of the children of the parties cannot deprive the court of its inherent as well as statutory authority to protect the interests of and provide for the welfare of minors. McKaughn v. McKaughn, 29 N.C. App. 702, 225 S.E.2d 616 (1976).

While the court cannot relieve parent of any contractual obligation he assumed to support his child in excess of what the law would require, it can, in the exercise of its inherent and statutory authority to provide for the welfare of minors, order payment of an amount either larger or smaller than that provided for in separation agreement. Bottomley v. Bottomley, 82 N.C. App. 231, 346 S.E.2d 317 (1986).

Arbitration Awards Also Remain Reviewable and Modifiable. — Just as parents cannot by agreement deprive the courts of their duty to promote the best interests of their children, they cannot do so by arbitration. Hence those provisions of an arbitration award concerning custody and child support, like those provisions in a separation agreement, will remain reviewable and modifiable by the court. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Court Retains Jurisdiction Despite Support Provisions of Separation Agreement or Arbitration Award. — While the amount of child support agreed on by the parties to a separation agreement is presumed, in the absence of evidence to the contrary, to be just and reasonable, it remains within the authority of the courts pursuant to this Chapter to order payments for support in such amounts as will meet the reasonable needs of the child for health, education and maintenance, having due regard to the estates, earnings, conditions, and accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case. The same reasoning applies to an arbitration award concerning child support. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

But Separation Agreements and Consent Judgments Cannot Be Ignored. — Provisions of a valid separation agreement, including a consent judgment based thereon, cannot be ignored or set aside by the court without the consent of the parties. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966), decided under former § 50-13.

A valid separation agreement cannot be ignored or set aside by the court without the consent of the parties. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

Level of Support in Separation Agreement Is Only One Factor in Decision. — When a trial court is called upon for the first time to determine the appropriate level of child support payments agreed upon in separation agreements, the "presumption" of reasonableness of the agreed upon level of support in such cases is one of evidence only; that is, the agreed upon level of support constitutes some evidence of the appropriate level of support, but that this evidence must be weighed and considered by the trial court together with all other relevant and competent evidence bearing upon the statutory factors set out in subsection (c) of this section; in other words, the trial court is writing upon a clean slate, and the previously agreed upon level of support is but one factor to be considered. Morris v. Morris, 92 N.C. App. 359, 374 S.E.2d 441 (1988).

When Agreement May Be Modified. — A separation agreement is a contract between the parties, and the court is without power to modify it except (1) to provide for adequate support for minor children, and (2) with the mutual consent of the parties thereto where rights of third parties have not intervened. McKaughn v. McKaughn, 29 N.C. App. 702, 225 S.E.2d 616 (1976).

Amount Set by Agreement Is Presumptively Just and Reasonable. — Where parties to a separation agreement agree upon the amount for the support and maintenance of their minor children, there is a presumption, in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable. Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963); Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

And May Not Be Changed Absent Change in Conditions. — Where parties to a separation agreement agree concerning the support and maintenance of their minor children, there is a presumption, in the absence of evidence to the contrary, that the provisions mutually agreed upon are just and reasonable, and the court is not warranted in ordering a change in the absence of any evidence of a change in conditions. McKaughn v. McKaughn, 29 N.C. App. 702, 225 S.E.2d 616 (1976).

Or Absent Need for Increase. — Where parties to a separation agreement agree upon the amount for the support and maintenance of their minor children, there is a presumption, in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable. Upon motion, a trial court may not order an increase in the absence of any evidence of a change in conditions or of the need for such increase, particularly when the increase is awarded solely on grounds that the father's income has increased so that he is able to pay a larger amount. Dishmon v. Dishmon, 57 N.C. App. 657, 292 S.E.2d 293 (1982).

Child Referred to in Consent Judgment Is Under Protective Custody of Court. — Even though an order requiring father to make payments for the support of his child was entered by consent of the parents, the child was under the protective custody of the court. Smith v. Smith, 247 N.C. 223, 100 S.E.2d 370 (1957), rev'd on other grounds, 248 N.C. 298, 103 S.E.2d 400 (1958).

The effect of an order setting a lesser amount of child support than that provided for by separation agreement is not to deprive the custodial parent of her contractual right to recover the sums provided for in the agreement, but to limit her contempt remedy to the sums provided for by the court order. Bottomley v. Bottomley, 82 N.C. App. 231, 346 S.E.2d 317 (1986).

Right of Party to Separation Agreement to Bring Action. — When a case is properly before it, the court has the duty to award custody in accordance with the best interests of the child, and no agreement, consent or condition between the parents can interfere with this duty or bind the court. Thus, the existence of a valid separation agreement containing provisions relating to the custody and support of minor children does not prevent one of the parties to the agreement from instituting an action for a judicial determination of those same matters. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

The existence of a valid separation agreement relating to child support or custody does not prevent one of the parties from instituting an action for a judicial determination of those same matters. Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991), appeal dismissed, 331 N.C. 286, 417 S.E.2d 254 (1992).

As to effect of reconciliation and resumption of cohabitation on a separation agreement, see Hand v. Hand, 46 N.C. App. 82, 264 S.E.2d 597, cert. denied, 300 N.C. 556, 270 S.E.2d 107 (1980).

No Obligation to Support Child Past Majority Despite Disability. — Where mother's testimony offered at the hearing showed that son was 18 years old, had graduated from high school, had a part-time job, and was attempting to raise money to go to college, and mother further testified that son was not a normal 18 year old since he was involved in a wreck, trial court was without authority to order father to pay child support arrearages of five hundred dollars ($500.00); the evidence showed that pursuant to subdivision (c)(2) of this section, defendant was relieved of any obligation to support his son after his graduation from high school on June 5, 1988, and even if mother's evidence was sufficient to show that son was physically or mentally incapable of self-support, there was no longer a statutory obligation for parents to support their disabled adult children. State v. Benfield, 95 N.C. App. 451, 382 S.E.2d 776 (1989).

Obligation to Pay Is Independent of Compliance with Unrelated Provisions in Agreement. — The duty of a parent to pay child support as agreed to in a separation agreement will not be excused because the other parent does not comply with other provisions of the separation agreement unrelated to the financial support of the children. Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151, cert. denied, 329 N.C. 499, 407 S.E.2d 538 (1991).

Defendant's obligation to pay child support as provided in the separation agreement is not dependent upon plaintiff's compliance with visitation, nonharassment, or noncohabitation provisions in the same agreement. To hold otherwise would punish the children for the misbehavior of a parent. Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151, cert. denied, 329 N.C. 499, 407 S.E.2d 538 (1991).

V. TERMINATION OF OBLIGATION.

A. In General.

When Legal Obligation to Support Child Ends. — The statutes concerning child support all use the term "minor," "minor child" or "minor children," never referring to age 21. Therefore, in substituting the new meaning of "minor" provided by Chapter 48A into the statutes, the legal obligation to support one's child ends at age 18, absent a showing that the child is insolvent, unmarried and physically or mentally incapable of earning a livelihood as contemplated by G.S. 50-13.8. Crouch v. Crouch, 14 N.C. App. 49, 187 S.E.2d 348, cert. denied, 281 N.C. 314, 188 S.E.2d 897 (1972).

In the absence of an enforceable contract otherwise obligating a parent, North Carolina courts have no authority to order child support for a child who has attained the age of majority, unless the child has not completed secondary schooling, or, pursuant to G.S. 50-13.8, the child is mentally or physically incapable of self-support. Bridges v. Bridges, 85 N.C. App. 524, 355 S.E.2d 230 (1987); Pieper v. Pieper, 90 N.C. App. 405, 368 S.E.2d 422, aff'd, Ellinwood v. Ellinwood, 88 N.C. App. 119, 362 S.E.2d 584 (1987).

Effect of One of Several Children Reaching Age 18. — While child support obligations ordered by a court terminate upon the child reaching age 18, unless the child is otherwise emancipated prior to reaching age 18 or the trial court in its discretion continues to enforce the payment obligation after the child reaches age 18 and while the child is in primary or secondary school, when one of two or more minor children for whom support is ordered reaches age 18, and when the support ordered to be paid is not allocated as to each individual child, the supporting parent has no authority to unilaterally modify the amount of the child support payment. The supporting parent must apply to the trial court for modification. Craig v. Craig, 103 N.C. App. 615, 406 S.E.2d 656 (1991).

Cases holding that where one of two minor children reaches the age of 18, a trial court may retroactively modify child support arrearages when equitable considerations exist which would create an injustice if modification is not allowed were decided before G.S. 50-13.10 became effective on October 1, 1987. Under this statute, if the supporting party is not disabled or incapacitated, a past due, vested child support payment is subject to divestment only as provided by law, and if, but only if, a written motion is filed and due notice is given to all parties before the payment is due. Craig v. Craig, 103 N.C. App. 615, 406 S.E.2d 656 (1991).

Support Improperly Terminated. — Where father unilaterally terminated child support payments after his son reached the age of 18 and had failed to make satisfactory progress towards graduation from high school, the support payments were improperly terminated. Leak v. Leak, 129 N.C. App. 142, 497 S.E.2d 702 (1998), cert. denied, 348 N.C. 498, 510 S.E.2d 385 (1998).

"Minor Child" under Prior Law. — Before the enactment of Chapter 48A, it was evident that the meaning of "minor child" within the purview of the custody and support statutes contemplated the common-law age of majority, age 21. Shoaf v. Shoaf, 14 N.C. App. 231, 188 S.E.2d 19, rev'd on other grounds, 282 N.C. 287, 192 S.E.2d 299 (1972).

B. Effect of Separation Agreement, Consent Judgment, etc.

A parent may contract to support his or her children past the age of majority, and the court has power to enforce such a contract just as it would any other. Harding v. Harding, 46 N.C. App. 62, 264 S.E.2d 131 (1980).

But Court Cannot Enlarge on Such Obligation. — Since the duty to support after the age of majority arises in contract, the court may not enlarge upon the obligation agreed to by the parties. Harding v. Harding, 46 N.C. App. 62, 264 S.E.2d 131 (1980).

Any attempt by the court to enlarge upon the obligation arising under contract by extending the duty of support beyond the age of majority would be void for lack of subject matter jurisdiction. Harding v. Harding, 46 N.C. App. 62, 264 S.E.2d 131 (1980).

Consent Judgment Providing for Support Until Majority. — A father's legal liability for the support of his son born on January 13, 1953, by reason of a consent judgment dated June 11, 1970, providing that payments for child support should continue until such time as said minor child reached his majority or was otherwise emancipated, would not continue until his son became 21 years of age. Shoaf v. Shoaf, 282 N.C. 287, 192 S.E.2d 299 (1972).

VI. SEPARATE IDENTIFICATION OF ALLOWANCES.

Allowances to Be Separated. — The allowances to be separated in the order, as required by subsection (e) of this section, are the support payments for the minor child or children and the amounts ordered for alimony or alimony pendente lite. Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

Court Need Not Designate Amounts for Each Child. — Subsection (e) of this section does not require the trial court to designate the amount of support payments for each child, although such designation may prove helpful to simplify any future adjustments or modifications. Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

Failure to Identify Purpose of Support as Health, Education and Maintenance Is Not Error. — The better practice is for the court's order to relate that the payment ordered under this section is the amount necessary to meet the reasonable needs of the child for health, education, and maintenance, but the failure of the court to do so does not constitute reversible error. Andrews v. Andrews, 12 N.C. App. 410, 183 S.E.2d 843 (1971); Martin v. Martin, 35 N.C. App. 610, 242 S.E.2d 393, cert. denied, 295 N.C. 261, 245 S.E.2d 778 (1978).

Failure to Separate Allowances Held Error. — The trial court erred in failing to separately state and identify the allowances for alimony pendente lite and child support as required by subsection (e) of this section. Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973).

VII. FINDINGS AND CONCLUSIONS.

Judge Must Make Findings of Fact and Conclusions of Law. — In setting amounts for child support, where the trial court sits without a jury, the judge is required to find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. Dishmon v. Dishmon, 57 N.C. App. 657, 292 S.E.2d 293 (1982); Gibson v. Gibson, 68 N.C. App. 566, 316 S.E.2d 99 (1984).

The requirements for findings of fact applicable to orders for alimony are also applicable to the determination of reasonable and adequate child support. Gebb v. Gebb, 77 N.C. App. 309, 335 S.E.2d 221 (1985).

The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment, and the legal conclusions which underlie it, represent a correct application of the law. Gibson v. Gibson, 68 N.C. App. 566, 316 S.E.2d 99 (1984).

Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Gibson v. Gibson, 68 N.C. App. 566, 316 S.E.2d 99 (1984).

Remand for Further Findings. — The findings of fact in a case for child support, were insufficient to determine whether the trial court gave due regard to the estates of the parties and the case must be remanded for further findings on this matter, even though there was ample evidence contained in the record about the estates of both parties. Sloan v. Sloan, 87 N.C. App. 392, 360 S.E.2d 816 (1987).

Case was remanded for additional fact-finding where the district court failed to identify the presumptive amount of support due under the Guidelines and where there was no analysis of the reasonable needs of the two minor children, other than a finding that plaintiff's child care costs for one of the children was reasonable. Rowan County DSS v. Brooks, 135 N.C. App. 776, 522 S.E.2d 590, 1999 N.C. App. LEXIS 1231 (1999).

Trial court erred by failing to explain in its findings of fact why it did not award child support from the time of the filing of the paternity and child support complaint; judgment was reversed and case was remanded to trial court for further findings. State ex rel. Miller v. Hinton, 147 N.C. App. 700, 556 S.E.2d 634, 2001 N.C. App. LEXIS 1254 (2001).

Trial court was required to conduct a hearing when the trial court neither made findings related to the needs of the children at the time of a modification hearing nor concluded whether the presumption of reasonableness in a separation agreement was rebutted. Pataky v. Pataky, 160 N.C. App. 289, 585 S.E.2d 404, 2003 N.C. App. LEXIS 1797 (2003), aff'd, 359 N.C. 65, 602 S.E.2d 360 (2004).

A case involving a motion to modify child support under G.S. 50-13.7, was remanded for further findings of fact because, in entering an order deviating from the North Carolina Child Support Guidelines, the trial court did not make sufficient findings of fact regarding the reasonable needs of the children; the order only made findings regarding health insurance and the fact that the children did not need private schooling. Beamer v. Beamer, 169 N.C. App. 594, 610 S.E.2d 220, 2005 N.C. App. LEXIS 673 (2005).

Contents of Findings. — There are no set guidelines as to what the findings of fact concerning the needs of the minor children must contain. The appellate courts of this State require only that the findings be based on competent evidence as to what the needs of the children are, and that such findings sustain the conclusion that the support payments ordered are in such amount as to meet the reasonable needs of the child. Byrd v. Byrd, 62 N.C. App. 438, 303 S.E.2d 205 (1983).

Findings Must Be Specific. — Where the trial court sits without a jury, the judge is required to make factual findings specific enough to indicate to the appellate court that due regard was taken of the factors enumerated in this section. Byrd v. Byrd, 62 N.C. App. 438, 303 S.E.2d 205 (1983).

In orders of child support, the court should make findings of specific facts (e.g. incomes, estates) to support a conclusion as to the relative abilities of the parties to provide support. Steele v. Steele, 36 N.C. App. 601, 244 S.E.2d 466 (1978).

Without findings relating to the parties' reasonable expenses, there is no basis for a determination as to the parties' relative abilities to provide the support necessary to meet the reasonable needs of the children. Holderness v. Holderness, 91 N.C. App. 118, 370 S.E.2d 602 (1988).

In order to determine the reasonable needs of the child, the trial court must hear evidence and make findings of specific fact on the child's actual past expenditures and present reasonable expenses. Holderness v. Holderness, 91 N.C. App. 118, 370 S.E.2d 602 (1988).

Case would be remanded for additional findings regarding the income or loss, if any, of one of defendant's businesses where the trial court's order failed to reflect its treatment of these figures. Cauble v. Cauble, 133 N.C. App. 390, 515 S.E.2d 708 (1999).

And Must Cover Factors in Subsection (c). — The trial court must hear evidence on each of the factors listed in subsection (c) of this section and substantiate its conclusions of law by making findings of specific facts on each of the listed factors. Newman v. Newman, 64 N.C. App. 125, 306 S.E.2d 540, cert. denied, 309 N.C. 822, 310 S.E.2d 351 (1983).

Conclusions of law must be based upon factual findings specific enough to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, and accustomed standard of living of both the child and the parents. Dishmon v. Dishmon, 57 N.C. App. 657, 292 S.E.2d 293 (1982); Newman v. Newman, 64 N.C. App. 125, 306 S.E.2d 540, cert. denied, 309 N.C. 822, 310 S.E.2d 351 (1983); In re Botsford, 75 N.C. App. 72, 330 S.E.2d 23 (1985); Boyd v. Boyd, 81 N.C. App. 71, 343 S.E.2d 581 (1986).

To support an award of payment for support, the judgment of the trial court should contain findings of fact which sustain the conclusion of law that the support payments ordered are in such amount as to meet the reasonable needs of the child for health, education and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular care. Montgomery v. Montgomery, 32 N.C. App. 154, 231 S.E.2d 26 (1977); Poston v. Poston, 40 N.C. App. 210, 252 S.E.2d 240 (1979); Grimes v. Grimes, 78 N.C. App. 208, 336 S.E.2d 664 (1985).

The trial court must make specific findings on each of the factors specified in subsection (c) of this section. In addition, the case law may require certain findings, as when the award is based on earning capacity rather than present income. Once the trial court has made such findings, they are conclusive if supported by any evidence, even if there is evidence contra. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

The trial judge must at least make findings sufficiently specific to indicate proper consideration of each of the factors established by subsection (c) of this section for a determination of child support. Spencer v. Spencer, 70 N.C. App. 159, 319 S.E.2d 636 (1984).

Orders for child support must be based upon the interplay of the trial court's conclusions of law as to the amount of support necessary to meet the reasonable needs of the child and the relative abilities of the parents to provide that amount. These conclusions must, in turn, be based upon factual findings sufficiently specific to indicate to the appellate court that the trial court took due regard of the estates, earnings, conditions and accustomed standard of living of both child and parents. Little v. Little, 74 N.C. App. 12, 327 S.E.2d 283 (1985).

To comply with subsection (c) of this section, the order for child support must be premised upon the interplay of the trial court's conclusions of law as to the amount of support necessary to meet the reasonable needs of the child and the relative ability of the parties to provide that amount. To support these conclusions of law, the court must also make specific findings of fact so that an appellate court can ascertain whether the judge below gave due regard to the facts of the particular case. Such findings are necessary to an appellate court's determination of whether the judge's order is sufficiently supported by competent evidence. Where the record discloses sufficient evidence to support the findings, it is not the Supreme Court's task to determine de novo the weight and credibility to be given the evidence contained in the record on appeal. Plott v. Plott, 313 N.C. 63, 326 S.E.2d 863 (1985).

Conclusions must be based upon factual findings sufficiently specific to indicate that the trial court took "due regard" of the factors enumerated in the statute. Atwell v. Atwell, 74 N.C. App. 231, 328 S.E.2d 47 (1985).

The trial court must hear evidence and make findings of fact on the parents' income, estates and present reasonable expenses to determine the parties' relative ability to pay. Bottomley v. Bottomley, 82 N.C. App. 231, 346 S.E.2d 317 (1986).

To comply with subsection (c), the trial court is required to make findings of fact with respect to the factors listed in the statute. Holderness v. Holderness, 91 N.C. App. 118, 370 S.E.2d 602 (1988).

Findings must be based upon competent evidence, and it is not enough that there may be evidence, in the record sufficient to support findings which could have been made. The trial court must itself determine what pertinent facts are actually established by the evidence before it. Atwell v. Atwell, 74 N.C. App. 231, 328 S.E.2d 47 (1985).

Actual Past Expenditures Must Be Found. — To determine the amount of support necessary to meet the reasonable needs of the child for health, education and maintenance, the court must make findings of specific facts as to what actual past expenditures have been. Warner v. Latimer, 68 N.C. App. 170, 314 S.E.2d 789 (1984).

To determine the amount of support necessary to meet the reasonable needs of the child for health, education and maintenance (which are conclusions of law), the court must make findings of specific facts as to what actual past expenditures have been. Where past expenditures are below subsistence, due regard, of course, must be given to meeting the reasonable needs of the child. Steele v. Steele, 36 N.C. App. 601, 244 S.E.2d 466 (1978).

In order to determine the reasonable needs of the child, the trial court must hear evidence and make findings of specific fact on the child's actual past expenditures and present reasonable expenses. Boyd v. Boyd, 81 N.C. App. 71, 343 S.E.2d 581 (1986); Bottomley v. Bottomley, 82 N.C. App. 231, 346 S.E.2d 317 (1986).

Conclusion as to Reasonableness of Personal Expenses. — In a child support case, the trial court should be satisfied that personal expenses itemized in the parties' balance sheets are reasonable under all the circumstances before making a determination of need or liability, and though absence of a specific conclusion as to reasonableness will not necessarily be held for error, the better practice is for the order to contain such a conclusion. Coble v. Coble, 300 N.C. 708, 268 S.E.2d 185 (1980).

The determination of what portion of claimed expenses is reasonable, and what portion is unreasonable, in arriving at an amount necessary to meet the reasonable needs of the child, requires an exercise of judgment and is therefore not a question of fact but a conclusion of law. Boyd v. Boyd, 81 N.C. App. 71, 343 S.E.2d 581 (1986).

Error to Order Support Absent Appropriate Findings. — Where the court does not make appropriate findings based on competent evidence as to what are the reasonable needs of the children for health, education and maintenance, it is error to direct payments for their support. Hampton v. Hampton, 29 N.C. App. 342, 224 S.E.2d 197 (1976); Poston v. Poston, 40 N.C. App. 210, 252 S.E.2d 240 (1979).

In a child support action, where the trial court failed to make findings as to the actual needs of the parties' minor child or the expenses of the parties, its order directing child support payments was erroneous. Ingle v. Ingle, 53 N.C. App. 227, 280 S.E.2d 460 (1981).

Appellate court reversed the trial court's judgment ordering a father who was in college to pay $95 per month in child support because the trial court based its order on the father's earning capacity but did not find that the father was deliberately suppressing his income to avoid family responsibilities. State v. Williams, 163 N.C. App. 353, 593 S.E.2d 123, 2004 N.C. App. LEXIS 365 (2004).

Without findings relating to the parties' reasonable expenses, there is no basis for a determination as to the relative abilities of the parents to provide the support necessary to meet the reasonable needs of the children. Boyd v. Boyd, 81 N.C. App. 71, 343 S.E.2d 581 (1986).

Where child support for defendant's five children by three different mothers, set pursuant to the guidelines, amounted to 66% of his gross income, the trial court's duty was to determine whether this support exceeded the reasonable needs of each child, whether it was unjust or inappropriate, and whether defendant had "sufficient income to maintain a minimum standard of living based on the 1997 federal poverty level for one person." Buncombe County ex rel. Blair v. Jackson, 138 N.C. App. 284, 531 S.E.2d 240, 2000 N.C. App. LEXIS 608 (2000).

Award of Reimbursement for Past Support. — The trial court must make specific factual findings to support not only an award of future support but also to support an award of reimbursement for past support of the child. Buff v. Carter, 76 N.C. App. 145, 331 S.E.2d 705 (1985).

Findings as to Suppression of Income. — The trial court erred in awarding child support based upon each party's "earning capacity" without any findings as to whether either party deliberately suppressed his or her income to avoid his or her support obligation. Bowers v. Bowers, 141 N.C. App. 729, 541 S.E.2d 508, 2001 N.C. App. LEXIS 13 (2001).

Finding as to Income of Supporting Spouse. — Although a proper finding pertaining to the income of the supporting spouse must be based on present, as opposed to past, income, there is no rule that requires a specific finding as to the income of the supporting spouse on the precise date of the hearing. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

Findings Held Insufficient. — Where the trial did not make an assessment of the child's needs, and found that plaintiff's expenses exceeded her income and that her unwieldy credit card obligations were caused by defendant's failure to pay $220 in support to her in a timely manner when she had custody of both children, the findings of fact were insufficient to support the conclusion that plaintiff should not be required to support her minor children; defendant's $220 delinquency in child support payments did not mean that plaintiff's expenses were reasonable, and the trial judge made no findings upon which to conclude that defendant had the ability to support both children. Payne v. Payne, 91 N.C. App. 71, 370 S.E.2d 428 (1988).

Appellate court would remand case where the trial court failed to make findings as to what the child support amount would be under the applicable Guidelines, as to the child's reasonable needs, and as to whether the greater weight of the evidence established that application of the presumptive Guidelines amount would be "unjust or inappropriate." Sain v. Sain, 134 N.C. App. 460, 517 S.E.2d 921 (1999).

Trial court's finding that a husband was not under any other child support obligation pursuant to a court order or other written obligation flew in the face of the uncontroverted evidence presented at trial by both parties that was under a district court order to provide child support payments for a child born from his subsequent marriage; thus, the trial court's finding was not supported by competent evidence in the record, was not sufficient to establish that the trial court took due regard of defendant's estates, earnings, conditions and other facts of the particular case as required under G.S. 50-13.4(c), and the child support order was reversed. Zaliagiris v. Zaliagiris, 164 N.C. App. 602, 596 S.E.2d 285, 2004 N.C. App. LEXIS 1041 (2004), cert. denied, 359 N.C. 643, 617 S.E.2d 662 (2005).

VIII. APPELLATE REVIEW.

Standard for reviewing child support orders resembles that for reviewing awards of custody, in that the amount of child support allowed by the trial judge will be disturbed only when there is an abuse of discretion. Dixon v. Dixon, 67 N.C. App. 73, 312 S.E.2d 669 (1984).

Support Award Will Not Be Disturbed Absent Abuse of Discretion. — The amount of child support awarded is in the discretion of the trial judge and will be disturbed only on a showing of abuse of that discretion. Coggins v. Coggins, 260 N.C. 765, 133 S.E.2d 700 (1963); Swink v. Swink, 6 N.C. App. 161, 169 S.E.2d 539 (1969); Sawyer v. Sawyer, 21 N.C. App. 293, 204 S.E.2d 224, cert. denied, 285 N.C. 591, 205 S.E.2d 723 (1974); Gibson v. Gibson, 24 N.C. App. 520, 211 S.E.2d 522 (1975); Wyatt v. Wyatt, 32 N.C. App. 162, 231 S.E.2d 42, aff'd, 35 N.C. App. 650, 242 S.E.2d 180 (1977); Minges v. Minges, 53 N.C. App. 507, 281 S.E.2d 88 (1981); Peters v. Elmore, 59 N.C. App. 404, 297 S.E.2d 154 (1982), cert. denied, 307 N.C. 577, 299 S.E.2d 651 (1983); Plott v. Plott, 65 N.C. App. 657, 310 S.E.2d 51 (1983); Warner v. Latimer, 68 N.C. App. 170, 314 S.E.2d 789 (1984).

The trial court's consideration of the factors contained in subsection (c) of this section is an exercise in sound judicial discretion, and if its findings are supported by competent evidence in the record, its determination as to the proper amount of support will not be disturbed on appeal. Boyd v. Boyd, 81 N.C. App. 71, 343 S.E.2d 581 (1986).

Even If Evidence Is Conflicting. — An order for child support is a question of fairness to all parties involved. It will not be disturbed on appeal absent an abuse of discretion by the trial judge, even if there is conflicting evidence. Evans v. Craddock, 61 N.C. App. 438, 300 S.E.2d 908 (1983).

In determining the amount of alimony and child support to be awarded, the trial judge must follow the requirements of this section. The amount is a reasonable subsistence, to be determined by the trial judge in the exercise of a judicial discretion from the evidence before him. His determination is reviewable, but it will not be disturbed in the absence of a clear abuse of discretion. Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976).

Finding of Ability to Pay Is Conclusive When Supported by Evidence. — The trial court's discretion as to the amount of child support awarded is not absolute and unreviewable. The order must be based not only on the needs of the child, but also on the ability of the father to meet the needs. But where there is a finding of ability to pay, supported in the record by competent evidence, that finding will be conclusive. Wyatt v. Wyatt, 32 N.C. App. 162, 231 S.E.2d 42, aff'd, 35 N.C. App. 650, 242 S.E.2d 180 (1977).

Remand for Further Findings. — Where the trial judge found that the reasonable expenses of child were "in excess of $500," while the child's mother claimed that the child's expenses were $855.16, and found the reasonable living expenses of the child's father to be $800, rejecting his claimed figure of $1,196.80, lack of findings as to what claimed expenses of the child or the father the court considered unreasonable would require the appellate court to vacate the order and remand the cause for further findings. Patterson v. Patterson, 81 N.C. App. 255, 343 S.E.2d 595 (1986).

Failure to Assign Error to Trial Court's Findings. — Trial court's consideration of a child's needs, the mother's share of those needs, and the father's contribution to those needs was found to have been reasonable and adequate under circumstances in which the father did not assign error to the trial court's findings; the trial court's finding that the amount in the parties' agreement was inadequate and thus did not influence the trial court's decision, or the trial court's total calculated reasonable expenses. Pascoe v. Pascoe, — N.C. App. —, 645 S.E.2d 156, 2007 N.C. App. LEXIS 1124 (2007).

Presumption Allowing Modification. — The presumption, created in a 1994 revision, allowing modification of a child support order which is at least three years old, when there is a disparity of 15% or more between the amount of support payable under the original order and the amount owed based on the parties' current income and expenses, is within the scope of the legislative mandate to ensure adequate child support awards over time. Garrison v. Connor, 122 N.C. App. 702, 471 S.E.2d 644 (1996).

IX. REMEDIES.

A. In General.

Court Has Broad Discretion Under Subsection (e). — The court is not limited to ordering one method of payment, to the exclusion of the others provided in subsection (e) of this section. The legislature's use of the disjunctive and the phrase "as the court may order" shows that the court is to have broad discretion in providing for payment of child support orders. Moore v. Moore, 35 N.C. App. 748, 242 S.E.2d 642 (1978).

And Its Remedies Have Been Expanded. — The broad language of this statute suggests that the legislature intended to expand, not limit, the trial court's remedies in enforcing payment of child support. Griffin v. Griffin, 103 N.C. App. 65, 404 S.E.2d 478 (1991).

The enforcement provisions under subsection (f) of this section are not mutually exclusive. Griffin v. Griffin, 103 N.C. App. 65, 404 S.E.2d 478 (1991).

Nor Are the Payment Provisions. — The methods of payment listed in this section are not mutually exclusive. Warner v. Latimer, 68 N.C. App. 170, 314 S.E.2d 789 (1984).

The trial court has broad discretion under subsection (e) of this section in providing for payment of child support. Griffin v. Griffin, 103 N.C. App. 65, 404 S.E.2d 478 (1991).

Creation of Savings Account for Use of Children. — In an action for child support, the court was without the power to, in effect, attempt to create a savings account for the use of the children after they reached the age of 18. Parrish v. Cole, 38 N.C. App. 691, 248 S.E.2d 878 (1978).

Receipt of Support May Not Be Conditioned on Visitation. — A trial judge does not have authority to condition a minor child's receipt of support paid by the noncustodial parent on compliance with court-ordered visitation allowed the noncustodial parent by ordering that child support paid by defendant be placed in escrow if minor child fails or refuses to abide by the visitation privileges allowed defendant. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

Child Support May Not Be Offset by Equitable Distribution Judgment or Other Obligations. — Defendant was not entitled to a "credit" against his future child support payments for the $12,435.50 he paid over and above his court-ordered obligation or for the $500.00 plaintiff owed him as a result of an equitable distribution judgment; child support obligations may not be offset by other obligations. Brinkley v. Brinkley, 135 N.C. App. 608, 522 S.E.2d 90, 1999 N.C. App. LEXIS 1187 (1999).

Court Had No Authority to Order Payment of Social Security Benefits Directly to Mother. — A North Carolina district court had no authority to order the Social Security Administration and defendant father, a representative payee receiving Social Security disability payments for the benefit of his children, to pay those benefits directly to plaintiff mother. Brevard v. Brevard, 74 N.C. App. 484, 328 S.E.2d 789 (1985).

Defendant did not waive his right to support by failing to schedule notice of a hearing on the issue prior to child's emancipation; trial court was incorrect in its presumption that because the issue of custody had become moot, it could not address the issue of support. Freeman v. Freeman, 103 N.C. App. 801, 407 S.E.2d 262 (1991).

B. Security.

Nonresident Defendant May Be Required to Post Bond. — Under subsection (f)(1) of this section and G.S. 50-16.7(b), the court properly required supporting spouse to post a security bond to secure his compliance with a judgment requiring him to make monthly payments for the support of his wife and children, where the court found that defendant no longer resided within the State and that he had no attorney of record in the case. Parker v. Parker, 13 N.C. App. 616, 186 S.E.2d 607 (1972).

C. Award of Property.

Award of Home. — The award of the homeplace does not constitute a writ of possession within the meaning of G.S. 50-17, and the trial judge may award exclusive possession of the homeplace, even though it is owned by the entirety, as a part of the support under this section. Arnold v. Arnold, 30 N.C. App. 683, 228 S.E.2d 48 (1976); Rogers v. Rogers, 39 N.C. App. 635, 251 S.E.2d 663 (1979).

The General Assembly has made statutory provisions in subdivision (f)(2) of this section for awarding possession of a home as a part of child support. This is true without regard to whether the parties are divorced. To the extent that the General Assembly's will, as expressed in this section, conflicts with the common-law principle that the husband is entitled to exclusive possession of entirety property, the common law has been abrogated and supplanted. Martin v. Martin, 35 N.C. App. 610, 242 S.E.2d 393, cert. denied, 295 N.C. 261, 245 S.E.2d 778 (1978).

D. Attachment and Garnishment.

For case upholding garnishment of father's income from alleged "spendthrift" trust created in another jurisdiction and administered by a trustee bank in this State to satisfy judgment of mother against father for alimony, child support and counsel fees, see Swink v. Swink, 6 N.C. App. 161, 169 S.E.2d 539 (1969).

It was not error for trial court to enter order to withhold plaintiff's wages to collect child support arrearages that had been reduced to judgment. Griffin v. Griffin, 103 N.C. App. 65, 404 S.E.2d 478 (1991).

E. Recovery of Past Due Payments.

The sole limitation on a party's right to reimbursement for documented past support expenditures is imposed by G.S. 1-52(2), which limits recovery to those expenditures incurred within three years before the date the action for support is filed. Freeman v. Freeman, 103 N.C. App. 801, 407 S.E.2d 262 (1991).

Effect of Subdivision (f)(8). — The portion of subdivision (f)(8) of this section following the semicolon does not constitute an election of remedies. Nor it is true that once arrearages are reduced to judgment the party attempting to collect the judgment is limited to the execution procedures provided by G.S. 1-302. Griffin v. Griffin, 103 N.C. App. 65, 404 S.E.2d 478 (1991).

Reduction to Judgment. — A parent having custody of a minor child may institute an action for the support of such child, and once an order for support has been obtained, the past due payments may be reduced to judgment by motion in the cause. Griffith v. Griffith, 38 N.C. App. 25, 247 S.E.2d 30, cert. denied, 296 N.C. 106, 249 S.E.2d 804 (1978).

After Child Reaches Majority. — The fact that a child becomes 18 years of age does not prevent the parent having custody from having the past due payments which accrued while the child was a minor reduced to judgment. Griffith v. Griffith, 38 N.C. App. 25, 247 S.E.2d 30, cert. denied, 296 N.C. 106, 249 S.E.2d 804 (1978).

Notice. — The defendant in an action for unpaid child support could not complain of inadequate notice of the plaintiff's motion to reduce to judgment support payments alleged to be in arrears where the defendant's attorney of record was properly served with notice. Griffith v. Griffith, 38 N.C. App. 25, 247 S.E.2d 30, cert. denied, 296 N.C. 106, 249 S.E.2d 804 (1978).

F. Retroactive Support and Reimbursement.

Retroactive Distinguished from Prospective. — Child support awarded prior to the time a party files a complaint is properly classified as retroactive child support and is determined by considering reasonably necessary expenditures made on behalf of the child by the party seeking retroactive child support and the defendant's ability to pay during the period in the past for which reimbursement is sought; child support awarded from the time a party files a complaint for child support to the date of trial is not "retroactive child support," but is in the nature of prospective child support representing that period from the time a complaint seeking child support is filed to the date of trial. Taylor v. Taylor, 118 N.C. App. 356, 455 S.E.2d 442 (1995), rev'd on other grounds, 343 N.C. 50, 468 S.E.2d 33 (1996).

Although prospective child support based upon the presumptive guidelines requires no factual findings regarding the child's reasonable needs or the supporting parent's ability to pay, the trial court must set out specific findings of fact in a reimbursement award for retroactive support. Biggs v. Greer, 136 N.C. App. 294, 524 S.E.2d 577, 2000 N.C. App. LEXIS 13 (2000).

Trial court's award of child support was not retroactive in nature because prior consent order was not intended as a final determination on the issue of child support; thus, under G.S. 50-13.4(c), the trial court properly followed the guidelines in awarding prospective child support. Cole v. Cole, 149 N.C. App. 427, 562 S.E.2d 11, 2002 N.C. App. LEXIS 194 (2002).

Claim for Retroactive Child Support. — Not only may an action be brought to collect child support payments in arrears, but a claim for retroactive child support may be brought under this section. Warner v. Latimer, 68 N.C. App. 170, 314 S.E.2d 789 (1984).

Retroactive child support is based solely on amount actually expended for support of minor children during time period in question. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

"Emergency Situation" Must Be Shown. — Child support reimbursement, or child support governing a period prior to a motion to increase an existing child support order, would constitute retroactive child support and would not be based on the presumptive guidelines. Therefore, a child support payment order may not be retroactively increased without evidence of some emergency situation that required the expenditure of sums in excess of the amount of child support paid. Biggs v. Greer, 136 N.C. App. 294, 524 S.E.2d 577, 2000 N.C. App. LEXIS 13 (2000).

Reasonable Necessity and Ability to Pay Must Be Considered. — When a trial court is faced with calculating a retroactive child support award, it must consider, among other things, whether what was actually expended was "reasonably necessary" for the child's support and the defendant's ability to pay during the time for which reimbursement is sought. Buff v. Carter, 76 N.C. App. 145, 331 S.E.2d 705 (1985).

Retroactive Support for Private Schooling Denied. — Award of additional retroactive child support for private schooling was denied where the trial court's limited findings failed to set forth the existence of a "sudden emergency" so unusual or extraordinary as to require plaintiff to expend sums in excess of defendant's existing support obligation, and the court's order contained no findings reflective of defendant's ability to pay during the period the emergency expenses were allegedly incurred. Biggs v. Greer, 136 N.C. App. 294, 524 S.E.2d 577, 2000 N.C. App. LEXIS 13 (2000).

Measure of Liability for Reimbursement of Support Funds Expended. — Where there was no evidence or finding as to the actual amount expended by plaintiff for the support of the children for which she was entitled to reimbursement from defendant, what the defendant "should have paid" was not the measure of his liability to plaintiff. The measure of defendant's liability to plaintiff was the amount actually expended by plaintiff which represented the defendant's share of support. Hicks v. Hicks, 34 N.C. App. 128, 237 S.E.2d 307 (1977); Rawls v. Rawls, 94 N.C. App. 670, 381 S.E.2d 179 (1989).

No Reimbursement for Share of Support Paid by Court Order. — In an action by a mother for child support, mother was not entitled to be reimbursed for sums expended by her for the support of the children which represented her share of support as determined by the trial judge, considering the relative ability of the parties to provide support. Hicks v. Hicks, 34 N.C. App. 128, 237 S.E.2d 307 (1977).

Mother's Homemaking Services Considered. — In determining father's share of the reasonable actual expenditures made by mother during the period for which retroactive child support is sought, the trial court must consider her child care and homemaking services rendered during this period. Lawrence v. Tise, 107 N.C. App. 140, 419 S.E.2d 176 (1992).

Mother Not Entitled to Compensation for Support by Others. — In an action by a mother for child support, she was not entitled to be compensated for support for the children which was provided by others. Hicks v. Hicks, 34 N.C. App. 128, 237 S.E.2d 307 (1977).

Extent of Recovery for Past Expenditures. — Assuming adequate proof of the expenditures under subsection (c) of this section, the plaintiff-mother could recover reimbursement for her past support expenditures (1) to the extent she paid the father's share of such expenditures, and (2) to the extent the expenditures occurred three years or less before August 8, 1986, the date she filed her claim for child support. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Error Where Court Used Guidelines Instead of Actual Expenditures. — Where, although the trial court made a finding on mother's actual expenditures during the period for which retroactive support was sought, the court instead based the retroactive support award on the guidelines in effect at the time the expenses were incurred by mother, this was error requiring reversal of the order of retroactive support. Lawrence v. Tise, 107 N.C. App. 140, 419 S.E.2d 176 (1992).

The trial court was under no obligation to render findings of fact where it did not deviate from the presumptive guidelines, but rather adjusted the guideline amounts to account, prospectively, for the extraordinary expense of private schooling. Biggs v. Greer, 136 N.C. App. 294, 524 S.E.2d 577, 2000 N.C. App. LEXIS 13 (2000).

Where the trial court abused its discretion in calculating plaintiff's income and in failing to value plaintiff's estate, and erred in using the "retroactive child support" test for calculating prospective child support, case would be remanded. Taylor v. Taylor, 118 N.C. App. 356, 455 S.E.2d 442 (1995), rev'd on other grounds, 343 N.C. 50, 468 S.E.2d 33 (1996).

Evidence Held Sufficient to Support Award. — Where trial court specifically found that prior to filing action plaintiff expended at least four hundred dollars ($400.00) per month for the support of the parties' child and that defendant had the capacity to pay one-half of this amount toward the child's support during this time, the findings were supported by the evidence and were binding on appeal; the trial court correctly awarded plaintiff reimbursement for past child support. Rawls v. Rawls, 94 N.C. App. 670, 381 S.E.2d 179 (1989).

After the father had been found to be in contempt due to his failure to pay child support, the trial court made sufficient findings of fact to support an award of attorney's fees to the mother under G.S. 50-13.6, despite the fact that there was no finding that the mother was an interested party with insufficient means to defray the cost of the litigation; under G.S. 50-13.4(c), the children's ability to pay attorney's fees was at issue, not the mother's, and the mother was an interested party under G.S. 50-13.6, as she provided the financial support in the absence of the husband. Belcher v. Averette, 152 N.C. App. 452, 568 S.E.2d 630, 2002 N.C. App. LEXIS 1069 (2002).

G. Contempt.

Editor's Note. *— Some of the cases cited below were decided under subdivision (f)(9) of this section as it read prior to amendment in 1977. Prior to such amendment, subdivision (f)(9) provided for punishment as for contempt of the "willful disobedience" of an order for the payment of child support.*

Agreement of Parties Incorporated in Judgment Is Enforceable by Contempt Proceedings. — Where, in wife's action for alimony and child support, the parties agreed to the terms of a judgment providing that husband would make specified monthly support payments, and the judgment entered by the court ordered husband to make the payments which he had agreed to make, husband's obligation to make the support payments could be enforced by contempt proceedings. Parker v. Parker, 13 N.C. App. 616, 186 S.E.2d 607 (1972).

Willfulness Is Required Under Subdivision (f)(9). — The element of willfulness is required for a finding of civil contempt under subdivision (f)(9) of this section and G.S. 5A-21. Jones v. Jones, 52 N.C. App. 104, 278 S.E.2d 260 (1981); Harris v. Harris, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

Priority of G.S. 50-13.4(f)(8)-(9) over G.S. Ch. 5A. — Because G.S. 50-13.4(f)(8)-(9) is more specific than the generalized contempt allowances set forth in G.S. ch. 5A, G.S. 50-13.4(f)(8)-(9) must control. Brown v. Brown, 171 N.C. App. 358, 615 S.E.2d 39, 2005 N.C. App. LEXIS 1206 (2005), cert. denied, 360 N.C. 60, 621 S.E.2d 175 (2005).

And Only Willful Disobedience May Be Punished. — A failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is willful, which imports knowledge and a stubborn resistance. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

To constitute willful disobedience there must be an ability to comply with the court order and a deliberate and intentional failure to do so. Bennett v. Bennett, 21 N.C. App. 390, 204 S.E.2d 554 (1974).

One does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Ability to Pay or to Take Measures to Do So Required. — Although an order for child support is enforceable by civil contempt proceedings, a supporting party cannot be held in contempt unless the party willfully failed to comply with the support order. A finding of willful failure to comply with the order requires evidence of the present ability to pay or to take reasonable measures to comply. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Contempt for Violation Based on Willfulness Upheld. — Trial court acted correctly when it exercised jurisdiction under this section and found defendant/husband in civil contempt, where he made a calculated and deliberate decision to pay a lower amount of child support than it had previously ordered. Burnett v. Wheeler, 133 N.C. App. 316, 515 S.E.2d 480 (1999).

Trial Court Must Make Particular Findings of Ability to Pay. — In order to hold a parent in contempt for failure to pay child support in accordance with a decree, the failure must be willful. In order to find the failure willful, there must be particular findings of the ability to pay during the period of delinquency. Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

In order to punish by contempt proceedings, the trial court must find as a fact that the defendant possessed the means to comply with orders of the court during the period when he was in default. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

There must be a specific finding of fact, supported by competent evidence, to the effect that defendant possesses the means to comply with the court order, before he can be incarcerated for contempt until compliance. Bennett v. Bennett, 21 N.C. App. 390, 204 S.E.2d 554 (1974); Fitch v. Fitch, 26 N.C. App. 570, 216 S.E.2d 734, cert. denied, 288 N.C. 240, 217 S.E.2d 679 (1975).

A defendant may not deliberately divest himself of his property and in effect pauperize himself for appearance at a hearing for contempt and thereby escape punishment because he is at that time unable to comply with the court order. Bennett v. Bennett, 21 N.C. App. 390, 204 S.E.2d 554 (1974).

Defendant's voluntary purging of assets in bankruptcy was considered a deliberate divestment of assets; therefore, failure to comply with a child support order was willful and punishable by contempt proceedings. Harris v. Harris, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

Past contempt cannot be ignored by the court even if at the exact time of the contempt hearing the defendant does not have the means to comply with the order for child support.

Bennett v. Bennett, 21 N.C. App. 390, 204 S.E.2d 554 (1974).

Contempt Decree Set Aside for Lack of Findings. — Where the lower court had not found as a fact that defendant possessed the means to comply with the orders for payment of subsistence pendente lite at any time during the period when he was in default in such payments, the findings that defendant's failure to make the payments of subsistence was deliberate and willful was not supported by the record, and the decree committing him to imprisonment for contempt would be set aside. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

When order reducing child support arrears to a money judgment does not provide for periodic payments although the lower court's prior judgment reduced the father's child support arrearage to a money judgment, it did not provide for periodic payments so his failure to satisfy the arrearage was enforceable by execution under G.S. 1-302, and not civil contempt under G.S. 50-13.4(f)(8)-(9), so the lower court's judgment holding him in contempt was beyond its jurisdiction and was vacated. Brown v. Brown, 171 N.C. App. 358, 615 S.E.2d 39, 2005 N.C. App. LEXIS 1206 (2005), cert. denied, 360 N.C. 60, 621 S.E.2d 175 (2005).

When order reducing child support arrears to a money judgment does not provide for periodic payments or other deadline for payment, it is not enforceable by contempt, and the trial court does not have jurisdiction to enter an order finding a defendant in contempt. Brown v. Brown, 171 N.C. App. 358, 615 S.E.2d 39, 2005 N.C. App. LEXIS 1206 (2005), cert. denied, 360 N.C. 60, 621 S.E.2d 175 (2005).

Failure to Pay College Expenses. — Trial court properly found father in civil contempt where he willfully failed to pay his daughters college expenses as he had contracted to do. Ross v. Voiers, 127 N.C. App. 415, 490 S.E.2d 244 (1997), cert. denied, 347 N.C. 402, 496 S.E.2d 387 (1997).

Defendant Not in Contempt. — Defendant was not in civil contempt of court in deducting from child support payments made to plaintiff amounts representing voluntary expenditures for needs of the parties' children while they were visiting him. Jones v. Jones, 52 N.C. App. 104, 278 S.E.2d 260 (1981).

Review of Facts Found in Contempt Proceedings. — In proceedings for contempt, the facts found by the judge are not reviewable, except for the purpose of passing upon their sufficiency to warrant the judgment. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Payment of Counsel Fees. — The court is vested with broad power when it is authorized to punish "as for contempt." This power includes the authority for a district court judge to require one whom he has found in willful contempt of court for failure to comply with a child support order to pay reasonable counsel fees to opposing counsel as a condition to being purged of contempt. Blair v. Blair, 8 N.C. App. 61, 173 S.E.2d 513 (1970).

Indefinite Jail Term. — When a defendant has the present means to comply with a court order and deliberately refuses to comply, there is a present and continuing contempt, and the court may commit such defendant to jail for an indefinite term, that is, until he complies with the order. Bennett v. Bennett, 21 N.C. App. 390, 204 S.E.2d 554 (1974); Fitch v. Fitch, 26 N.C. App. 570, 216 S.E.2d 734, cert. denied, 288 N.C. 240, 217 S.E.2d 679 (1975).

Effect of Dismissal of Contempt Action Without Explanation. — A dismissal of a contempt action, without explanation, at most signified that the supporting party was not in contempt as of that date and did not cancel the accrued child support debt; it merely forced the custodial parent or an authorized party to pursue one of the alternate remedies listed in subsection (f) to enforce the debt. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

As to effect of reconciliation and resumption of cohabitation on a separation agreement, see Hand v. Hand, 46 N.C. App. 82, 264 S.E.2d 597, cert. denied, 300 N.C. 556, 270 S.E.2d 107 (1980).

Failure to Identify Purpose of Support as Health, Education and Maintenance Is Not Error. — The better practice is for the court's order to relate that the payment ordered under this section is the amount necessary to meet the reasonable needs of the child for health, education, and maintenance, but the failure of the court to do so does not constitute reversible error. Andrews v. Andrews, 12 N.C. App. 410, 183 S.E.2d 843 (1971); Martin v. Martin, 35 N.C. App. 610, 242 S.E.2d 393, cert. denied, 295 N.C. 261, 245 S.E.2d 778 (1978).

Appeal Did Not Divest Trial Court of Enforcement Jurisdiction. — Notice of appeal from a trial court order requiring a husband to make payments pursuant to a child support order did not divest the trial court of jurisdiction to make an enforcement order finding the husband in contempt based on the exception to the divestment of the trial court's jurisdiction found in G.S.50-13.4(f)(9). Guerrier v. Guerrier, 155 N.C. App. 154, 574 S.E.2d 69, 2002 N.C. App. LEXIS 1638 (2002).

OPINIONS OF ATTORNEY GENERAL

Medical Child Support Enforcement Provisions. — The medical child support enforcement provisions of House Bill 1563, 1993 (Reg. Sess., 1994), N.C. Session Laws c. 644, are inapplicable to the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan (now State Health Plan for Teachers and State Employees) and the governmental entities whose employees and retirees, along with their dependents, are eligible for coverage under the Plan or its HMO option. Medical child support orders nonetheless may be enforced directly against State employees and retirees who fail to enroll, or maintain coverage for, their eligible dependent children under the State Health Plan in accordance with the provisions of G.S. 50-13.9, 50-13.11 and subsection (f) of this section. See opinion of Attorney General to Patricia Crawford, Associate General Counsel, University of North Carolina at Chapel Hill, — N.C.A.G. — (August 10, 1995).

§ 50-13.5. Procedure in actions for custody or support of minor children.

(a) Procedure. — The procedure in actions for custody and support of minor children shall be as in civil actions, except as provided in this section and in G.S. 50-19. In this G.S. 50-13.5 the words "custody and support" shall be deemed to include custody or support, or both.

(b) Type of Action. — An action brought under the provisions of this section may be maintained as follows:

(1) As a civil action.

(2) Repealed by Session Laws 1979, c. 110, s. 12.

(3) Joined with an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(4) As a cross action in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(5) By motion in the cause in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(6) Upon the court's own motion in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(7) In any of the foregoing the judge may issue an order requiring that the body of the minor child be brought before him.

(c) Jurisdiction in Actions or Proceedings for Child Support and Child Custody. —

(1) The jurisdiction of the courts of this State to enter orders providing for the support of a minor child shall be as in actions or proceedings for the payment of money or the transfer of property.

(2) The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child under the provisions of G.S. 50A-201, 50A-202, and 50A-204.

(3) to (6) Repealed by Session Laws 1979, c. 110, s. 12.

(d) Service of Process; Notice; Interlocutory Orders. —

(1) Service of process in civil actions for the custody of minor children shall be as in other civil actions. Motions for support of a minor child in a pending action may be made on 10 days notice to the other parties and compliance with G.S. 50-13.5(e). Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-205.

(2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the

temporary custody and support of the child, pending the service of process or notice as herein provided.

(3) A temporary order for custody which changes the living arrangements of a child or changes custody shall not be entered ex parte and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts.

(e) Notice to Additional Persons in Support Actions and Proceedings; Intervention. —

(1) The parents of the minor child whose addresses are reasonably ascertainable; any person, agency, organization or institution having actual care, control, or custody of a minor child; and any person, agency, organization or institution required by court order to provide for the support of a minor child, either in whole or in part, not named as parties and served with process in an action or proceeding for the support of such child, shall be given notice by the party raising the issue of support.

(2) The notice herein required shall be in the manner provided by the Rules of Civil Procedure for the service of notices in actions. Such notice shall advise the person to be notified of the name of the child, the names of the parties to the action or proceeding, the court in which the action or proceeding was instituted, and the date thereof.

(3) In the discretion of the court, failure of such service of notice shall not affect the validity of any order or judgment entered in such action or proceeding.

(4) Any person required to be given notice as herein provided may intervene in an action or proceeding for support of a minor child by filing in apt time notice of appearance or other appropriate pleadings.

(f) Venue. — An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided. If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action. If an action or proceeding for the custody and support of a minor child has been instituted and an action for annulment or for divorce, either absolute or from bed and board, or for alimony without divorce is subsequently instituted in the same or another county, the court having jurisdiction of the prior action or proceeding may, in its discretion direct that the action or proceeding for custody and support of a minor child be consolidated with such subsequent action, and in the event consolidation is ordered, shall determine in which court such consolidated action or proceeding shall be heard.

(g) Custody and Support Irrespective of Parents' Rights Inter Partes. — Orders for custody and support of minor children may be entered when the matter is before the court as provided by this section, irrespective of the rights of the wife and the husband as between themselves in an action for annulment or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(h) Court Having Jurisdiction. — When a district court having jurisdiction of the matter shall have been established, actions or proceedings for custody and support of minor children shall be heard without a jury by the judge of such district court, and may be heard at any time.

(i) District Court; Denial of Parental Visitation Right; Written Finding of Fact. — In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

(j) Custody and Visitation Rights of Grandparents. — In any action in which the custody of a minor child has been determined, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7, the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights. (1858-9, c. 53, s. 2; 1871-2, c. 193, ss. 39, 46; Code, ss. 1292, 1296, 1570, 1662; Rev., ss. 1567, 1570, 1854; 1919, c. 24; C.S., ss. 1664, 1667, 2242; 1921, c. 13; 1923, c. 52; 1939, c. 115; 1941, c. 120; 1943, c. 194; 1949, c. 1010; 1951, c. 893, s. 3; 1953, cc. 813, 925; 1955, cc. 814, 1189; 1957, c. 545; 1965, c. 310, s. 2; 1967, c. 1153, s. 2; 1971, c. 1185, s. 24; 1973, c. 751; 1979, c. 110, s. 12; c. 563; c. 709, s. 3; 1981, c. 735, s. 3; 1983, c. 587; 1985, c. 575, s. 4; 1987 (Reg. Sess., 1988), c. 893, s. 3.1; 1999-223, ss. 11, 12.)

Cross References. — As to actions for custody, see also G.S. 50-13.1 through 50-13.3 and notes thereunder. As to actions for support, see also G.S. 50-13.4 and notes thereunder. As to maintenance of certain actions as independent actions, see G.S. 50-19. For the Uniform Child Custody Jurisdiction Act, see G.S. 50A-1 et seq.

Legal Periodicals. — For note on jurisdictional and full faith and credit requirements of custody awards of minor children, see 30 N.C.L. Rev. 282 (1952).

For note on the domicile rule in custody proceedings, see 35 N.C.L. Rev. 83 (1956).

For note on voluntary nonsuit in custody action, see 44 N.C.L. Rev. 1138 (1966).

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

For survey of 1972 case law on child support and pre-Chapter 48A consent judgments, see 51 N.C.L. Rev. 1091 (1973).

For survey of 1976 case law on domestic relations, see 55 N.C.L. Rev. 1018 (1977).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article, "Equating a Stepparent's Rights and Liabilities vis-a-vis Custody, Visitation and Support upon Dissolution of the Marriage with Those of the Natural Parent — An Equitable Solution to a Growing Dilemma?," see 17 N.C. Cent. L.J. 1 (1988).

For an article on recent developments in third-party custody proceedings after Petersen v. Rogers and Price v. Howard, see 76 N.C.L. Rev. 2145 (1998).

CASE NOTES

I. In General.

II. Type of Action.

III. Jurisdiction and Venue.

  A. In General.

  B. Full Faith and Credit.

  C. Residence and Domicile.

IV. Notice.

V. Hearing.

VI. Temporary Custody and Support.

VII. Visitation Rights.

  A. In General.

  B. Denial of Parents' Rights.

  C. Grandparents' Rights.

I. IN GENERAL.

Editor's Note. *— A number of the cases cited below were decided under former G.S. 50-13, which dealt with custody and maintenance of children in actions for divorce, former G.S. 50-16, which dealt with custody and support of children in proceedings for alimony without divorce, and former G.S. 17-39 and 17-39.1, which dealt with habeas corpus for custody of children.*

Legislature apparently intended to provide the maximum range of choice among procedures for determination of child custody and support. Latham v. Latham, 74 N.C. App. 722, 329 S.E.2d 721 (1985).

Remarriage Does Not Reduce Choice of Procedures. — The statutory scheme of this section provides for an election of procedures in actions for custody or support; there is no reason why the remarriage of the parties should reduce the choices available. Latham v. Latham, 74 N.C. App. 722, 329 S.E.2d 721 (1985).

Effect of Defendant's Petition for Custody on Plaintiff's Right to Voluntary Nonsuit. — Where wife instituted action for divorce and husband filed his petition in the cause praying the court for a determination of his custodial rights with respect to the child, thus seeking affirmative relief of a substantial nature, it was not within the power of the clerk to divest the court of its jurisdiction by allowing wife to submit to a voluntary nonsuit during the course of the hearings and while the issue of custody was in fieri before the presiding judge. Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957).

Ex Parte Order Improper. — Judge was censured for misconduct under circumstances in which the judge entered an ex parte order striking an earlier order that had been entered by a different district court judge, which had found a party in contempt for failure to pay child support, regardless of the judge's claim that his actions were allowed by G.S. 50-13.5. In re Royster, 361 N.C. 560, 648 S.E.2d 837, 2007 N.C. LEXIS 809 (2007).

Change in Circumstances. — Where parent was found to be a fit and proper parent, and in a later order found to be an unfit parent, the finding of unfitness constituted a change in circumstances. Raynor v. Odom, 124 N.C. App. 724, 478 S.E.2d 655 (1996).

Applied in Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969); Bonavia v. Torreso, 7 N.C. App. 21, 171 S.E.2d 108 (1969); Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Williams v. Williams, 12 N.C. App. 170, 182 S.E.2d 667 (1971); Snyder v. Snyder, 18 N.C. App. 658, 197 S.E.2d 802 (1973); Roberts v. Roberts, 25 N.C. App. 198, 212 S.E.2d 410 (1975); Benson v. Benson, 39 N.C. App. 254, 249 S.E.2d 877 (1978); Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979); Rhoney v. Sigmon, 43 N.C. App. 11, 257 S.E.2d 691 (1979); Misero v. Misero, 43 N.C. App. 523, 259 S.E.2d 346 (1979); Lynch v. Lynch, 302 N.C. 189, 274 S.E.2d 212 (1981); Miller v. Kite, 69 N.C. App. 679, 318 S.E.2d 102 (1984); Glesner v. Dembrosky, 73 N.C. App. 594, 327 S.E.2d 60 (1985).

Cited in Blair v. Blair, 8 N.C. App. 61, 173 S.E.2d 513 (1970); Texas v. Rhoades, 7 N.C. App. 388, 172 S.E.2d 235 (1970); In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228 (1971); Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975); Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976); Holbrook v. Holbrook, 38 N.C. App. 308, 247 S.E.2d 926 (1978); McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980); Oxendine v. Catawba County Dep't of Social Servs., 49 N.C. App. 571, 272 S.E.2d 417 (1980); Hamlin v. Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981); Davis v. Taylor, 81 N.C. App. 42, 344 S.E.2d 19 (1986); Shingledecker v. Shingledecker, 103 N.C. App. 783, 407 S.E.2d 589 (1991); Ray v. Ray, 103 N.C. App. 790, 407 S.E.2d 592 (1991); Brooks v. Brooks, 107 N.C. App. 44, 418 S.E.2d 534 (1992); Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993); Wake County ex rel. Horton v. Ryles, 112 N.C. App. 754, 437 S.E.2d 404 (1993); McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995); Fisher v. Fisher, 124 N.C. App. 442, 477 S.E.2d 251 (1996); Ross v. Voiers, 127 N.C. App. 415, 490 S.E.2d 244 (1997); Penland v. Harris, 135 N.C. App. 359, 520 S.E.2d 105 (1999); Montgomery v. Montgomery, 136 N.C. App. 435, 524 S.E.2d 360, 2000 N.C. App. LEXIS 19 (2000); Smith v. Barbour, 154 N.C. App. 402, 571 S.E.2d 872, 2002 N.C. App. LEXIS 1450 (2002); McDuffie v. Mitchell, 155 N.C. App. 587, 573 S.E.2d 606, 2002 N.C. App. LEXIS 1580 (2002); Williams v. Walker, 185 N.C. App. 393, 648 S.E.2d 536, 2007 N.C. App. LEXIS 1826 (2007); Smith v. Barbour, — N.C. App. —, 671 S.E.2d 578, 2009 N.C. App. LEXIS 109 (2009); Head v. Mosier, — N.C. App. —, 677 S.E.2d 191, 2009 N.C. App. LEXIS 669 (2009).

II. TYPE OF ACTION.

Editor's Note. *— Most of the cases cited below were decided prior to the enactment of G.S. 50-19, authorizing the maintenance of certain actions as independent actions.*

Justice to all parties is best served when one judge is able to see the controversy whole. In re King, 3 N.C. App. 466, 165 S.E.2d 60 (1969).

Joinder in Action for Alimony Without Divorce Is Permissible. — It is permissible under subdivision (b)(3) of this section for the wife (spouse) to join an action for custody and support of the minor children of the parties in her action for alimony without divorce. Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970).

As an Additional Method of Determining Issues as to Children. — The 1953 amendment of former G.S. 50-16, granting jurisdiction to determine custody in an action for alimony without divorce, created an additional method whereby the matter of custody may be determined. Blankenship v. Blankenship, 256 N.C. 638, 124 S.E.2d 857 (1962).

The 1955 amendment to former G.S. 50-16, which provided that custody orders were authorized "in the same manner as such orders are entered by the court in an action for divorce," bolstered the decision in Blankenship v. Blankenship, 256 N.C. 638, 124 S.E.2d 857 (1962), which held that that section created an additional method whereby all questions relating to custody and child support were brought into and determined in the suit for alimony without divorce, in one action. In re Sauls, 270 N.C. 180, 154 S.E.2d 327 (1967).

Prior to 1953, custody of children could not be determined in a proceeding for alimony without divorce. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

Counterclaims. — There is no conflict between the statutes dealing with procedure in divorce actions and G.S. 1A-1, Rule 13(a). Rather G.S. 1A-1, Rule 13(a) superimposes an additional characteristic on certain kinds of counterclaims. Gardner v. Gardner, 294 N.C. 172, 240 S.E.2d 399 (1978). But see now § 50-19.

Divorce action is pending for purposes of determining custody and support until the death of one of the parties or until the youngest child born of the marriage reaches maturity, whichever event occurs first. Latham v. Latham, 74 N.C. App. 722, 329 S.E.2d 721 (1985).

Remedy of Plaintiff in Divorce Suit Is by Motion in the Cause. — Where a wife institutes suit for divorce, her remedy to require the defendant to provide support for a minor child of the marriage is by motion in the cause, which may be filed either before or after final judgment. Winfield v. Winfield, 228 N.C. 256, 45 S.E.2d 259 (1947).

Plaintiff-husband, as a parent seeking custody, could seek to have his child support obligation determined through a motion in the cause in the divorce action. He was not precluded from doing so by the fact that the court had not previously entered orders in that action relating to child support. Bottomley v. Bottomley, 82 N.C. App. 231, 346 S.E.2d 317 (1986).

Modification of Order on Motion of Court or Party. — Upon motion of a party, or upon its own motion after due notice, the court may conduct a hearing to determine whether the decree should be modified. Spence v. Durham, 283 N.C. 671, 198 S.E.2d 537 (1973), cert. denied, 415 U.S. 918, 94 S. Ct. 1417, 39 L. Ed. 2d 473 (1974).

Foster Parents May Not Bring Custody Action. — Nothing in the language of G.S. 48-9.1(1) gives foster parents standing to contest the department's or agency's exercise of its rights as legal custodian; therefore, foster parents are without standing to bring an action seeking custody of minor child placed in their home by defendant. Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981); In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Intervention by Foster Parents. — In proceeding brought by DSS in which custody was put in issue by guardian ad litem and natural father, trial court did not err in permitting child's foster parents to intervene. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986), distinguishing Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981), and upholding award of custody to foster parents.

For cases involving the bringing of habeas corpus proceedings in custody disputes, prior to the amendment by Session Laws 1979, c. 110, s. 12, see Robbins v. Robbins, 229 N.C. 430, 50 S.E.2d 183 (1948); Weddington v. Weddington, 243 N.C. 702, 92 S.E.2d 71 (1956); Bunn v. Bunn, 258 N.C. 445, 128 S.E.2d 792 (1963); In re Skipper, 261 N.C. 592, 135 S.E.2d 671 (1964); In re Macon, 267 N.C. 248, 147 S.E.2d 909 (1966); Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967); In re King, 3 N.C. App. 466, 165 S.E.2d 60 (1969); In re Wright, 8 N.C. App. 330, 174 S.E.2d 27 (1970).

III. JURISDICTION AND VENUE.

A. In General.

Editor's Note. — *Most of the cases cited below were decided prior to the enactment of G.S. 50-19, authorizing the maintenance of certain actions as independent actions, and prior to the enactment of the Uniform Child Custody Jurisdiction Act, former G.S. 50A-1 et seq., or the Uniform Child-Custody Jurisdiction and Enforcement Act, G.S. 50A-101 et seq.*

Venue Provision. — Subdivision (f) of this section, enacted in 1967, is the venue provision for a child support action. Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991), appeal dismissed, 331 N.C. 286, 417 S.E.2d 254 (1992).

The jurisdiction of the court to protect infants is broad, comprehensive, and plenary.

Spence v. Durham, 283 N.C. 671, 198 S.E.2d 537 (1973), cert. denied, 415 U.S. 918, 94 S. Ct. 1417, 39 L. Ed. 2d 473 (1974).

Action to Determine Support Is in Personam. — Under subdivision (c)(1) of this section an action to determine the matter of support is in personam in nature. Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972).

An action for child support is an action in personam and is governed by jurisdictional rules as in actions for the payment of money or the transfer of property. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

While Award of Custody Is in Rem. — The awarding of the custody of the children in an action for divorce is in rem. Coble v. Coble, 229 N.C. 81, 47 S.E.2d 798 (1948); Hoskins v. Currin, 242 N.C. 432, 88 S.E.2d 228 (1955).

Divorce Action Gives Court Jurisdiction of Custody. — In divorce actions, whether for the dissolution of the marriage or from bed and board, the court in which the action is brought acquires jurisdiction over the custody of the unemancipated children of the parties. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

When Jurisdiction Is Obtained Over Defendant. — Upon the institution of a divorce action, the court is vested with jurisdiction of the children of the marriage for the purpose of entering orders respecting their care and custody. But the action is not instituted, within the meaning of this rule, until and unless the court acquires jurisdiction of the person of the defendant, and jurisdiction is subject to the fundamental requirement of notice and opportunity to be heard. If both parents are in court and subject to its jurisdiction, an order may be entered, in proper instances, binding the parties and enforceable through the court's coercive jurisdiction. Coble v. Coble, 229 N.C. 81, 47 S.E.2d 798 (1948).

And Consent Judgment Therein Does Not Divest Court of Jurisdiction as to Custody of Child. — Upon the institution of an action for divorce from bed and board, the court acquires jurisdiction of the minor children of the parties, which is not divested by a consent judgment on the issue of divorce entered in the cause with approval of the court, especially where such consent judgment expressly provides that either party may thereafter make a motion in the cause for the custody of the children, the court having the power in an action for divorce, either absolute or from bed and board, before or after final judgment, to enter orders respecting the care and custody of the children under this section. Tyner v. Tyner, 206 N.C. 776, 175 S.E. 144 (1934).

Where consent judgment in a suit a mensa et thoro has been entered in the action, without providing for the children, upon motion in the original cause the court has the power to make such further orders as it deems proper requiring the father (or mother) to provide for the support of his children, whether born before or after the rendition of the consent judgment. Sanders v. Sanders, 167 N.C. 317, 83 S.E. 489 (1914).

Actions Constituting General Appearance Subject Defendant to Jurisdiction. — By submitting information to the court relevant to the merits in action for child custody and support, defendant made a general appearance prior to his assertions of lack of personal jurisdiction where defendant sought affirmative relief from the court; submission of the documents was inconsistent with defendant's later claim of lack of personal jurisdiction. Bullard v. Bader, 117 N.C. App. 299, 450 S.E.2d 757 (1994).

Remarriage of parties to each other does not divest court of its continuing jurisdiction over the minor child acquired in action for divorce. Latham v. Latham, 74 N.C. App. 722, 329 S.E.2d 721 (1985).

Previous Action Pending. — Husband's motion as to child custody and child support was properly dismissed where the wife's previously commenced action with respect to the custody and support of the children was pending at the time the husband filed his motion. Basinger v. Basinger, 80 N.C. App. 554, 342 S.E.2d 549 (1986).

Child Becomes Ward of Court. — In a custody case, the court acquires jurisdiction of the child as well as the parent, and the child thus becomes a ward of the court. Joyner v. Joyner, 256 N.C. 588, 124 S.E.2d 724 (1962).

Presence of Child. — For cases as to the effect of the child's presence in this State on the issue of jurisdiction, prior to the enactment of G.S. 50A-1 et seq., see Coble v. Coble, 229 N.C. 81, 47 S.E.2d 798 (1948); Allman v. Register, 233 N.C. 531, 64 S.E.2d 861 (1951); Hoskins v. Currin, 242 N.C. 432, 88 S.E.2d 228 (1955); Weddington v. Weddington, 243 N.C. 702, 92 S.E.2d 71 (1956); Kovacs v. Brewer, 245 N.C. 630, 97 S.E.2d 96, vacated on other grounds, 356 U.S. 604, 78 S. Ct. 963, 2 L. Ed. 2d 1008 (1957); Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969); Pruneau v. Sanders, 25 N.C. App. 510, 214 S.E.2d 288, cert. denied, 287 N.C. 664, 216 S.E.2d 911 (1975); Hopkins v. Hopkins, 8 N.C. App. 162, 174 S.E.2d 103 (1970); Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972); Spence v. Durham, 16 N.C. App. 372, 191 S.E.2d 908 (1972), cert. denied, 415 U.S. 918, 94 S. Ct. 1417, 39 L. Ed. 2d 473 (1974); Spence v. Durham, 283 N.C. 671, 198 S.E.2d 537 (1973), cert. denied, 415 U.S. 918, 94 S. Ct. 1417, 39 L. Ed. 2d 473 (1974); Taylor v. Taylor, 20 N.C. App. 188, 201 S.E.2d 43 (1973); MacKenzie v. MacKenzie, 21 N.C. App. 403, 204 S.E.2d 561 (1974); Swanson v.

Swanson, 22 N.C. App. 152, 205 S.E.2d 738 (1974); Mathews v. Mathews, 24 N.C. App. 551, 211 S.E.2d 513 (1975); Searl v. Searl, 34 N.C. App. 583, 239 S.E.2d 305 (1977); Dishman v. Dishman, 37 N.C. App. 543, 246 S.E.2d 819 (1978); King v. Demo, 40 N.C. App. 661, 253 S.E.2d 616 (1979).

Jurisdiction Vests Exclusively in Divorce Court. — The court in which a suit for divorce is pending has exclusive jurisdiction as to the care or custody of the children of the marriage, before and after the decree of divorce has been entered. In re Blake, 184 N.C. 278, 114 S.E. 294 (1922); Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

When a divorce action is instituted, jurisdiction over the custody of the children born of the marriage vests exclusively in the court before whom the divorce action is pending and becomes a concomitant part of the subject matter of the court's jurisdiction in the divorce action. Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957); In re Sauls, 270 N.C. 180, 154 S.E.2d 327 (1967).

Jurisdiction over the custody of the children born of the marriage rests exclusively in the court before whom the divorce action is pending, and no order for the custody of the children may be entered in a later action by one of the parties for subsistence without divorce. Reece v. Reece, 231 N.C. 321, 56 S.E.2d 641 (1949), aff'd, 232 N.C. 95, 59 S.E.2d 363 (1950).

Where plaintiff instituted his action for divorce from bed and board in the superior court, and specifically prayed "that the court determine the proper custody for the aforesaid minor child of the plaintiff and defendant," that court became vested in his suit with exclusive jurisdiction to enter orders respecting the care, custody and maintenance of the child. Bunn v. Bunn, 258 N.C. 445, 128 S.E.2d 792 (1963).

Jurisdiction of the matters relating to custody having been invoked in an action for divorce, the court in which the divorce action was pending would have exclusive jurisdiction over the question of custody. Blankenship v. Blankenship, 256 N.C. 638, 124 S.E.2d 857 (1962).

And Such Jurisdiction Continues After Entry of Decree. — The court in which the suit for divorce is pending has exclusive jurisdiction of proceedings for custody and child support, and once they are commenced, maintains it after the divorce decree is entered. Bass v. Bass, 43 N.C. App. 212, 258 S.E.2d 391 (1979).

Jurisdiction of courts in custody and visitation cases is continuous. A decree determines only the present rights with respect to such custody and is subject to judicial alteration or modification upon a change of circumstances affecting the welfare of the child. In re Jones, 62 N.C. App. 103, 302 S.E.2d 259 (1983).

The jurisdiction of the court over the custody of unemancipated children of the parties in a divorce action continues even after divorce. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

Once jurisdiction of the court attaches to a child custody matter, it exists for all time until the cause is fully and completely determined. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Where Custody and Support Have Been Brought to Issue. — Where custody and support are brought to issue by the pleadings, the court retains continuing jurisdiction over these matters even when the issues are not determined by the judgment. Thus, where the issues of custody and support were raised in plaintiff wife's complaint and ruled on by the trial judge, the court retained jurisdiction to entertain and rule on defendant husband's motion in the cause for custody and support of the children. Jackson v. Jackson, 68 N.C. App. 499, 315 S.E.2d 90 (1984).

Until Death of a Party or Children's Attainment of Age of Majority. — A divorce action is pending for purposes of determining custody and support until the death of one of the parties or until the youngest child born of the marriage reaches the age of majority, whichever event shall first occur. Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972); Morris v. Morris, 42 N.C. App. 222, 256 S.E.2d 302 (1979).

But Custody Jurisdiction of Court Where Action for Alimony Without Divorce Is Pending Is Not Lost. — The general rule that exclusive custody jurisdiction is vested in the divorce court is subject to the exception that a court before which an action for alimony without divorce is pending does not lose its custody jurisdiction to the court of another county in which an action for divorce is subsequently filed. In re Sauls, 270 N.C. 180, 154 S.E.2d 327 (1967).

Institution of a divorce action did not oust the jurisdiction of another court, previously acquired in an action for alimony without divorce, to determine the rights of custody of the children of the marriage. Blankenship v. Blankenship, 256 N.C. 638, 124 S.E.2d 857 (1962).

Divorce Court May Hear and Determine Questions of Custody and Support. — Upon institution of a divorce action the court acquires jurisdiction over any child born of the marriage, and may hear and determine questions both as to the custody and as to the maintenance of such child either before or after final decree of divorce. Story v. Story, 221 N.C. 114, 19 S.E.2d 136 (1942).

After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper. Coggins v. Coggins, 260 N.C. 765, 133 S.E.2d 700 (1963).

And May Grant Custody to Either Parent. — The court has jurisdiction to enter an order granting custody to either of the children's parents, both of whom are subject to the court's jurisdiction. Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972).

Even Though Such Questions Were Not Raised or Determined in Final Judgment. — A court in which a divorce action was tried has jurisdiction to determine custody and support of children of the marriage, even though no custody or support questions were raised prior to, or determined in, the final judgment of divorce. Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972).

Issue of Custody and Support Remains in Fieri. — If the custody and support has been brought to issue or determined in the previously instituted action between the parents, there could be no final judgment in that case, because the issue of custody and support remains in fieri until the children have become emancipated. Wilson v. Wilson, 11 N.C. App. 397, 181 S.E.2d 190 (1971); Kennedy v. Surratt, 29 N.C. App. 404, 224 S.E.2d 215 (1976); Bass v. Bass, 43 N.C. App. 212, 258 S.E.2d 391 (1979).

Jurisdiction to Modify Custody Decree. — Once a court in this State properly asserts jurisdiction to determine the rights of the parties to custody of a minor child, that court retains jurisdiction to modify its custody decree upon a showing of a substantial change of circumstances. Lynch v. Lynch, 303 N.C. 367, 279 S.E.2d 840 (1981).

Subsection (f) of this section does not affect the situation where custody and support have already been determined and one of the parties seeks a modification. In such a case, the court first obtaining jurisdiction retains jurisdiction to the exclusion of all other courts and is the only proper court in which to bring an action for the modification of an order establishing custody and support. Tate v. Tate, 9 N.C. App. 681, 177 S.E.2d 455 (1970).

A party cannot seek modification of a child support order in a court other than that in which it was entered where there has been no change of venue by the court. Broyhill v. Broyhill, 81 N.C. App. 147, 343 S.E.2d 605 (1986).

Independent Action in Another Court Where Custody and Support Not Determined — After Final Judgment. — The first proviso of subsection (f) of this section, when read in conjunction with the first sentence of subsection (f) and in conjunction with subsection (b), makes it clear that after final judgment in a previously instituted action between the parents, where custody and support has not been brought to issue or determined, the custody and support issue may be determined in an independent action in another court. Kennedy v. Surratt, 29 N.C. App. 404, 224 S.E.2d 215 (1976).

The custody and support issue may be determined in an independent action in another court after final judgment in a previously instituted action between the parents, where custody and support has not been brought to issue or determined. In re Holt, 1 N.C. App. 108, 160 S.E.2d 90 (1968); Wilson v. Wilson, 11 N.C. App. 397, 181 S.E.2d 190 (1971).

Subsections (b) and (f) of this section, when considered together, permit questions of custody and support to be determined in independent actions, rather than only through a motion in the cause, where a divorce judgment has been entered without a determination of custody and support in that judgment. Johnson v. Johnson, 14 N.C. App. 378, 188 S.E.2d 711 (1972).

Same — Before Final Judgment. — When a divorce action has been filed in one county, and there has not been a final judgment in that action, the courts of another county are, by virtue of the first proviso in subsection (f) of this section, without jurisdiction to entertain an independent action for custody of the minor children of the parties. Holbrook v. Holbrook, 38 N.C. App. 303, 247 S.E.2d 923 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

Jurisdiction to Award Custody of Child After Denial of Divorce. — After plaintiff's suit for divorce from bed and board and defendant's cross action for alimony without divorce had both been denied, the judge had jurisdiction and power to enter the portion of the judgment awarding custody of the minor son of the parties to defendant and providing for his maintenance and support. Bunn v. Bunn, 258 N.C. 445, 128 S.E.2d 792 (1963).

Added Parties May Be Subjected to Jurisdiction to Same Extent as Original Parties. — In an action to determine custody of a child, an order which was entered in the Court of Appeals making the paternal grandparents parties, pursuant to their motion, subjected them to the jurisdiction of the Court of Appeals and of the trial court to the same extent as if they had been original parties plaintiff. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

Failure to Raise Issue of Child Support. — Defendant's mere mentioning of "a Separation Agreement dated June 5, 1981" in his 1982 divorce complaint was insufficient to raise the issue of child support. Defendant's divorce complaint did not ask the divorce court to review the question of child support and the divorce judgment did not even allude to the parties' separation agreement; therefore, defendant's contention that his prior divorce action placed the question of child support at issue with the results that (i) the original divorce court retained jurisdiction over that question and (ii) the present independent action by his wife should have been dismissed under a theory of abatement, was rejected. Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991), appeal dismissed, 331 N.C. 286, 417 S.E.2d 254 (1992).

Effect of Subsequent Divorce in Another State. — Where the children of the marriage were residents of this State and the parents were personally before the court, the courts of this State had jurisdiction in the wife's action for subsistence under former G.S. 50-16 to award the custody of the children to the wife and decree the amount defendant should contribute for their support, and to punish defendant as for contempt for willful failure to comply with its order, notwithstanding the fact that the husband obtained a decree of divorce in another state after the entry of the order for support. Whitford v. Whitford, 261 N.C. 353, 134 S.E.2d 635 (1964).

Judge Held Without Jurisdiction to Hear Matter Outside District. — Upon application for the custody of the children of the marriage after decree of divorce, the resident judge entered a temporary order awarding custody to the father, and issued an order to defendant wife to appear outside the county and outside the district to show cause why the temporary order should not be made permanent. It was held that the judge was without jurisdiction to hear the matter outside the district, and an order issued upon the hearing of the order to show cause was void ab initio. Patterson v. Patterson, 230 N.C. 481, 53 S.E.2d 658 (1949).

Jurisdiction over Petition Filed by DSS. — The district court had jurisdiction over the subject matter of petition filed, signed and verified by county division of social services, which alleged that child had been placed with DSS by its mother; that the putative father was unknown; that North Carolina was the home state of the child and no other state had jurisdiction over the child; and that the best interest of the child would be served if the court assumed jurisdiction over him. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Transfer of Venue. — For the convenience of witnesses and parties and because it may be in the best interests of justice and the parties, the court of original venue may, in its discretion, transfer the venue of an ongoing action for custody or support to a more appropriate county. Broyhill v. Broyhill, 81 N.C. App. 147, 343 S.E.2d 605 (1986).

Standing to Intervene. — As a grandmother failed to allege conduct sufficient to support a finding that the parents engaged in conduct inconsistent with their parental rights and responsibilities, she could not overcome the presumption that the parents had the superior right to the care, custody, and control of the child, and lacked standing to intervene. Perdue v. Fuqua, — N.C. App. —, 673 S.E.2d 145, 2009 N.C. App. LEXIS 210 (2009).

B. Full Faith and Credit.

Generally. — For cases as to full faith and credit accorded the custody decrees of other states, prior to the enactment of G.S. 50A-1 et seq., see In re Marlowe, 268 N.C. 197, 150 S.E.2d 204 (1966); Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969); In re Kluttz, 7 N.C. App. 383, 172 S.E.2d 95 (1970); Spence v. Durham, 283 N.C. 671, 198 S.E.2d 537 (1973), cert. denied, 415 U.S. 918, 94 S. Ct. 1417, 39 L. Ed. 2d 473 (1974); Mathews v. Mathews, 24 N.C. App. 551, 211 S.E.2d 513 (1975); Johnston v. Johnston, 29 N.C. App. 345, 224 S.E.2d 276 (1976).

Nature of Inquiry as to Full Faith and Credit. — In a proceeding to determine whether a custody judgment is entitled to full faith and credit, the court's inquiry is first confined to whether the judgment sought to be enforced was a final judgment rendered by a court with competent jurisdiction. If the court determines that the foreign judgment was final and was rendered by a court with proper jurisdiction, then the judgment is entitled to full faith and credit, and the court never reaches the merits of the custody action, unless one of the parties asserts that the judgment should be modified due to a substantial change in circumstances. Lynch v. Lynch, 303 N.C. 367, 279 S.E.2d 840 (1981).

When a court asserts jurisdiction to enforce a custody judgment of another state and no showing of a substantial change of circumstances is made, its jurisdiction terminates upon a final judgment awarding full faith and credit to the sister state's decree. Lynch v. Lynch, 303 N.C. 367, 279 S.E.2d 840 (1981).

A temporary custody judgment is not entitled to full faith and credit and has no effect on defendant's ability to seek full faith and credit of a final custody judgment subsequently rendered in another state. Lynch v. Lynch, 303 N.C. 367, 279 S.E.2d 840 (1981).

Indiana Order for Child Support Given Full Faith and Credit. — Although there was no jurisdictional rule requiring the trial court to dismiss plaintiff father's North Carolina action seeking definition of his child support obligations simply because defendant mother had filed an action in Indiana, where, when plaintiff's motion came on for hearing, the Indiana court had already entered an order on the issue of child support, that order was entitled to full faith and credit in this State as long as plaintiff was not denied due process of law in the Indiana court's assertion of jurisdiction over him. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

C. Residence and Domicile.

Findings of the court as to the residence of the parties are conclusive when supported by any competent evidence. Holbrook v. Holbrook, 38 N.C. App. 303, 247 S.E.2d 923 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

Domicile of Husband Not Necessarily Domicile of Wife and Children. — Where the husband in his divorce action alleged that he had notified his wife that he would no longer live with her as husband and wife, he could not assert the fictional unity of persons for the purpose of maintaining that his domicile was the domicile of his wife and children. Coble v. Coble, 229 N.C. 81, 47 S.E.2d 798 (1948).

IV. NOTICE.

Purpose of Subdivision (d)(1). — Subdivision (d)(1) of this section is designed to give the parties to a custody action adequate notice in order to insure a fair hearing. Clayton v. Clayton, 54 N.C. App. 612, 284 S.E.2d 125 (1981).

Five Day (now 10 Day) Notice of Custody Hearing Not Absolute Right. — Ordinarily a parent is entitled to at least five days' (now 10 days') notice (an intervening Saturday or Sunday excluded) of a hearing involving the custody of a child, but this is not an absolute right and is subject to the rule relating to waiver of notice and to the rule that a new trial will not be granted for mere technical error which could not have affected the result, but only for error which is prejudicial, amounting to the denial of a substantial right. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

A party entitled to notice of a motion may waive such notice. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

And ordinarily does this by attending the hearing of the motion and participating in it. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

Notice of Motion for Custody Served on Counsel of Record. — A court which acquired jurisdiction of husband in a divorce proceeding before he left the State had jurisdiction to hear motion for custody filed after divorce decree where notice of motion was served on husband's counsel of record. Weddington v. Weddington, 243 N.C. 702, 92 S.E.2d 71 (1956).

Request for Variance for Child Support Guidelines. — Section 50-13.4 does not identify any time restrictions for making the request for a hearing. However, to effectuate the purpose of that statute, any party in a pending action requesting a variance from the guidelines must, unless the request is made in the original pleadings, give at least ten days written notice as required by this section. Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991).

Absent a timely and proper request for a variance of the guidelines, support set consistent with the guidelines was conclusively presumed to be in such amount as to meet the reasonable needs of the child for health, education, and maintenance. Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991).

Trial court's temporary custody order in an action filed by the child's putative father was not valid because the child's presumed father was not given notice, even though, under G.S. 50-13.5(e)(3), in the discretion of the court, failure of service of notice would not affect the validity of an order; that provision only applied to orders entered with respect to support actions. Smith v. Barbour, 154 N.C. App. 402, 571 S.E.2d 872, 2002 N.C. App. LEXIS 1450 (2002), cert. denied, — N.C. —, 599 S.E.2d 408 (2004).

Adequacy of Notice. — Trial court's judgment to modify a child custody award and award sole custody of the minor children to the mother was affirmed because the father admitted that he was on actual notice that a motion to modify custody was set to be heard, but was continued to some date in the future in order to accommodate his need to find new counsel. In addition, he had actual notice of the scheduled court date for the hearing days prior to leaving for a planned vacation, but chose to proceed with the trip rather than attend the hearing; therefore, he had adequate notice of the hearing and an opportunity to be heard. Trivette v. Trivette, 162 N.C. App. 55, 590 S.E.2d 298, 2004 N.C. App. LEXIS 40 (2004).

No Notice. — Where there was no motion for custody before the trial court, there was no notice of a motion for custody as required by subdivision (d)(1) of this section. Jones v. Jones, 109 N.C. App. 293, 426 S.E.2d 468 (1993).

Notice Held Sufficient. — Mother had received adequate notice that the hearing would include changes to the visitation schedule since the father had moved the court for an order finding and holder the mother in contempt for her disobedience and failure to comply with the provision of prior orders entered in the case. Anderson v. Lackey, 163 N.C. App. 246, 593 S.E.2d 87, 2004 N.C. App. LEXIS 381 (2004).

V. HEARING.

Time-tested methods for assuring an adequate and fair hearing must be applied in child custody proceedings. In re Griffin, 6 N.C. App. 375, 170 S.E.2d 84 (1969).

The question of custody is one ad-

dressed to the trial court. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

And Not to a Jury. — Determining the custody of minor children is never the province of a jury; it is that of the judge of the court in which the proceeding is pending. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

No Right to Jury Trial on Custody and Support Issues. — Pursuant to subsection (h) of this section, a supporting spouse is not entitled to a jury trial on the matter of custody and support of minor children. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

In a wife's action for alimony without divorce and for custody and support of the children, a trial court properly removed the case from the trial docket when the wife abandoned her claim to alimony, and the defendant was not entitled to a jury trial on the issue of abandonment of his children. Ferguson v. Ferguson, 9 N.C. App. 453, 176 S.E.2d 358 (1970).

Jury to Determine Question of Fact. — Whether a child was a "minor child of the marriage" within the purview of former G.S. 50-13 could be a question of fact rather than an issue of fact, and the trial court could call a jury to its aid to hear the evidence and determine the question. Carter v. Carter, 232 N.C. 614, 61 S.E.2d 711 (1950).

An award of permanent custody may not be based upon affidavits. Story v. Story, 57 N.C. App. 509, 291 S.E.2d 923 (1982).

And Affidavits Are Not Admissible to Establish Material Facts in Custody Proceedings. — The question to be determined in child custody hearings is certainly as important as any presented in the usual contract or tort litigation. Affidavits are not, as a rule, admissible in the trial of contract and tort cases as independent evidence to establish facts material to the issues being tried, and there is no more justification for resort to inferior evidence in child custody proceedings than in such other litigations. In re Griffin, 6 N.C. App. 375, 170 S.E.2d 84 (1969).

But a party to a child custody proceeding must object when affidavits are offered or ask permission to cross-examine, or else his silence will be deemed to give consent. By implication, if timely objection is made, affidavits should not be received, at least not without affording an opportunity for cross-examination. In re Griffin, 6 N.C. App. 375, 170 S.E.2d 84 (1969).

VI. TEMPORARY CUSTODY AND SUPPORT.

Court Has Inherent Authority to Make Temporary Orders. — A court having jurisdiction of children located within this State has the inherent authority to protect those children and to make such temporary orders as their best interests may require. MacKenzie v. MacKenzie, 21 N.C. App. 403, 204 S.E.2d 561 (1974).

Subdivisions (c)(2) and (d)(2) give the courts jurisdiction to enter temporary custody and support orders for minor children. Story v. Story, 57 N.C. App. 509, 291 S.E.2d 923 (1982).

Under subdivision (d)(2) of this section, in appropriate cases the court may enter orders for the temporary custody of a child pending the service of process. Zajicek v. Zajicek, 12 N.C. App. 563, 183 S.E.2d 850 (1971); Broaddus v. Broaddus, 45 N.C. App. 666, 263 S.E.2d 842 (1980). See also, Lynch v. Lynch, 45 N.C. App. 391, 264 S.E.2d 114 (1980), aff'd in part and rev'd in part, 302 N.C. 189, 274 S.E.2d 212 (1981), modified on rehearing, 303 N.C. 367, 279 S.E.2d 840 (1981).

Once one of the bases for jurisdiction listed in § 50A-3(a) has been established, the court may enter an ex parte order for temporary custody prior to service of process or notice, if the circumstances of the case render it appropriate. Hart v. Hart, 74 N.C. App. 1, 327 S.E.2d 631 (1985).

Temporary Orders May Be Entered Ex Parte. — Temporary orders under subdivision (c)(2) and (d)(2) of this section may be entered ex parte and prior to service of process or notice. Story v. Story, 57 N.C. App. 509, 291 S.E.2d 923 (1982); Regan v. Smith, 131 N.C. App. 851, 509 S.E.2d 452 (1998).

Affidavits may be used as a basis for temporary orders under subdivision (c)(2) and (d)(2) of this section. Story v. Story, 57 N.C. App. 509, 291 S.E.2d 923 (1982).

If the circumstances of a particular case so require, the court may enter an order for temporary custody, even pending service of process or notice under subsection (d)(1) of this section, and the use of affidavits as a basis for filing necessary facts for such purpose may be appropriate. In re Griffin, 6 N.C. App. 375, 170 S.E.2d 84 (1969).

There may be occasions when there is considerable urgency for a temporary order for the custody of a child. In such instances, the judge may reach a decision on the basis of affidavits and other evidence produced at a preliminary hearing. The persons who have signed the affidavit are, of course, not present and there is no opportunity to cross-examine them, but this is said not to be objectionable, because the ultimate right of examination will be afforded the parties at the trial of the cause. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

Temporary Order Not Rendered Null and Void by Entry Prior to Service. — Clearly, under subdivision (e)(3) of this section, the fact that defendant was not served prior to the court's entry of a temporary order would not thereby render such order null and void. Broaddus v. Broaddus, 45 N.C. App. 666, 263 S.E.2d 842 (1980).

VII. VISITATION RIGHTS.

A. In General.

Visitation rights should not be permitted to jeopardize a child's welfare. In re Jones, 62 N.C. App. 103, 302 S.E.2d 259 (1983).

While a noncustodial parent has a right to reasonable visitation, that right is limited to avoid jeopardizing the child's welfare. Woncik v. Woncik, 82 N.C. App. 244, 346 S.E.2d 277 (1986).

The award of visitation rights is a judicial function which may not be delegated to the custodial parent. Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Order giving custodial parent exclusive control over visitation will not be sustained. Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Duty of Court to Include Visitation Provision. — Once the parties failed to agree, it was the duty of the trial judge to safeguard defendant's right to visitation by including a provision in its order specifying visitation periods. Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Trial court is not required to make specific findings to support a visitation schedule whenever a party contends the frequency of visitation is not reasonable. Raynor v. Odom, 124 N.C. App. 724, 478 S.E.2d 655 (1996).

Visitation and child support rights are independent rights accruing primarily to the benefit of the minor child and one is not, and may not be made, contingent upon the other. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

Receipt of Support May Not Be Conditioned on Visitation. — A trial judge does not have authority to condition a minor child's receipt of support paid by the noncustodial parent on compliance with court-ordered visitation allowed the noncustodial parent by ordering that child support paid by defendant be placed in escrow if minor child fails or refuses to abide by the visitation privileges allowed defendant. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

Enforcement of Visitation Orders. — Trial judges in this State have authority to enforce orders providing for visitation by the methods set forth in G.S. 50-13.3, that is, by contempt proceedings and by injunction. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

B. Denial of Parents' Rights.

Abandonment as Ground to Deny Visitation Rights. — The general rule is that abandonment, by itself, does not constitute sufficient ground to deny visitation rights completely, and this rule is in accord with the principle adopted by the courts that the purpose of denying custody or visitation rights is not to punish the noncustodial parent. Johnson v. Johnson, 45 N.C. App. 644, 263 S.E.2d 822 (1980).

Contingent Termination of Visitation. — Where the trial judge had ample evidence before him to justify a conclusion that mother had purposefully engaged in a course of conduct designed to alienate the child's affections for his father, and that these actions were detrimental to the child's welfare, he did not abuse his discretion in fashioning an order directing termination of mother's visitation privilege, pending a court hearing, applicable only on the happening of a certain condition (a repetition of that course of conduct), designed to prevent further harm to the child from this type of behavior. Woncik v. Woncik, 82 N.C. App. 244, 346 S.E.2d 277 (1986).

Findings Required Where Severe Restrictions Are Placed on Visitation Rights. — Where severe restrictions are placed on a parent's visitation rights with his child, there should be some finding of fact, supported by competent evidence in the record, warranting such restrictions. Johnson v. Johnson, 45 N.C. App. 644, 263 S.E.2d 822 (1980).

Where hostilities exist between estranged parents, it may be difficult for the noncustodial parent to maintain a relationship with his or her child when required to exercise visitation only in the presence of the other parent or a member of the other parent's family who may share such hostilities. There are, of course, circumstances warranting such restrictions, but if they are imposed, they must be based on appropriate factual findings. Johnson v. Johnson, 45 N.C. App. 644, 263 S.E.2d 822 (1980).

When severe restrictions are placed on the right of visitation, this section requires the trial judge to make findings of fact supported by competent evidence which warrant the restrictions. Falls v. Falls, 52 N.C. App. 203, 278 S.E.2d 546, cert. denied, 304 N.C. 390, 285 S.E.2d 831 (1981).

Subsection (i) of this section requires specific findings of fact to justify certain visitation restrictions. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

Findings Held Sufficient. — Finding of trial court that defendant had previously taken minor child to Texas under a false pretense and had subsequently refused to return him to North Carolina was a sufficient and appropriate factual finding to support the court's limitation as to the location of visitation (in North Carolina at plaintiff's home.) Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Judge did not err by imposing excessive restrictions on mother's visitations with her son; evidence supported the judge's finding that mother's demonstrations of anger and hostility in the presence of the child and her frustration of the relationship between the child and father necessitated, for the child's best interest, the restrictions the judge imposed on the visitation. Correll v. Allen, 94 N.C. App. 464, 380 S.E.2d 580 (1989).

Findings Held Insufficient. — The trial court's findings in a child custody proceeding that respondent mother had abandoned her child and that it would not be in the best interests of the child for him to be carried back and forth between North Carolina, home of the father, and New Jersey, home of the mother, were insufficient to support the trial court's order restricting respondent's visiting privileges, which were limited to one weekend a month, to occasions only when petitioner father or his designated representative was present. Johnson v. Johnson, 45 N.C. App. 644, 263 S.E.2d 822 (1980).

No competent evidence showed that the father had engaged in any conduct that warranted forfeiture of his visitation rights or that the exercise of his visitation rights would be detrimental to the child's best interest, and the court's factual finding that the motel room where the father lived was an unfit environment for visitation did not support supervised visitation. Hinkle v. Hartsell, 131 N.C. App. 833, 509 S.E.2d 455 (1998).

Where the court merely recited the testimony of witnesses and did not make the required findings of fact, further findings of fact and a determination of the father's parental fitness was needed if he was to be denied all contact with his daughter. Moore v. Moore, 160 N.C. App. 569, 587 S.E.2d 74, 2003 N.C. App. LEXIS 1827 (2003).

C. Grandparents' Rights.

Modification of Grandparents' Visitation Rights. — Before an order providing visitation for grandparents of a minor child may be modified, the party seeking modification must show changed circumstances and an abuse of discretion by the trial judge. In re Jones, 62 N.C. App. 103, 302 S.E.2d 259 (1983).

Right to File Suit. — Subsection (j) of this section makes it clear that grandparents have the right to file suit for custody or visitation during an ongoing proceeding, but it does not restrict their right to bring an initial custody suit pursuant to G.S. 50-13.1 when there are allegations that the parent is unfit. Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996).

The grandmother did not have standing under this section to seek visitation rights with her grandchildren, where the children had been adopted by their biological aunt and her husband, and there was no custody dispute. Hill v. Newman, 131 N.C. App. 793, 509 S.E.2d 226 (1998).

Grandparents' Right to Seek Visitation Terminated Upon Death of Daughter/Non-Custodial Parent. — The trial court's jurisdiction over the issues of visitation and custody regarding plaintiff's grandchildren terminated upon the death of plaintiff's daughter, where the son-in-law had exclusive custody. Price v. Breedlove, 138 N.C. App. 149, 530 S.E.2d 559, 2000 N.C. App. LEXIS 543 (2000).

Right to File Suit. — There are four statutes in North Carolina which permit a grandparent to maintain an action for custody or visitation of a minor child, and although plaintiff, mother of the deceased father of the two minor children, did not specify under which statute she filed, it was clear that she had no right to proceed under G.S.G.S. 50-13.1(a), 50-13.2(b1), 50-13.2A, or under this section. Shaut v. Cannon, 136 N.C. App. 834, 526 S.E.2d 214, 2000 N.C. App. LEXIS 158 (2000).

Grandparents' Rights When Family Intact. — Under G.S. 50-13.1(a), 50-13.2(b1), 50-13.2A, 50-13.5(j), a grandparent's right to visitation arises either in the context of an ongoing custody proceeding or where the minor child is in the custody of a stepparent or a relative—the "intact family" rule; in a case that does not involve adoption by a stepparent or other relative, a grandparent must prove that the child's family is not intact before the grandparent can intervene to request visitation with his grandchild—G.S. 50-13.1(a), 50-13.2(b1), 50-13.2A, 50-13.5(j) does not grant grandparents the right to sue for visitation when no custody proceeding is ongoing and the minor children's family is intact. Eakett v. Eakett, 157 N.C. App. 550, 579 S.E.2d 486, 2003 N.C. App. LEXIS 729 (2003).

Lack of Intact Family Was Not Alleged So Grandparent Could Have Standing to Intervene for Visitation. — Under G.S. 50-13.5(j), a grandparent was required to, and did not, allege that the wife and the child were not an "intact family" or that the underlying custody controversy had become active; therefore, his complaint did not allege facts to support his claim, so he lacked standing to intervene to gain visitation, and the grant of the motion to dismiss his claim for visitation was appropriate. Eakett v. Eakett, 157 N.C. App. 550, 579 S.E.2d 486, 2003 N.C. App. LEXIS 729 (2003).

Single Parent and One Child Can Be Intact Family. — Single parent and her child can constitute an "intact family" for the purposes of the intact family rule. Eakett v. Eakett, 157 N.C. App. 550, 579 S.E.2d 486, 2003 N.C. App. LEXIS 729 (2003).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.

In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances. (1967, c. 1153, s. 2; 1973, c. 323.)

Legal Periodicals. — For survey of 1976 case law on domestic relations, see 55 N.C.L. Rev. 1018 (1977).

For survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

For article, "Using Hindsight to Change Child Support Obligations: A Survey of Retroactive Modification and Reimbursement of Child Support in North Carolina," see 10 Campbell L. Rev. 111 (1987).

CASE NOTES

I. In General.
II. Actions for Support Only.

I. IN GENERAL.

Notice and Due Process Considerations. — Although this section and G.S. 50-16.4 provide for attorney's fees in both modification of child support actions and alimony actions, this authority does not override a party's basic constitutional rights to notice and due process considerations. Spencer v. Spencer, 133 N.C. App. 38, 514 S.E.2d 283 (1999).

This section applies to a proceeding to compel the future support of the child. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

And not to a proceeding to compel reimbursement for past payments made by a person secondarily liable for such child's support. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

The legislature set different standards in actions for support and in actions for custody and support in enacting this section. Taylor v. Taylor, 343 N.C. 50, 468 S.E.2d 33 (1996).

This section does not require a determination that one spouse is a dependent spouse and the other a supporting spouse. Taylor v. Taylor, 343 N.C. 50, 468 S.E.2d 33 (1996).

Attorneys' fees are not recoverable in an action for equitable distribution, so that, in a combined action, the fees awarded must be attributable to work by the attorneys on the divorce, alimony and child support actions. Patterson v. Patterson, 81 N.C. App. 255, 343 S.E.2d 595 (1986); Holder v. Holder, 87 N.C. App. 578, 361 S.E.2d 891 (1987).

Settlement Agreement May Provide for Recovery of Attorney's Fees. — The public policy of this state encourages settlement agreements and supports the inclusion of a provision for the recovery of attorney's fees in settlement agreements. Bromhal v. Stott, 341 N.C. 702, 462 S.E.2d 219 (1995).

Applicability in Action Involving Illegitimate Child. — This section does not apply to civil actions to establish paternity under G.S. 49-14, but would authorize an award of reasonable attorneys' fees for custody and support actions involving an illegitimate child whose paternity has been determined. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), modified on other grounds, 315 N.C. 523, 340 S.E.2d 408 (1986).

Attorneys' fees incurred in prosecuting paternity actions may not be awarded under this section, but may only be assessed as costs under G.S. 6-21(10). Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

G.S. 50-13.6 did not apply to a civil action to establish paternity under G.S. 49-14. Guilford County ex rel. Holt v. Puckett, 191 N.C. App. 693, 664 S.E.2d 362, 2008 N.C. App. LEXIS 1471 (2008).

Contingent Fee Agreements Not Enforceable. — A contract for the payment of a fee to an attorney contingent upon his procuring a divorce for his client or contingent in amount upon the amount of alimony and/or property awarded is void as against public policy. Such a contract is unenforceable exclusively by virtue of the fact that it violates the public policy of this State. Thompson v. Thompson, 70 N.C. App. 147, 319 S.E.2d 315 (1984), rev'd on other grounds, 313 N.C. 313, 328 S.E.2d 288 (1985).

A trial court has no discretion to award statutory legal fees for services rendered in a child custody and support action pursuant to a contingent fee contract, which is void as against public policy. Davis v. Taylor, 81 N.C. App. 42, 344 S.E.2d 19, cert. denied, 318 N.C. 414, 349 S.E.2d 593 (1986).

Contingent fee provision in contract between mother seeking child support and attorneys, whose stated purpose was to recover a lump sum award, from which a percentage attorneys' fee would be derived, permeated the entire agreement, as it was the essence of the contract; therefore, the entire contract was void as against public policy. Davis v. Taylor, 81 N.C. App. 42, 344 S.E.2d 19, cert. denied, 318 N.C. 414, 349 S.E.2d 593 (1986).

But Fees May Be Awarded for Services after Withdrawal of Contract. — Statutory legal fees for services rendered in a child custody and support action may be awarded for the period beginning after illegal contingent fee contract is withdrawn. Davis v. Taylor, 81 N.C. App. 42, 344 S.E.2d 19, cert. denied, 318 N.C. 414, 349 S.E.2d 593 (1986).

Trial judge is permitted to exercise considerable discretion in allowing or disallowing attorneys' fees in child custody or support cases. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971); Warner v. Latimer, 68 N.C. App. 170, 314 S.E.2d 789 (1984).

The amount awarded as counsel fees also comes within the discretion of the trial judge and will not be disturbed in the absence of an abuse of discretion. Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969), overruled on other grounds, Stephenson v. Stephenson, 55 N.C. App. 250, 285 S.E.2d 281 (1981).

When the statutory requirements for a custody suit or a custody and support suit have been met, the amount of attorneys' fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980); Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

In a custody and support action, once the statutory requirements of this section have been met, whether to award attorney's fees and in what amounts is within the sound discretion of the trial judge and is only reviewable based on an abuse of discretion. Savani v. Savani, 102 N.C. App. 496, 403 S.E.2d 900 (1991).

The amount of the award of attorneys' fees is within the discretion of the trial judge and will not be reversed in the absence of an abuse of discretion. Cobb v. Cobb, 79 N.C. App. 592, 339 S.E.2d 825 (1986).

Court's discretion in disallowing attorneys' fees is limited only by the abuse of discretion rule. Puett v. Puett, 75 N.C. App. 554, 331 S.E.2d 287 (1985).

As to the effect of this section and other statutes on the court's discretion, see Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

Binding Effect of Trial Court's Determination Absent Abuse. — The trial court's determination of attorneys' fees is binding on the appellate courts in the absence of abuse of discretion. Wyche v. Wyche, 29 N.C. App. 685, 225 S.E.2d 626, cert. denied, 290 N.C. 668, 228 S.E.2d 459 (1976); Evans v. Craddock, 61 N.C. App. 438, 300 S.E.2d 908 (1983).

Reviewable Question of Law in Custody and Custody and Support Suits. — Whether the requirements of this section for a custody suit or a custody and support suit have been met is a question of law reviewable on appeal. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980); Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986); Cox v. Cox, 133 N.C. App. 221, 515 S.E.2d 61 (1999).

Proof Required to Support Award in Custody and Custody and Support Suits. — In a custody suit or a custody and support suit, the trial judge, pursuant to the first sentence in this section, has the discretion to award attorneys' fees to an interested party when that party is (1) acting in good faith and (2) has insufficient means to defray the expense of the suit. The facts required by the statute must be alleged and proved to support an order for attorneys' fees. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Trial court found sufficient facts to support an award of attorney's fees to the mother under G.S. 50-13.6 in the father's action seeking child support; because the trial court considered both child custody and child support issues, it was not required to make an additional finding of fact regarding a refusal to provide child support in order to award the mother attorney's fees. Burr v. Burr, 153 N.C. App. 504, 570 S.E.2d 222, 2002 N.C. App. LEXIS 1185 (2002).

Award of counsel fees is appropriate whenever it is shown that the spouse is, in fact, dependent, is entitled to the relief demanded, and is without sufficient means whereon to subsist during the prosecution and defray the necessary expenses thereof.

Fungaroli v. Fungaroli, 53 N.C. App. 270, 280 S.E.2d 787 (1981).

Award Proper in Case of Frivolous Action. — Evidence of the father's lack of contact with the child after the parties separated was sufficient to support the district court's conclusion that the father's action for custody of the child was frivolous; therefore, the award of attorney's fees to the mother was proper. Doan v. Doan, 156 N.C. App. 570, 577 S.E.2d 146, 2003 N.C. App. LEXIS 205 (2003).

Award of Fees Appropriate. — In an action by a mother to modify a father's child support pursuant to G.S. 50-13.7(a), the trial court properly granted attorney's fees to the mother pursuant to G.S. 50-13.6, because the trial court specifically found as a fact that the mother was a party acting in good faith to obtain reasonable support for her daughter, that the mother lacked sufficient means to pay her attorney fees, and that the father refused to provide support which was reasonable under the circumstances. Mason v. Erwin, 157 N.C. App. 284, 579 S.E.2d 120, 2003 N.C. App. LEXIS 641 (2003).

Consideration of Estate. — Trial court, in ruling on a motion for attorney's fees in a child custody and support action, may determine that a party has sufficient means to defray the cost of the action without considering the estate of the other party. Taylor v. Taylor, 343 N.C. 50, 468 S.E.2d 33 (1996).

Requirement of Insufficient Means. — Before attorneys' fees may be awarded in an alimony case to the dependent spouse under G.S. 50-16.3 and 50-16.4, and before attorneys' fees may be awarded to the interested party in a custody, support, or custody and support suit under this section, that person must have insufficient means to defray the expense of the suit; that is, he or she must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980); Boyd v. Boyd, 81 N.C. App. 71, 343 S.E.2d 581 (1986).

Sufficient Allegations of Insufficient Means. — Allegations that plaintiff was the dependent spouse and that she had insufficient means to support the children during the pendency of the suit were sufficient to support an award of counsel fees under this section. Rogers v. Rogers, 39 N.C. App. 635, 251 S.E.2d 663 (1979).

Required Facts Must Be Found and Proved. — Before attorneys' fees can be taxed under this section, the facts required by the section, that movant (1) is acting in good faith, and (2) has insufficient means to defray the expenses of the suit, must be both alleged and proved. Allen v. Allen, 65 N.C. App. 86, 308 S.E.2d 656 (1983), cert. denied, 310 N.C. 475, 312 S.E.2d 881 (1984).

An order for attorneys' fees pursuant to this section in an action for child custody or support, or both, must be supported by findings, required by the statute, that the party seeking the award is (1) an interested party acting in good faith and (2) has insufficient means to defray the expense of the suit. Cobb v. Cobb, 79 N.C. App. 592, 339 S.E.2d 825 (1986).

Before awarding attorneys' fees, the trial court must make specific findings of fact concerning: (1) The ability of the movants to defray the cost of the suit, i.e., that the movants are unable to employ adequate counsel in order to proceed as a litigant to meet the other litigants in the suit; (2) the good faith of the movants in proceeding in the suit; (3) the lawyer's skill; (4) the lawyer's hourly rate; and (5) the nature and scope of the legal services rendered. In re Scearce, 81 N.C. App. 662, 345 S.E.2d 411, cert. denied, 318 N.C. 415, 349 S.E.2d 590 (1986).

In order to be awarded attorneys' fees in an action for divorce, alimony, custody and child support, a spouse must be found to be a dependent spouse in addition to being found to be unable to defray the expense of the suit. Patterson v. Patterson, 81 N.C. App. 255, 343 S.E.2d 595 (1986).

In order to award attorneys' fees in an action involving only child support, the trial court must find as fact that (1) the interested party (a) acted in good faith and (b) has insufficient means to defray the expenses of the action and further, that (2) the supporting party refused to provide adequate support under the circumstances existing at the time of the institution of the action or proceeding. Boyd v. Boyd, 81 N.C. App. 71, 343 S.E.2d 581 (1986).

An award of attorney's fees to the father was not supported by sufficient factual findings, where the trial court concluded that the father did not have sufficient assets with which to pay his attorney's fees and that the mother did have the means to pay, but there were no findings as to father's monthly income or expenses, and no explicit finding that he acted in good faith in instituting a civil contempt action. Cox v. Cox, 133 N.C. App. 221, 515 S.E.2d 61 (1999).

Reasonableness as Key Factor. — Reasonableness, not arbitrary classification of attorney activity, is the key factor under all the attorneys' fees statutes. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 70 N.C. App. 221, 319 S.E.2d 650, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Order Must Contain Factual Findings. — A proper order under this section must contain factual findings upon which a determination of the reasonableness of the counsel fees might be based, e.g., findings as to the nature and scope of the legal services rendered, and the time and skill required. Atwell v. Atwell, 74 N.C. App. 231, 328 S.E.2d 47 (1985); Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607

(1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

The trial court made insufficient findings relative to its award of attorneys' fees where it failed to take into account the plaintiff's liquid estate of $88,000 and focused instead on her negative disposable income and where it failed to determine whether she was an interested party acting in good faith, required for actions involving child support. Bookholt v. Bookholt, 136 N.C. App. 247, 523 S.E.2d 729, 1999 N.C. App. LEXIS 1376 (1999).

In a father's appeal from a child custody and support order, although the trial court denied a mother's request for attorneys' fees under G.S. 50-13.6, it made no findings relating to that denial, such as whether the mother acted in good faith or whether she had insufficient means to defray the expense of the suit. Consequently, the case was remanded for entry of proper factual findings to support the trial court's decision regarding the mother's request for attorneys' fees. Diehl v. Diehl, 177 N.C. App. 642, 630 S.E.2d 25, 2006 N.C. App. LEXIS 1180 (2006).

Findings of Fact Must Support Reasonableness of Fees. — Section 50-16.4 and this section permit the entering of a proper order for reasonable counsel fees for the benefit of a dependent spouse, but only where the record contains findings of fact, such as the nature and scope of the legal services rendered and the skill and time required, upon which a determination of the requisite reasonableness could be based. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

The trial court erred in failing to make findings of fact as to the reasonableness of the attorneys' fees incurred by the plaintiff after requesting and receiving a detailed affidavit from the plaintiff's counsel setting forth the nature and scope of the legal services. Rogers v. Rogers, 39 N.C. App. 635, 251 S.E.2d 663 (1979).

To support an award of attorneys' fees, the trial court should make findings as to the lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent. Falls v. Falls, 52 N.C. App. 203, 278 S.E.2d 546, cert. denied, 304 N.C. 390, 285 S.E.2d 831 (1981); Cox v. Cox, 133 N.C. App. 221, 515 S.E.2d 61 (1999).

As this section requires that awards of attorneys' fees be reasonable, cases construing the statute have in effect annexed a fifth requirement concerning reasonableness onto the express statutory ones; namely, that the record must contain findings of fact upon which a determination of the requisite reasonableness can be based, for example, findings pertaining to the nature and scope of the legal services rendered and the skill and time required. Warner v. Latimer, 68 N.C. App. 170, 314 S.E.2d 789 (1984).

Because this section allows for an award of reasonable attorneys' fees, cases construing the statute have in effect annexed an additional requirement concerning reasonableness onto the express statutory ones. Thus, the record must contain additional findings of fact upon which a determination of the requisite reasonableness can be based, such as findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorneys' hourly rate, and its reasonableness in comparison with that of other lawyers. Cobb v. Cobb, 79 N.C. App. 592, 339 S.E.2d 825 (1986).

An order awarding counsel fees in a child support or alimony action must contain a finding or findings upon which a determination of the reasonableness of the award can be based, such as the nature and scope of the legal services rendered, the time and skill required, and the attorney's hourly rate in comparison to the customary charges of attorneys practicing in that general area. Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706, cert. denied, 322 N.C. 330, 368 S.E.2d 875 (1988).

Partial listing of legal expenses is an insufficient finding of fact as to the reasonable worth of attorneys' fees. Wyatt v. Wyatt, 32 N.C. App. 162, 231 S.E.2d 42, aff'd, 35 N.C. App. 650, 242 S.E.2d 180 (1977).

Fees Where Increase in Support Not Warranted. — The court would abuse its discretion if, after determining that an increase in the award of child support was not warranted under the circumstances, it nevertheless proceeded to award attorneys' fees to plaintiff. Walker v. Tucker, 69 N.C. App. 607, 317 S.E.2d 923 (1984).

Merit Bonus. — While the quality of services rendered is properly considered in awarding fees, as well as the nature of the services required, and hence the scope and complexity of the case, there is no North Carolina authority for an award of a "merit bonus." Even assuming such bonuses are allowed, as under federal practice, that should occur only in the rare case where the applicant specifically shows superior quality representation and exceptional success. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 70 N.C. App. 221, 319 S.E.2d 650, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Remand for Lack of Evidence as to Reasonableness. — Where an award of counsel's fees was based on attorney's affidavit stating the number of hours spent on the case, but there was no evidence before the trial court as to the nature and scope of the legal services and the skill and time required, the award was not sufficiently based, and would be vacated and remanded. Rickenbaker v. Rickenbaker, 21 N.C. App. 276, 204 S.E.2d 198 (1974).

Order awarding attorneys' fees which failed to satisfy requirement of findings as to the lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent was insufficient and case would be remanded for appropriate findings as to attorneys' fees. Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985).

Where trial judge made no finding of good faith by plaintiff and no indication of what portion of attorney fees was attributable to custody and support aspects of case, award of attorneys' fees would be vacated and the case remanded for further proceedings on that issue. Smith v. Price, 315 N.C. 523, 340 S.E.2d 408 (1986).

Multiple awards of counsel fees in the same domestic action are, in the proper circumstances, within the court's discretion to allow. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

Legitimate work by counsel in precursory activity is allowable within an attorneys' fee award in connection with a domestic case. Cobb v. Cobb, 79 N.C. App. 592, 339 S.E.2d 825 (1986).

Unreasonable Depletion of Separate Estate Not Intended. — It would be contrary to the intent of the legislature to require one seeking an award of attorneys' fees to meet the expenses of litigation through the unreasonable depletion of her separate estate, where her separate estate is smaller than that of the other party. Cobb v. Cobb, 79 N.C. App. 592, 339 S.E.2d 825 (1986).

Findings Held Insufficient. — Factual findings on award of attorneys' fees were deficient as to child support where there was no finding that the supporting spouse refused to provide adequate support under the circumstances existing at the time the action was initiated, and as to both alimony and child support, where there were no factual findings upon which a determination of the reasonableness of the award could be based, other than the trial court's statement that the time expended was "reasonably necessary." Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

Award of Fees Held Error. — The trial court erred in requiring plaintiff father to pay counsel fees of defendant mother for a hearing upon defendant's motion for an increase in the amount of child support payments made by plaintiff, where there was no showing or finding that at the time of the hearing defendant was a dependent spouse. Crouch v. Crouch, 14 N.C. App. 49, 187 S.E.2d 348, cert. denied, 281 N.C. 314, 188 S.E.2d 897 (1972), decided prior to the 1973 amendment to this section.

Where the trial court failed to make a finding of fact with respect to the wife's ability to defray the expense of the suit, as required by this section, the court abused its discretion in ordering plaintiff husband to pay attorneys' fees. Nolan v. Nolan, 20 N.C. App. 550, 202 S.E.2d 344, cert. denied, 285 N.C. 234, 204 S.E.2d 24 (1974); Rogers v. Rogers, 39 N.C. App. 635, 251 S.E.2d 663 (1979).

The trial court could not order defendant to pay plaintiff's attorney for the time spent in representing her on a contempt citation stemming from her violation of defendant's court-ordered visitation rights. Daniels v. Hatcher, 46 N.C. App. 481, 265 S.E.2d 429 (1980).

For additional case in which award of fees was held error, see Norton v. Norton, 76 N.C. App. 213, 332 S.E.2d 724 (1985).

Findings were inadequate to support an award for payment of attorneys' fees where trial court failed to make specific findings of fact required by statute and case law and instead found only that plaintiff did not have the ability to defray the costs and expenses to employ adequate representation, that the attorney had provided valuable services, and that the attorney expended in excess of five hours representing plaintiff. Cameron v. Cameron, 94 N.C. App. 168, 380 S.E.2d 121 (1989).

Where plaintiff introduced affidavits of her legal expenses but trial court made no findings on all the factors required under this section, award of attorneys' fees was vacated. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Reversal of Fee Award Where Increase in Support Reversed. — Where that part of order increasing child support payments was reversed, the award of attorneys' fees also had to be reversed. Mullen v. Mullen, 79 N.C. App. 627, 339 S.E.2d 838 (1986).

Where both of plaintiff's attorneys, who represented her in the custody and support hearings, submitted detailed affidavits of their experience, time, and preparation of the case, the trial judge properly found that an attorneys' fee of $80.00 per hour for 75 and 10 hours of time respectively was a reasonable amount to award for time spent on the issue of support only. Savani v. Savani, 102 N.C. App. 496, 403 S.E.2d 900 (1991).

Trial Court Erred in Considering Relative Estates of Parties. — Where the evidence failed to show that defendant did not have ample income to defry the expenses of the action and would have been required to deplete her estate to pay expenses, the trial court erred in considering the relative estates of the parties in assessing the defendant's ability to employ "adequate" counsel. Van Every v. McGuire, 125 N.C. App. 578, 481 S.E.2d 377 (1997), aff'd, 348 N.C. 58, 497 S.E.2d 689 (1998).

Award of Fees Appropriate. — The trial court did not err in requiring father to pay reasonable attorneys' fees of mother in a habeas corpus proceeding to determine the custody of their minor children, where custody of the children had been awarded to mother by both North Carolina and South Carolina courts, and father's failure to return the children to mother in South Carolina after a visit in this State forced mother to come to this State to secure their return, and father was not providing support for the children as he had been ordered. In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228, cert. denied, 279 N.C. 727, 184 S.E.2d 884 (1971).

Where district court found that defendant acted in good faith and could not defray the expenses of lawsuit without impoverishing herself, and the plaintiff had not furnished adequate support for several months, the findings were sufficient to support award of attorney's fees. Osborne v. Osborne, 129 N.C. App. 34, 497 S.E.2d 113 (1998).

Where father unilaterally terminated child support payments after his son reached the age of 18 and failed to make satisfactory progress towards graduation from high school, the support payments were improperly terminated and father was properly ordered to pay the mother's attorney's fees. Leak v. Leak, 129 N.C. App. 142, 497 S.E.2d 702 (1998), cert. denied, 348 N.C. 498, 510 S.E.2d 385 (1998).

Attorney fees were properly awarded to the father in a child custody case, where the trial court made factual findings as to the parties' financial resources, that the father was an interested party acting in good faith, and as to father's attorney's skill, rates, and rendition of services. Cox v. Cox, 133 N.C. App. 221, 515 S.E.2d 61 (1999).

Trial court did not err in awarding attorney's fees to plaintiff's counsel where defendant had substantial assets, retirement and investment accounts, a home, an aircraft, a boat and a business, and plaintiff had a $41,000 income plus $2,000 in modest bank accounts. Burnett v. Wheeler, 133 N.C. App. 316, 515 S.E.2d 480 (1999).

Trial court could order the husband to pay the wife's attorney's fees incurred in seeking to have the husband held in contempt, even though he could not be held in civil contempt due to obeying the trial court's orders prior to the contempt hearing, where the trial court found: (1) the wife was acting in good faith; (2) she had insufficient means to pay her attorney's fees; and (3) the attorney's fees were reasonable. Reynolds v. Reynolds, 147 N.C. App. 566, 557 S.E.2d 126, 2001 N.C. App. LEXIS 1231 (2001), cert. denied, 355 N.C. 493, 563 S.E.2d 567 (2002).

There was sufficient evidence to support the trial court's finding of the wife's inability to defray the cost of litigation in a divorce proceeding as she had been paying all of the uninsured medical expenses for the past two years and had outstanding balances on those expenses at the time of the hearing. Leary v. Leary, 152 N.C. App. 438, 567 S.E.2d 834, 2002 N.C. App. LEXIS 912 (2002).

Order that the father pay attorneys' fees was proper because the action involved both child custody and child support, and the trial court based its calculation on an extensive discussion with the mother's counsel as well as careful consideration of the attorneys' affidavit stating the number of hours he worked on the custody and support claims. Spicer v. Spicer, 168 N.C. App. 283, 607 S.E.2d 678, 2005 N.C. App. LEXIS 260 (2005).

Attorney's fee award in favor of the mother in a child custody and support action was proper because, inter alia, the affidavit and detailed billing records submitted in support of the request, along with the husband's stipulation as to reasonableness of counsel's hourly rate, supported the award. Attorney fee award was not used as punishment but was based upon mother's insufficient means to defray expense of suit. Kuttner v. Kuttner, — N.C. App. —, 666 S.E.2d 883, 2008 N.C. App. LEXIS 1760 (2008).

Trial court did not abuse its discretion in ordering the father to pay $40,000 of the maternal grandparents' attorneys' fee, where the fees were sought because of the father's failure to cooperate with the grandparents regarding visitation, the father did not object to the evidence offered at trial, and the trial court found that the father had the ability to pay those fees. Smith v. Barbour, — N.C. App. —, 671 S.E.2d 578, 2009 N.C. App. LEXIS 109 (2009).

Denial of Fees Upheld. — Respondent in a child custody proceeding was not entitled to an award of counsel fees or to have court costs taxed against petitioner father, where respondent introduced no evidence with respect to her dependent status or inability to defray the expense of the suit, and where she was not the party for whom judgment had been given. In re Cox, 17 N.C. App. 687, 195 S.E.2d 132, cert. denied, 283 N.C. 585, 196 S.E.2d 809 (1973).

Where defendant complied with all orders that directed him to make child support payments, and when necessary defendant voluntarily made payments for the support of the parties' children, it was not an abuse of discretion for the trial court to deny plaintiff's motion for an award of attorneys' fees. Prescott v. Prescott, 83 N.C. App. 254, 350 S.E.2d 116 (1986).

Disallowance of Fees As Matter of Law Held Improper. — The trial court, in its discretion, was fully authorized to disallow attorneys' fees for defendant's counsel, but to disallow such fees as a matter of law was error. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

Entitlement to Legal Representation Not Limited to Trial Level. — There is nothing in our statutory or case law to suggest that a dependent spouse in this State is entitled to meet the supporting spouse on equal footing, in terms of adequate and suitable legal representation, at the trial level only. Fungaroli v. Fungaroli, 53 N.C. App. 270, 280 S.E.2d 787 (1981).

Award of attorneys' fees for services performed on appeal should ordinarily be granted, provided the general statutory requirements for such an award are duly met, especially where the appeal is taken by the supporting spouse. Fungaroli v. Fungaroli, 53 N.C. App. 270, 280 S.E.2d 787 (1981).

Award of Fees by Appellate Court. — Neither this section nor any other statute authorizes an appellate court to make an award of attorneys' fees. Tilley v. Tilley, 30 N.C. App. 581, 227 S.E.2d 640 (1976).

Distinction Between Taxing Fees as Costs and Ordering Payment. — As to the difference between including attorney fees in the costs taxed against a party to a lawsuit and in ordering the payment of attorneys' fees, see Smith v. Price, 315 N.C. 523, 340 S.E.2d 408 (1986).

A request for attorneys' fees may be properly raised by a motion in the cause subsequent to the determination of the main custody action. In re Scearce, 81 N.C. App. 662, 345 S.E.2d 411, cert. denied, 318 N.C. 415, 349 S.E.2d 590 (1986).

Time for Motion. — Where intervenors' motion for attorneys' fees was made approximately four months after the trial court had entered order awarding custody to the intervenors, and approximately four months after county division of social services had filed its notice of appeal to that order, the trial court lacked jurisdiction to consider the intervenors' motion. However, following resolution of the appeal of the custody order, the trial court could consider intervenors' motion for attorneys' fees. In re Scearce, 81 N.C. App. 662, 345 S.E.2d 411, cert. denied, 318 N.C. 415, 349 S.E.2d 590 (1986).

Reservation of Issue of Fees when Judgment Rendered. — Since the trial court expressly reserved the issue of attorney's fees at the time it rendered judgment as to the custody matters before it, it retained the authority to consider the issue since attorney's fees were within the court's "oral announcements." Surles v. Surles, 113 N.C. App. 32, 437 S.E.2d 661 (1993).

Review of Attorney's Fees on Appeal. — While whether the statutory requirements have been met is a question of law, reviewable on appeal, the amount of attorneys' fees is within the sound discretion of the trial judge and is only reviewable for an abuse of discretion. Atwell v. Atwell, 74 N.C. App. 231, 328 S.E.2d 47 (1985).

The findings required by this section must be supported by competent evidence and are fully reviewable on appeal. Boyd v. Boyd, 81 N.C. App. 71, 343 S.E.2d 581 (1986).

The trial court committed error in failing to make adequate findings of fact to support its denial of attorney's fees. Gowing v. Gowing, 111 N.C. App. 613, 432 S.E.2d 911 (1993).

Applied in Williams v. Williams, 12 N.C. App. 170, 182 S.E.2d 667 (1971); Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973); Sawyer v. Sawyer, 21 N.C. App. 293, 204 S.E.2d 224 (1974); Powell v. Powell, 25 N.C. App. 695, 214 S.E.2d 808 (1975); Tidwell v. Booker, 27 N.C. App. 435, 219 S.E.2d 648 (1975); Holt v. Holt, 29 N.C. App. 124, 223 S.E.2d 542 (1976); Hampton v. Hampton, 29 N.C. App. 342, 224 S.E.2d 197 (1976); Lindsey v. Lindsey, 34 N.C. App. 201, 237 S.E.2d 561 (1977); Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979); Byrd v. Byrd, 62 N.C. App. 438, 303 S.E.2d 205 (1983); Darden v. Darden, 66 N.C. App. 432, 311 S.E.2d 600 (1984); Forbes v. Forbes, 72 N.C. App. 684, 325 S.E.2d 272 (1985); Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990); Lawrence v. Tise, 107 N.C. App. 140, 419 S.E.2d 176 (1992).

Cited in Fonvielle v. Fonvielle, 8 N.C. App. 337, 174 S.E.2d 67 (1970); Andrews v. Andrews, 12 N.C. App. 410, 183 S.E.2d 843 (1971); Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971); Winters v. Winters, 11 N.C. App. 595, 181 S.E.2d 604 (1971); Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640 (1979); Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986); In re Cooper, 81 N.C. App. 27, 344 S.E.2d 27 (1986); Craig v. Kelley, 89 N.C. App. 458, 366 S.E.2d 249 (1988); McLemore v. McLemore, 89 N.C. App. 451, 366 S.E.2d 495 (1988); Glatz v. Glatz, 98 N.C. App. 324, 390 S.E.2d 763 (1990); Hartsell v. Hartsell, 99 N.C. App. 380, 393 S.E.2d 570 (1990); Van Every v. McGuire, 125 N.C. App. 578, 481 S.E.2d 377 (1997); Cox v. Cox, 133 N.C. App. 221, 515 S.E.2d 61 (1999); Eakes v. Eakes, — N.C. App. —, 669 S.E.2d 891, 2008 N.C. App. LEXIS 2255 (2008).

II. ACTIONS FOR SUPPORT ONLY.

Second Sentence of Section Is Limited to Support Actions. — The General Assembly, having limited the second sentence to support actions, apparently did not intend the requirement to apply to custody or custody and support actions. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

Finding Under Second Sentence Is Required Only in Support Actions. — The duty to make the required finding under the second sentence of this section is imposed only in a support action. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

And Not in Custody or Custody and Support Actions. — The requirement of a finding that the party ordered to pay support has refused to provide support applies only in support actions and not in custody or custody and support actions. Arnold v. Arnold, 30 N.C. App. 683, 228 S.E.2d 48 (1976). See also, Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

Where cause was heard upon plaintiff's motion for an increase in child support payments and upon defendant's motion for a modification of the child custody order, the trial court's award of attorney fees did not have to be supported by a finding that defendant, the party ordered to furnish support, had refused to provide support which was adequate at the time of the institution of the action. Fellows v. Fellows, 27 N.C. App. 407, 219 S.E.2d 285 (1975).

This section requires, in a child support action, a finding that defendant refused to provide support. In an action for custody and support, findings of fact are not required to sustain an award for counsel fees. Walker v. Walker, 38 N.C. App. 226, 247 S.E.2d 615 (1978).

Findings Required in Action for Support. — A finding of fact supported by competent evidence must be made on the issue of whether the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding, in addition to meeting the requirements of "good faith" and "insufficient means," before attorneys' fees may be awarded in a support suit. This issue is a question of law, reviewable on appeal. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Before a court can award attorneys' fees to an interested party under this section in a motion in the cause proceeding for a modification of child support, the court must make the following three findings of fact: (1) the party is acting in good faith; (2) the party has insufficient means to defray the expenses of the suit; and (3) the party ordered to pay support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding. Quick v. Quick, 67 N.C. App. 528, 313 S.E.2d 233 (1984).

The text of this section sets out four requirements to support an award of attorneys' fees, namely: (1) that the party awarded fees be an interested party; (2) that that party be acting in good faith; (3) that that party have insufficient means to defray the expense of the suit; and (4) that the party ordered to furnish support have refused to provide adequate support under the circumstances existing at the time the action was instituted. Warner v. Latimer, 68 N.C. App. 170, 314 S.E.2d 789 (1984).

Where the action is one for custody or custody and support, the first sentence of this section applies, and the court may award attorneys' fees to an interested party if it finds (1) that the party acted in good faith and (2) that the party lacks the means to defray the expense of the suit. Where the action is solely one for support, attorneys' fees may be awarded provided the court finds, in addition, that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of institution of the action or proceeding. Gibson v. Gibson, 68 N.C. App. 566, 316 S.E.2d 99 (1984).

In actions for support only, the court may award reasonable attorneys' fees to a party if it finds: (1) that the party is acting in good faith; (2) that the party has insufficient means to defray the costs of the action; and (3) that the party ordered to pay support had not provided adequate support under the circumstances existing at the time of the institution of the action or proceeding. Plott v. Plott, 72 N.C. App. 82, 327 S.E.2d 273 (1985).

To award attorneys' fees in a child support action, the trial court must find as fact that: (1) The interested party (a) acted in good faith and (b) has insufficient means to defray the expenses of the action; and (2) the supporting party refused to provide adequate support "under the circumstances existing at the time of the institution of the action or proceeding." Moreover, the required findings of fact must in turn be supported by competent evidence, such as that of the parties' incomes, estates and debts. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Where trial court's order was devoid of any statutorily required findings of fact, the award of attorneys' fees could not stand. Harris v. Harris, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

Case would be remanded where trial court failed to make specific findings that: (1) the mother was acting in good faith; (2) the mother's means were insufficient to defray the expenses of the suit; and (3) the father refused to provide the child support which was adequate under the circumstances existing at the time of the action. Thomas v. Thomas, 134 N.C. App. 591, 518 S.E.2d 513 (1999).

After the father had been found to be in contempt due to his failure to pay child support, the trial court made sufficient findings of fact to support an award of attorney's fees to the mother under G.S. 50-13.6, despite the fact that there was no finding that the mother was an interested party with insufficient means to defray the cost of the litigation; under G.S. 50-13.4(c), the children's ability to pay attorney's fees was at issue, not the mother's, and the mother was an interested party under G.S. 50-13.6, as she provided the financial support in the absence of the husband. Belcher v. Averette, 152 N.C. App. 452, 568 S.E.2d 630, 2002 N.C. App. LEXIS 1069 (2002).

Plaintiff's contention that proceeding was solely one for support was without merit, where plaintiff's modification motion initially put the issue of custody before the court, even though the issue of custody was quickly settled by agreement. Theokas v. Theokas, 97 N.C. App. 626, 389 S.E.2d 278, cert. denied, 327 N.C. 437, 395 S.E.2d 697 (1990).

Court estimates of time required and attorney's hourly rate are not sufficient. — Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Award Upheld. — Trial court order requiring mother to pay $2,500 to the father of the parties' three minor children was proper because the three children resided with the father, along with his new wife and three other children, the father had inadequate monthly income, and the attorneys' fees were reasonable. The fees were found to have been increased as a result of the mother's failure to contribute a reasonable sum to the support of the children after being asked to do so. Roberts v. McAllister, 174 N.C. App. 369, 621 S.E.2d 191, 2005 N.C. App. LEXIS 2490 (2005), appeal dismissed, — N.C. —, 629 S.E.2d 608 (2006).

§ 50-13.7. Modification of order for child support or custody.

(a) Except as otherwise provided in G.S. 50-13.7A, an order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested subject to the limitations of G.S. 50-13.10. Subject to the provisions of G.S. 50A-201, 50A-202, and 50A-204, an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.

(b) When an order for support of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order for support which modifies or supersedes such order for support, subject to the limitations of G.S. 50-13.10. Subject to the provisions of G.S. 50A-201, 50A-202, and 50A-204, when an order for custody of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and a showing of changed circumstances, enter a new order for custody which modifies or supersedes such order for custody. (1858-9, c. 53; 1868-9, c. 116, s. 36; 1871-2, c. 193, s. 46; Code, ss. 1296, 1570, 1661; Rev., ss. 1570, 1853; C.S., ss. 1664, 2241; 1929, c. 270, s. 1; 1939, c. 115; 1941, c. 120; 1943, c. 194; 1949, c. 1010; 1953, c. 813; 1957, c. 545; 1965, c. 310, s. 2; 1967, c. 1153, s. 2; 1979, c. 110, s. 13; 1981, c. 682, s. 12; 1987, c. 739, s. 3; 1999-223, s. 13; 2007-175, s. 1.)

Cross References. — As to the vesting of past due child support payments, see G.S. 50-13.10. As to distribution by court of marital property upon divorce, see G.S. 50-20. For the Uniform Child Custody Jurisdiction Act, see G.S. 50A-1 et seq.

Editor's Note. — Subsection (a), as amended by Session Laws 2007-175, s. 1, effective October 1, 2007, is applicable to custody or visitation actions instituted on or after that date.

Legal Periodicals. — For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

For survey of 1972 case law on child support and pre-Chapter 48A consent judgments, see 51 N.C.L. Rev. 1091 (1973).

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For survey of 1982 family law, see 61 N.C.L. Rev. 1155 (1983).

For note, "Miller v. Kite, 313 N.C. 474, 329 S.E.2d 663 (1985): Should Domestic Disputes Require the Maximum of Minimum Contacts?," see 64 N.C.L. Rev. 825 (1986).

For note, "The Effect on the Child of a Custodial Parent's Involvement in an Intimate Same-Sex Relationship," see 10 Campbell L. Rev. 131 (1996).

For comment, "Contractual Modification of Past Due and Future Child Support Payments," see 19 Campbell L. Rev. 189 (1996).

CASE NOTES

I. In General.
II. Modification, Generally.
III. Change in Circumstances.
IV. Visitation Rights.
V. Findings and Discretion of Trial Court.
VI. Jurisdiction.
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I. IN GENERAL.

Editor's Note. *— A number of the cases cited below were decided under former G.S. 17-39.1, which dealt with determining custody of children in habeas corpus proceedings, former G.S. 50-13, which dealt with custody and maintenance of children in divorce proceedings, and former G.S. 50-16, which dealt with custody and support of children in actions for alimony without divorce.*

Some of the cases below were decided prior to enactment of G.S. 50-13.10, relating to the vesting of past due child support payments.

Section 50-13.2A must be read in pari materia with subsection (a), which therefore requires a showing of a substantial change of circumstances. Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

No Voluntary Dismissal of Final Order Permitted. — Under Rule 41(a) and existing case law, parties may not voluntarily dismiss a final custody and child support order. Massey v. Massey, 121 N.C. App. 263, 465 S.E.2d 313 (1996).

Use of Word "May". — Where defendant contended that the use of the word "may" in this statute authorizes the trial court in the exercise of its discretion to refuse to exercise its jurisdiction, he misconstrued the statute. The word "may" authorizes the trial judge to enter an order of modification upon a showing of changed circumstances. Morris v. Morris, 91 N.C. App. 432, 371 S.E.2d 756 (1988).

There is no requirement that each successive custody hearing start with a "clean slate" and that the court not rely on the record previously generated. To the contrary, custody proceedings generally are continuing in nature. Best v. Best, 81 N.C. App. 337, 344 S.E.2d 363 (1986), overruled on other grounds, Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994).

Noncustodial parent is not entitled as a matter of law to a credit against accrued arrearage in child support for expenses incurred while the child was with the noncustodial parent. Each case must be decided upon it own facts, and the guiding principle is whether an injustice would exist if a credit is not given. Simmons v. Simmons, 74 N.C. App. 725, 329 S.E.2d 723 (1985). And see now § 50-13.10.

Decision to allow, or disallow, a credit to the noncustodial parent against accrued arrearage in child support expenses incurred while the child was with the noncustodial parent is a matter within the discretion of the trial judge. Simmons v. Simmons, 74 N.C. App. 725, 329 S.E.2d 723 (1985).

Custody orders are never permanent, but rather are always subject to revision based upon changes in circumstances pursuant to G.S. 50-13.7(a). Heatzig v. MacLean, 191 N.C. App. 451, 664 S.E.2d 347, 2008 N.C. App. LEXIS 1480 (2008), review denied, appeal dismissed, 362 N.C. 681, 670 S.E.2d 564 (2008).

Applied in Ferguson v. Ferguson, 9 N.C. App. 453, 176 S.E.2d 358 (1970); Paschall v. Paschall, 26 N.C. App. 491, 216 S.E.2d 415 (1975); Roberts v. Roberts, 38 N.C. App. 295, 248 S.E.2d 85 (1978); Pritchard v. Pritchard, 45 N.C. App. 189, 262 S.E.2d 836 (1980); In re Register, 303 N.C. 149, 277 S.E.2d 356 (1981); Harris v. Harris, 56 N.C. App. 122, 286 S.E.2d 859 (1982); Newman v. Newman, 64 N.C. App. 125, 306 S.E.2d 540 (1983); O'Neal v. Wynn, 64 N.C. App. 149, 306 S.E.2d 822 (1983); Cartrette v. Cartrette, 73 N.C. App. 169, 325 S.E.2d 671 (1985); Glesner v. Dembrosky, 73 N.C. App. 594, 327 S.E.2d 60 (1985); Little v. Little, 74 N.C. App. 12, 327 S.E.2d 283 (1985); Bowen v. Gilliard, 483 U.S. 587, 107 S. Ct. 3008, 97 L. Ed. 2d 485 (1987); Koufman v. Koufman, 330 N.C. 93, 408 S.E.2d 729 (1991); Bost v. Van Nortwick, 117 N.C. App. 1, 449 S.E.2d 911 (1994); Shipman v. Shipman, 155 N.C. App. 523, 573 S.E.2d 755, 2002 N.C. App. LEXIS 1588 (2002).

Cited in In re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971); Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971); Moore v. Moore, 14 N.C. App. 165, 187 S.E.2d 371 (1972); Carmichael v. Carmichael, 40 N.C. App. 277, 252 S.E.2d 257 (1979); County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979); Williams v. Richardson, 53 N.C. App. 663, 281 S.E.2d 777 (1981); Phillips v. Choplin, 65 N.C. App. 506, 309 S.E.2d 716 (1983); Mather v. Mather, 70 N.C. App. 106, 318 S.E.2d 548 (1984); Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985); Graham v. Graham, 77 N.C. App. 422, 335 S.E.2d 210 (1985); Griffin v. Griffin, 81 N.C. App. 665, 344 S.E.2d 828

(1986); Craig v. Kelley, 89 N.C. App. 458, 366 S.E.2d 249 (1988); Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993); Jones v. Jones, 109 N.C. App. 293, 426 S.E.2d 468 (1993); Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995); Garrison v. Connor, 122 N.C. App. 702, 471 S.E.2d 644 (1996); Kelly v. Otte, 123 N.C. App. 585, 474 S.E.2d 131 (1996); Cox v. Cox, 133 N.C. App. 221, 515 S.E.2d 61 (1999); Price v. Breedlove, 138 N.C. App. 149, 530 S.E.2d 559, 2000 N.C. App. LEXIS 543 (2000); In re Estate of Lunsford, 143 N.C. App. 646, 547 S.E.2d 483, 2001 N.C. App. LEXIS 326 (2001); King v. King, 144 N.C. App. 391, 547 S.E.2d 846, 2001 N.C. App. LEXIS 446 (2001); Mohr v. Mohr, 155 N.C. App. 421, 573 S.E.2d 729, 2002 N.C. App. LEXIS 1590 (2002); Pataky v. Pataky, 160 N.C. App. 289, 585 S.E.2d 404, 2003 N.C. App. LEXIS 1797 (2003); Cunningham v. Cunningham, 171 N.C. App. 550, 615 S.E.2d 675, 2005 N.C. App. LEXIS 1371 (2005); New Enforcement ex rel. Dillon v. Rains, — N.C. App. —, 666 S.E.2d 800, 2008 N.C. App. LEXIS 1736 (2008).

II. MODIFICATION, GENERALLY.

Editor's Note. — *Some of the cases below were decided prior to enactment of G.S. 50-13.10, relating to the vesting of past due child support payments.*

This section gives North Carolina courts subject matter jurisdiction to modify child support orders entered by another state. Morris v. Morris, 91 N.C. App. 432, 371 S.E.2d 756 (1988).

Statutory Compliance Required. — Since there is a statutory procedure for modifying a custody determination, a party seeking modification of a custody decree must comply with its provisions. Bivens v. Cottle (Westlake), 120 N.C. App. 467, 462 S.E.2d 829 (1995), appeal dismissed, 346 N.C. 270, 485 S.E.2d 296 (1997).

A court is without authority to sua sponte modify an existing support order. Royall v. Sawyer, 120 N.C. App. 880, 463 S.E.2d 578 (1995).

Trial court's order allowing partial payment of support obligation at contempt proceeding did not constitute a modification, such modification of child support being only allowed "upon motion in the cause and a showing of changed circumstances by either party." Bogan v. Bogan, 134 N.C. App. 176, 516 S.E.2d 641 (1999).

Court does not have the authority to sua sponte modify an existing support order, and modification of a support order cannot occur until the threshold issue of substantial change in circumstances has been shown. Miller v. Miller, 153 N.C. App. 40, 568 S.E.2d 914, 2002 N.C. App. LEXIS 1070 (2002).

The welfare of the children in controversies involving custody is the polar star by which the courts must be guided in awarding custody. Pruneau v. Sanders, 25 N.C. App. 510, 214 S.E.2d 288, cert. denied, 287 N.C. 664, 216 S.E.2d 911 (1975); Dean v. Dean, 32 N.C. App. 482, 232 S.E.2d 470 (1977).

And the Determinative Factor. — The welfare of the child, not the frustration of the court order, is the determinative factor. Gordon v. Gordon, 46 N.C. App. 495, 265 S.E.2d 425 (1980).

And Is the Ultimate Object in Securing Child Support. — The welfare of the child is the "polar star" in the matters of custody and maintenance, yet common sense and common justice dictate that the ultimate object in such matters is to secure support commensurate with the needs of the child and the ability of the father to meet the needs. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

The ultimate object in setting awards of child support is to secure support commensurate with the needs of the children and the ability of the father to meet the needs. Gibson v. Gibson, 24 N.C. App. 520, 211 S.E.2d 522 (1975).

The welfare of the child is always open to inquiry by the court, and upon the showing of a change of circumstances the order of custody may be modified. In re Mason, 13 N.C. App. 334, 185 S.E.2d 433 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 513 (1972).

"Best Interests of Child" Standard Applied to Temporary Order. — Trial court properly applied the "best interests of the child" standard in declining to modify a child custody award because the initial custody order was not final where it left open a parent's visitation periods and was subject to regular review to ensure the parent's increased participation pending recovery from a traumatic brain injury. Simmons v. Arriola, 160 N.C. App. 671, 586 S.E.2d 809, 2003 N.C. App. LEXIS 1911 (2003).

The control and custody of minor children cannot be determined finally. Changed conditions will always justify inquiry by the courts into the interest and welfare of the children, and decrees may be entered as often as the facts justify. In re Herring, 268 N.C. 434, 150 S.E.2d 775 (1966); In re Bowen, 7 N.C. App. 236, 172 S.E.2d 62 (1970).

Neither agreements nor adjudications for the custody or support of a minor child are ever final. McLeod v. McLeod, 266 N.C. 144, 146 S.E.2d 65 (1966).

As children develop, their needs change, and these needs must be supplied by the parent, whose ability to supply them may change. For these reasons orders in custody proceedings are not final. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

A judgment awarding custody is based upon conditions found to exist at the time it is entered. The judgment is subject to such change as is necessary to make it conform to changed conditions when they occur. In re Bowen, 7 N.C. App. 236, 172 S.E.2d 62 (1970); Owen v. Owen, 31 N.C. App. 230, 229 S.E.2d 49 (1976).

And Is Temporary in Nature. — All custody orders are from their very nature temporary and founded upon conditions and circumstances existing at the time of the hearing. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

Although they provide guidance, prior custody orders are not binding in subsequent proceedings. Custody orders are not permanent, but remain freely modifiable upon appropriate evidence of changed circumstances. Williams v. Williams, 91 N.C. App. 469, 372 S.E.2d 310 (1988).

Decrees with respect to custody and support are subject to further orders of the court. Blankenship v. Blankenship, 256 N.C. 638, 124 S.E.2d 857 (1962); Thomas v. Thomas, 259 N.C. 461, 130 S.E.2d 871 (1963).

And May Be Altered upon a Change in Circumstances. — Decrees entered by North Carolina courts in child custody and support matters are impermanent in character and are res judicata of the issue only so long as the facts and circumstances remain the same as when the decree was rendered. The decree is subject to alteration upon a change of circumstances affecting the welfare of the child. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967); Tate v. Tate, 9 N.C. App. 681, 177 S.E.2d 455 (1970); Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

A decree for the support of a minor child is subject to alteration upon a change of circumstances affecting the welfare of the child. Bishop v. Bishop, 245 N.C. 573, 96 S.E.2d 721 (1957); Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963).

It is elementary that court decrees in child custody and support matters are not permanent in character and may be modified by the court in the future if subsequent events and the welfare of the child require. In re Rose, 9 N.C. App. 413, 176 S.E.2d 249 (1970).

An order awarding the custody of minor children determines the present rights of the parties, but is not permanent in nature, and is subject to modification for a subsequent change of circumstances affecting the welfare of the children. Thomas v. Thomas, 259 N.C. 461, 130 S.E.2d 871 (1963); In re Bowen, 7 N.C. App. 236, 172 S.E.2d 62 (1970); Owen v. Owen, 31 N.C. App. 230, 229 S.E.2d 49 (1976).

The entry of an order in a custody matter does not finally determine the rights of parties as to the custody, care and control of a child, and thus when a substantial change of condition affecting the child's welfare is properly established, the court may modify a prior custody decree. Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974); Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123 (1979).

On a hearing in a custody suit, the judgment is not intended to be a final determination of the rights of the parties touching the care and control of the child; thus, on a change of conditions, properly established, the question may be further heard and determined. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

The purpose of a child support proceeding is to determine the nature and extent of the support required. The initial determination is subject to modification or vacation at any time upon motion and a showing of changed circumstances. The support issue thus may be before the court on numerous occasions during a child's minority. Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983).

Since the ruling in Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (1994) that recognized the constitutionally — protected paramount right of parents to custody, the ruling has been interpreted to apply only to an initial custody determination, and not to motions for change of custody based on changed circumstances. Speaks v. Fanek, 122 N.C. App. 389, 470 S.E.2d 82 (1996).

As May Agreements on Such Matters. — Decrees entered by courts in child custody and support matters, or written agreements with respect to such matters, are impermanent in character and are subject to alteration by the court upon a change of circumstances affecting the welfare of the child. Williams v. Williams, 18 N.C. App. 635, 197 S.E.2d 629 (1973).

While the provisions of a valid separation agreement relating to marital and property rights of the parties cannot be set aside by the court without the consent of the parties, no agreement between husband and wife can serve to deprive the courts of their inherent authority to protect the interests of and provide for the welfare of minor children. Hershey v. Hershey, 57 N.C. App. 692, 292 S.E.2d 141 (1982).

Change in Circumstances Is Threshold Issue. — Modification of a support order cannot occur until the threshold issue of substantial change in circumstances has been shown. Davis v. Risley, 104 N.C. App. 798, 411 S.E.2d 171 (1991).

Party Required to Demonstrate Substantially Changed Circumstances. — Under this section, a party is required to demonstrate substantially changed circumstances affecting the welfare of the child in order to be granted a modification of an existing custody order. The word custody under the statute also includes visitation. Savani v. Savani, 102 N.C. App. 496, 403 S.E.2d 900 (1991).

No agreement or contract between husband and wife will serve to deprive the courts of their inherent as well as their statutory authority to protect the interests and provide for the welfare of infants. The parties may bind themselves by a separation agreement or by a consent judgment, but they cannot thus withdraw the children of the marriage from the protective custody of the court. Voss v. Summerfield, 77 N.C. App. 839, 336 S.E.2d 144 (1985).

Retroactive Increase Requires "Emergency Situation". — Child support reimbursement or child support governing a period prior to a motion to increase an existing child support order would constitute retroactive child support and would not be based on the presumptive guidelines. Therefore, a child support payment order may not be retroactively increased without evidence of some emergency situation that required the expenditure of sums in excess of the amount of child support paid. Biggs v. Greer, 136 N.C. App. 294, 524 S.E.2d 577, 2000 N.C. App. LEXIS 13 (2000).

Separation Agreement Incorporated into Consent Judgment Is Modifiable. — Where a separation agreement is adopted by incorporation into a consent judgment, the terms thereof are subject to modification by the court upon a showing of changed circumstances. Mann v. Mann, 57 N.C. App. 587, 291 S.E.2d 794 (1982).

Deference Due Agreement. — On motion filed by defendant to modify consent order to provide for child support, the defendant, as movant, will have the burden of showing a "substantial change of circumstances affecting the welfare of the child." Deference due the agreement gives rise to the presumption, in the absence of evidence to the contrary, that the amount agreed upon is just and reasonable. Voss v. Summerfield, 77 N.C. App. 839, 336 S.E.2d 144 (1985).

Burden in Seeking Modification of Separation Agreement Not Incorporated in Order. — When a motion is made to modify the child support provisions of a separation agreement which has not previously been incorporated into an order or judgment of the court, the moving party's only burden is to show the amount of support necessary to meet the reasonable needs of the child at the time of the hearing, and he is not required to show a change in circumstances. Should the evidence establish, giving due regard to the factors contained in G.S. 50-13.4(b) and (c), that such amount substantially exceeds the amount agreed upon in the separation agreement, such evidence would necessarily rebut the presumption of reasonableness of the amount of child support established in the agreement and establish the need for an increase. However, absent such a showing, the agreement of the parties will be deemed to be reasonable. Boyd v. Boyd, 81 N.C. App. 71, 343 S.E.2d 581 (1986).

Mother did not establish that she relied to her detriment on the parties' agreement to reduce child support; since the support order was not judicially modified, the separation agreement remained in full force and effect. Baker v. Showalter, 151 N.C. App. 546, 566 S.E.2d 172, 2002 N.C. App. LEXIS 776 (2002).

Effect of Reconciliation on Support Provisions of Separation Agreement. — A separation agreement is terminated for every purpose, insofar as it remains executory, when the parties resume the marital relationship. Among the executory purposes for which a separation agreement is terminated is the payment of child support. But while the courts have held that reconciliation voids alimony provisions, whether in a separation agreement or a court order, this principle has not been applied to void, as a matter of law, a judgment ordering payment of child support. Walker v. Walker, 59 N.C. App. 485, 297 S.E.2d 125 (1982).

Defendant may, upon a proper showing, be entitled to relief from those payments which, under a judgment, fell due during a period of reconciliation. Walker v. Walker, 59 N.C. App. 485, 297 S.E.2d 125 (1982).

Relitigation of Paternity Not Basis for Modifying Support Agreement. — While a voluntary support agreement may, upon motion and a showing of changed circumstances, be modified or vacated at any time, it cannot be modified or vacated on the basis of relitigation, in a proceeding related solely to the order for support, of the paternity issue. That issue is res judicata and shall not be reconsidered by the court in such a proceeding. Beaufort County v. Hopkins, 62 N.C. App. 321, 302 S.E.2d 662 (1983).

Arbitration Award Remains Reviewable and Modifiable. — While there exists no prohibition to the parties settling the issues of custody and child support by arbitration, the provisions of an award for custody or child support will always be reviewable and modifiable by the courts, as parents cannot by agreement deprive the court of its inherent and statutory authority to protect the interests of their children, and further, a court order pertaining to custody or support of a minor child does not finally determine the rights of the parties as to these matters. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Because all awards or orders concerning child support or custody are reviewable and modifiable, any arbitration concerning these issues is not binding. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Temporary resumption of marital relationship does not require court to void support order on motion pursuant to G.S. 1A-1, Rule 60(b)(4). Walker v. Walker, 59 N.C. App. 485, 297 S.E.2d 125 (1982).

Custody Provisions in a Divorce Decree

Are Subject to Modification. — The provision of a final decree of divorce awarding the custody of the minor children of the marriage is subject to modification for subsequent change of condition as often as the facts justify. In re Marlowe, 268 N.C. 197, 150 S.E.2d 204 (1966).

A decree awarding custody of the child of the marriage as between its divorced parents is determinative of the present rights of the parties, but is not permanent, and may be later modified by the court upon a change of conditions. Hardee v. Mitchell, 230 N.C. 40, 51 S.E.2d 884 (1949); Griffin v. Griffin, 237 N.C. 404, 75 S.E.2d 133 (1953).

As Are Support Provisions Therein. — The court has jurisdiction to modify an order for the support of a child of the marriage entered in the husband's action for absolute divorce and may do so upon the wife's motion in the cause made subsequent to the rendition of the decree of absolute divorce. Story v. Story, 221 N.C. 114, 19 S.E.2d 136 (1942).

While the rule in Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983) did not apply to a divorce judgment entered prior thereto, the language used by the court in absolute divorce judgment, incorporating separation agreement into the judgment, was sufficient under the law as it existed prior to Walters to evidence the court's intent to make the parties' separation agreement its own determination of their respective rights and obligations. Thus, when the court adopted the parties' agreement as to child support as its own determination of the amount of child support to be paid by defendant, this order of support became modifiable in the same manner as any other child support order. Holthusen v. Holthusen, 79 N.C. App. 618, 339 S.E.2d 823 (1986).

Modification of Payments Accrued After Motion Filed. — Any child support payments which accrued after the filing of mother's motion for an increase based on changed circumstances could be subject to modification as provided by law. Mackins v. Mackins, 114 N.C. App. 538, 442 S.E.2d 352, cert. denied, 337 N.C. 694, 448 S.E.2d 527 (1994).

Modification Where Consent Judgment in Divorce Action Determined Custody. — Where custody was awarded by court order by the adoption of a consent judgment relative to child custody by the court in its findings of fact and conclusions of law, custody being awarded to defendant as part of the divorce judgment, not merely by agreement of the parties, any subsequent modification must be made in accordance with subsection (a) of this section. Barnes v. Barnes, 55 N.C. App. 670, 286 S.E.2d 586 (1982).

When child support agreement was incorporated into parties divorce judgment it became an order of court that was modifiable only as other judgments involving child custody and support are modifiable. Tyndall v. Tyndall, 80 N.C. App. 722, 343 S.E.2d 284, cert. denied, 318 N.C. 420, 349 S.E.2d 606 (1986), upholding trial court's refusal to disregard the terms of judgment and make a new, independent determination where no grounds for modifying the judgment were presented.

Modification of Support Provisions in Order of Alimony Without Divorce. — An order of alimony without divorce and child support is temporary in nature, and if future circumstances justify a change, defendant is at liberty to seek relief in the trial court by motion in the cause. Fonvielle v. Fonvielle, 8 N.C. App. 337, 174 S.E.2d 67 (1970).

In wife's action for alimony without divorce and for child support, the Court of Appeals would not disturb an order of the trial court requiring husband to make substantial payments to wife for alimony and for support of the minor children, notwithstanding husband's contention that he anticipates a substantial decrease in earning, since the order was temporary in nature and is subject to modification upon change of circumstances. Fonvielle v. Fonvielle, 8 N.C. App. 337, 174 S.E.2d 67 (1970).

Modification of Order Transferring Child Custody. — An order which transferred child custody from the plaintiff to the defendant was a final order under G.S. 1A-1, Rule 60(b), but the order could be changed subsequently upon a proper showing of change of circumstances under this section. Dishman v. Dishman, 37 N.C. App. 543, 246 S.E.2d 819 (1978).

Order May Not Be Vacated by Stipulation. — Where an order of the trial court awarding plaintiff permanent custody and obligating defendant to pay permanent child support was rendered, nothing in Rule 41 granted authority to the parties, without action by the trial court, to vacate by stipulation the order previously entered in the action. Massey v. Massey, 121 N.C. App. 263, 465 S.E.2d 313 (1996).

As to the weight to be accorded the wishes of a child who has reached the age of discretion in choosing a custodian, see Elmore v. Elmore, 4 N.C. App. 192, 166 S.E.2d 506 (1969); In re Harrell, 11 N.C. App. 351, 181 S.E.2d 188 (1971); In re Williamson, 32 N.C. App. 616, 233 S.E.2d 677 (1977); Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978); Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123 (1979).

The trial court must determine the present reasonable needs of the child before ordering a modification in child support. Mullen v. Mullen, 79 N.C. App. 627, 339 S.E.2d 838 (1986); Smith v. Smith, 89 N.C. App. 232, 365 S.E.2d 688 (1988).

To properly determine child's present

reasonable needs, trial court must hear evidence and make findings of specific fact on the actual past expenditures for the minor child, the present reasonable expenses of the minor child, and the parties' relative abilities to pay. Mullen v. Mullen, 79 N.C. App. 627, 339 S.E.2d 838 (1986); Smith v. Smith, 89 N.C. App. 232, 365 S.E.2d 688 (1988).

Determination of Relative Ability to Pay. — Evidence of, and findings of fact on, the parties' income, estates, and present reasonable expenses are necessary to determine their relative abilities to pay. Mullen v. Mullen, 79 N.C. App. 627, 339 S.E.2d 838 (1986).

Inclusion of Estimated Expenses for Items That Custodial Parent Cannot Currently Afford Not Improper. — In support modification proceedings it was not improper for the court to include in its findings estimated expenses for certain items that plaintiff could not currently afford; simply because a custodial parent is unable to afford a certain item or expense is no reason to disqualify that item as a reasonable need of the child. Findings of fact as to actual past expenditures are meant to aid the trial court in determining the reasonable needs of the children, not to hamper the court's ability to assess the children's reasonable needs. Smith v. Smith, 89 N.C. App. 232, 365 S.E.2d 688 (1988).

An order providing for temporary child support is not an appealable final order, whereas an order providing for permanent child support until emancipation is an appealable final order even though permanent child support orders may be modified upon a showing of change of circumstances. Banner v. Hatcher, 124 N.C. App. 439, 477 S.E.2d 249 (1996).

Modification of Support Provisions Upheld. — Where, in a decree of divorce, father was ordered to pay a certain sum monthly for the support of his infant daughter, and by its first order the court retained the cause subject to the right of either party at any time to apply for a modification of the order, and pursuant to this provision the court later, upon father's insolvency, made the sums assessed a charge on plaintiff's homestead and personal property exemptions when allotted, the modification was authorized by statute as well as by the order of the courts. Walker v. Walker, 204 N.C. 210, 167 S.E. 818 (1933).

In the modification of an order for child support, there was no error where the trial court found sufficient facts to justify an increase in the child support payments, and these findings were supported by competent evidence in the record. Gibson v. Gibson, 24 N.C. App. 520, 211 S.E.2d 522 (1975).

Modification of Custody and Support Provisions Upheld. — Trial court's judgment transferring custody of a child from his mother to his father and ordering the mother to pay child support was supported by evidence which showed that the mother moved frequently, had no home of her own, moved in with her boyfriend, and actively attempted to prevent the father from visiting his child, and that the father was about to remarry and could provide a stable home for the child. Shipman v. Shipman, 357 N.C. 471, 586 S.E.2d 250, 2003 N.C. LEXIS 1103 (2003).

Modification of Custody and Support Provisions Erroneous. — The trial court errs in modifying a previous order as to custody of and support of children in the absence of a motion for modification and absent any showing of changed circumstances. Smith v. Smith, 15 N.C. App. 180, 189 S.E.2d 525 (1972).

In the absence of any evidence and finding of any change in circumstances, it was error for the trial court to order an increase in the amount of child support. Childers v. Childers, 19 N.C. App. 220, 198 S.E.2d 485 (1973).

Trial court's findings held insufficient to justify an increase in support payment of $500.00 for two children, as specified in separation agreement, to payment of $800.00 for one child following older child's attaining of her majority. Rice v. Rice, 81 N.C. App. 247, 344 S.E.2d 41, cert. denied, 317 N.C. 706, 347 S.E.2d 439 (1986).

Where there was no evidence that defendant, who worked for a school system as a psychologist, intentionally depressed his income or otherwise engaged in bad faith, the trial court erred by imputing income to defendant for four weeks during the school district summer recess. Ellis v. Ellis, 126 N.C. App. 362, 485 S.E.2d 82 (1997).

Father did not show sufficient changed circumstances to warrant modification of either the support or custody order of his three children, even though mother no longer retained custody of the oldest daughter, as the welfare of the children at the time the contest came on for hearing was the controlling consideration and, based on their welfare, modification in his favor was not warranted. Davis v. Davis, 2001 N.C. App. LEXIS 664 (N.C. App. Aug. 7, 2001).

Evidence of Child-Oriented Expenses in Modification Hearings. — In seeking a modification of child support, the moving party must present evidence of child-oriented expenses, including the amount of those expenses at the time of the original support hearing. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Modification of Custody Order Erroneous. — Where the trial court correctly found that no change in circumstances affecting minor's welfare had been shown, its order requiring plaintiff/mother to give defendant/father final decision-making authority as to child's schooling, extracurricular activities, and travel constituted a wrongful modification of prior custody order. Sain v. Sain, 134 N.C. App. 460, 517 S.E.2d 921 (1999).

Where there was no written order signed before the wife filed her motion to modify custody, and the written order granting joint custody was eventually entered on the same day that the trial court heard the motion to modify, an appellate court reversed the order modifying custody because there was nothing to modify since there was no order when the mother filed her motion to modify; even if it were proper for the trial court to hear the motion, it was impossible for there to have been a change in circumstances between the time the order was entered and the time it was modified on the same day, and in deciding whether a change of circumstances had occurred, the trial court should not have considered the events that transpired between the time it announced its joint custody decision and the date of the entry of the order. Carland v. Branch, 164 N.C. App. 403, 595 S.E.2d 742, 2004 N.C. App. LEXIS 809 (2004).

Where although father, the custodial parent, presented some evidence of present and future expenses, he presented no evidence of child-oriented expenses at the time of the prior hearing, the trial court did not have all of the evidence necessary to establish a change of circumstances and did not err in refusing to modify plaintiff's child support. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

For case involving refusal to modify custody decree where child was actually in custody of another married couple, see Fearrington v. Fearrington, 251 N.C. 694, 111 S.E.2d 850 (1960).

For case affirming order transferring custody to paternal grandmother and awarding visitation rights to both mother and father, see Best v. Best, 81 N.C. App. 337, 344 S.E.2d 363 (1986), overruled on other grounds, Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994).

Parent can obligate himself to support a child after emancipation and past majority, and his contract will be enforceable, it being beyond the inherent power of the court to modify same absent the consent of the parties. Hershey v. Hershey, 57 N.C. App. 692, 292 S.E.2d 141 (1982).

Modification When One of Several Children Reaches Age 18. — While child support obligations ordered by a court terminate upon the child reaching age 18, unless the child is otherwise emancipated prior to reaching age 18 or the trial court in its discretion continues to enforce the payment obligation after the child reaches age 18 and while the child is in primary or secondary school, when one of two or more minor children for whom support is ordered reaches age 18, and when the support ordered to be paid is not allocated as to each individual child, the supporting parent has no authority to unilaterally modify the amount of the child support payment. The supporting parent must apply to the trial court for modification. Craig v. Craig, 103 N.C. App. 615, 406 S.E.2d 656 (1991).

Cases holding that where one of two minor children reaches the age of 18, a trial court may retroactively modify child support arrearages when equitable considerations exist which would create an injustice if modification is not allowed, were decided before G.S. 50-13.10 became effective on October 1, 1987. Under this statute, if the supporting party is not disabled or incapacitated, a past due, vested child support payment is subject to divestment only as provided by law, and if, but only if, a written motion is filed, and due notice is given to all parties before the payment is due. Craig v. Craig, 103 N.C. App. 615, 406 S.E.2d 656 (1991).

Continuing Obligation to Support Illegitimate Child. — Section 49-7, read together with this section, clearly contemplates a continuing obligation on the part of the parents of an illegitimate child to provide support, including when necessary the modification or increase of payments ordered to satisfy this obligation. Having been conclusively determined a "responsible parent," as that term is defined in G.S. 110-129, the father of an illegitimate child must necessarily remain liable for the future support of his minor child. Wilkes County ex rel. Child Support Enforcement ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

Substantial Decrease in Parent's Income Not Shown. — Although a substantial decrease in the non-custodial parent's income can support a modification without a showing of a change in the needs of the child, the decrease in defendant's income of $500 a year was not substantial in this case. Wiggs v. Wiggs, 128 N.C. App. 512, 495 S.E.2d 401 (1998).

Unilateral Reduction of Payments. — The father was properly held in contempt, despite his claim that the evidence did not show that he had the means to comply with the trial court's purge order, where he unilaterally reduced his child support payments after suffering a substantial reduction in income. Chused v. Chused, 131 N.C. App. 668, 508 S.E.2d 559 (1998).

III. CHANGE IN CIRCUMSTANCES.

Editor's Note. — *Some of the cases below were decided prior to enactment of G.S. 50-13.10, relating to the vesting of past due child support payments.*

A change in circumstances must be shown in order to modify an order relating to custody, support or alimony. Rock v. Rock, 260 N.C. 223, 132 S.E.2d 342 (1963); Elmore v. Elmore, 4 N.C. App. 192, 166 S.E.2d 506 (1969); In re Griffin, 6 N.C. App. 375, 170 S.E.2d 84 (1969); Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969); Rabon v. Ledbetter, 9 N.C. App. 376, 176 S.E.2d 372 (1970); McDowell v. McDowell, 13 N.C. App. 643, 186 S.E.2d 621 (1972); Kenney v. Kenney, 15 N.C. App. 665, 190 S.E.2d 650 (1972); Register v. Register, 18 N.C. App. 333, 196 S.E.2d 550 (1973); Pruneau v. Sanders, 25 N.C. App. 510, 214 S.E.2d 288, cert. denied, 287 N.C. 664, 216 S.E.2d 911 (1975).

Where a provision for a reduction in support payments was omitted from the original order, that order could not thereafter be modified by inserting such provision without a showing and finding of change in circumstances. Rabon v. Ledbetter, 9 N.C. App. 376, 176 S.E.2d 372 (1970).

When the parties have entered into a consent order providing for the custody and support of their children, any modification of that order must be based upon a showing of a substantial change in circumstances affecting the welfare of the child. Woncik v. Woncik, 82 N.C. App. 244, 346 S.E.2d 277 (1986).

Where a Virginia court which had issued a divorce decree denied modification of the original child support order, and the former spouse and minor children were living in North Carolina, U.S. Const., Art. IV, § 1 required the Virginia order denying modification to be given full faith and credit in North Carolina subject to changed circumstances under this section. Morris v. Morris, 91 N.C. App. 432, 371 S.E.2d 756 (1988).

A Georgia divorce judgment precluded a North Carolina court from making any findings as to child support without a showing of a change in circumstances. Shores v. Shores, 91 N.C. App. 435, 371 S.E.2d 747 (1988).

Trial court erred in modifying an existing support decree from the State of Georgia when there were no findings of fact or conclusions of law showing a change of circumstances to support such a conclusion. Shores v. Shores, 91 N.C. App. 435, 371 S.E.2d 747 (1988).

Without evidence of any change of circumstances affecting the welfare of the child or an increase in need, an increase for support based solely on the ground that the support payor's income has increased is improper. Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991).

There are no exceptions in North Carolina law to the requirement that a change in circumstances be shown before a custody decree may be modified. Bivens v. Cottle (Westlake), 120 N.C. App. 467, 462 S.E.2d 829 (1995), appeal dismissed, 346 N.C. 270, 485 S.E.2d 296 (1997).

Because a trial court could not, on the one hand, conclude there was not a substantial change of circumstances, and at the same time change the existing consent order, and the parties' incomes had to be considered to properly evaluate the mother's motion to modify child support, the modification of custody and support was reversed and remanded. Lewis v. Lewis, 181 N.C. App. 114, 638 S.E.2d 628, 2007 N.C. App. LEXIS 82 (2007).

A party seeking modification of child custody has the burden of showing changed circumstances only where an order for permanent custody already exists. Regan v. Smith, 131 N.C. App. 851, 509 S.E.2d 452 (1998).

A change in circumstances may be shown in any of several ways: an increase or decrease in the child's needs; a substantial and involuntary decrease in the income of the noncustodial parent; a voluntary decrease in income of either supporting parent; and, if the support order is at least three years old, proof of a disparity of fifteen percent or more between the original order and the amount under the Child Support Guidelines. Wiggs v. Wiggs, 128 N.C. App. 512, 495 S.E.2d 401 (1998).

Or a Separation Agreement. — Where parties to a separation agreement agree upon the amount of the support and maintenance of their minor children, there is a presumption, in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable, and that upon motion for an increase in such allowance, a court is not warranted in ordering an increase in the absence of any evidence of a change of conditions. Soper v. Soper, 29 N.C. App. 95, 223 S.E.2d 560 (1976); Dishmon v. Dishmon, 57 N.C. App. 657, 292 S.E.2d 293 (1982); Hershey v. Hershey, 57 N.C. App. 692, 292 S.E.2d 141 (1982).

Modification of a child support order involves a two-step process: 1) the court must first determine a substantial change of circumstances has taken place; and 2) only then does it proceed to apply the guidelines to calculate the applicable amount of support. McGee v. McGee, 118 N.C. App. 19, 453 S.E.2d 531 (1995).

Meaning of "Changed Circumstances". — "Changed circumstances," as used in this section, means such a change as affects the welfare of the child. In re Harrell, 11 N.C. App. 351, 181 S.E.2d 188 (1971); Hensley v. Hensley, 21 N.C. App. 306, 204 S.E.2d 228 (1974); Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123, cert. denied, 298 N.C. 568, 261 S.E.2d 122 (1979); O'Briant v. O'Briant, 70 N.C. App. 360, 320 S.E.2d 277, cert. denied as to additional issues, 312 N.C. 623, 323 S.E.2d 923 (1984); Wehlau v. Witek, 75 N.C. App. 596, 331 S.E.2d 223 (1985).

Although a court must make findings concerning the party's ability to pay, the changed circumstances with which the courts are concerned are those relating to child-oriented expenses. Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991).

The changed circumstances with which the courts are concerned are those which relate to child-oriented expenses. Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

The court erred in concluding that a finding of change in child-oriented expenses is a threshold requirement that must be satisfied before a court can modify a support order because of a change in the supporting party's circumstances, where the defendant presented evidence of a decreased income that could support a modification based on changed circumstances. Padilla v. Lusth, 118 N.C. App. 709, 457 S.E.2d 319 (1995).

The trial court was not required to find adverse changes in circumstances, but properly modified custody based on special needs child's best interests, where (1) reformed father's lifestyle would be better suited to providing the boy with the proper structure and educational opportunities he needed; (2) defendant/mother's job would require her to be away from the child in the evenings, leaving him in the care of others; (3) mother's home schooling of him would not meet his social and educational needs; (4) since father enrolled the child in the local public schools during the trial custody period, the boy had exhibited "phenomenal" improvement with respect to his stuttering and motor tics due to the specialized speech therapy he received; (5) father lived in a spacious new home where the boy had his own bedroom and bathroom; and (6) mother lived in an overcrowded rental home in which the boy shared a bathroom with four other people. Metz v. Metz, 138 N.C. App. 538, 530 S.E.2d 79, 2000 N.C. App. LEXIS 621 (2000).

Change of Circumstances in Conclusion of Law. — A substantial change of circumstances is unequivocally a conclusion of law, meaning that a change has occurred among the parties, and that change has affected the welfare of the children involved. Garrett v. Garrett, 121 N.C. App. 192, 464 S.E.2d 716 (1995).

Change Must Be Substantial. — There must generally be a substantial change of circumstances before an order of custody is changed. Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969); Todd v. Todd, 18 N.C. App. 458, 197 S.E.2d 1 (1973).

Before the court will modify a custody order, it must be shown that the circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified. Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969); Searl v. Searl, 34 N.C. App. 583, 239 S.E.2d 305 (1977); Wachacha v. Wachacha, 38 N.C. App. 504, 248 S.E.2d 375 (1978); Daniels v. Hatcher, 46 N.C. App. 481, 265 S.E.2d 429 (1980); Gordon v. Gordon, 46 N.C. App. 495, 265 S.E.2d 425 (1980); O'Briant v. O'Briant, 70 N.C. App. 360, 320 S.E.2d 277 (1984), rev'd on other grounds, 313 N.C. 432, 329 S.E.2d 370 (1985).

Reduction of the monthly child support award was error because the trial court did not make a finding pursuant to G.S. 50-13.7(a) that there had been a substantial change in circumstances affecting the welfare of the husband and wife's three minor children. A reduction could not be based on the fact that the husband remarried and had a child born to the new marriage, as the remarriage and obligation of also supporting a new child was a voluntary undertaking on the husband's part. Frey v. Best, 189 N.C. App. 622, 659 S.E.2d 60, 2008 N.C. App. LEXIS 715 (2008).

The moving party has the burden of showing a substantial change of circumstances affecting the welfare of the child. Searl v. Searl, 34 N.C. App. 583, 239 S.E.2d 305 (1977); Ebron v. Ebron, 40 N.C. App. 270, 252 S.E.2d 235 (1979); Barnes v. Barnes, 55 N.C. App. 670, 286 S.E.2d 586 (1982); Kelly v. Kelly, 77 N.C. App. 632, 335 S.E.2d 780 (1985).

When plaintiff moved that original order be vacated and either modified or eliminated, he assumed the burden of showing that circumstances had changed between the time of the order and the time of the hearing upon his motion. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967); In re Harrell, 11 N.C. App. 351, 181 S.E.2d 188 (1971); Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

The original decree ordering the payment of money is an adjudication of the court as to what was reasonable and proper at the time it was made. The burden of proving, by a preponderance of the evidence, that a material change in the circumstances has occurred is upon the party requesting the modification. Allen v. Allen, 7 N.C. App. 555, 173 S.E.2d 10 (1970).

The party seeking to have custody order vacated has the burden of showing that circumstances have changed. Hensley v. Hensley, 21 N.C. App. 306, 204 S.E.2d 228 (1974); Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974); King v. Allen, 25 N.C. App. 90, 212 S.E.2d 396, cert. denied, 287 N.C. 259, 214 S.E.2d 431 (1975); King v. Demo, 40 N.C. App. 661, 253 S.E.2d 616 (1979); Daniels v. Hatcher, 46 N.C. App. 481, 265 S.E.2d 429 (1980); Gordon v. Gordon, 46 N.C. App. 495, 265 S.E.2d 425 (1980); Dishmon v. Dishmon, 57 N.C. App. 657, 292 S.E.2d 293 (1982); Woncik v. Woncik, 82 N.C. App. 244, 346 S.E.2d 277 (1986).

A finding of change in child-oriented expenses is not a threshold requirement that must be satisfied before a court can modify a support order because of a change in the supporting party's circumstances. Padilla v. Lusth, 118 N.C. App. 709, 457 S.E.2d 319 (1995).

Interference with Visitation. — Because the welfare of the child is the paramount concern in custody cases, interference with visitation of the noncustodial parent which has a negative impact on the welfare of the child can constitute a substantial change of circumstances sufficient to warrant a change of custody. Woncik v. Woncik, 82 N.C. App. 244, 346 S.E.2d 277 (1986).

Communication Between Parents. — There was insufficient evidence to support trial court's findings of a substantial change in circumstances justifying a modification of a child custody order based on findings that subsequent to the parents' failed efforts to reunite, communication between them had been unsuccessful, issues relating to domestic violence had not been effectively resolved and had resulted in emotional trauma to the child, and that the parents' failure to communicate regarding issues with the minor child had jeopardized the success of the joint custodial arrangement of the previous order; instead, a review of the record showed ample evidence that although the parents had disagreements and verbal disputes, they had developed ways to communicate regarding the welfare of their son, communicated about the child's health, and that upon request by the mother, the father had delivered medicine to the child's pre-school and had cared for the child at unscheduled times. Ford v. Wright, 170 N.C. App. 89, 611 S.E.2d 456, 2005 N.C. App. LEXIS 889 (2005).

Removal of Parent to Another Residence. — A finding that mother "is now residing in Mecklenburg County, North Carolina" is not a finding of a substantial change of circumstances that will support the modification of a child custody order. Harrington v. Harrington, 16 N.C. App. 628, 192 S.E.2d 638 (1972).

Where a parent changes his residence, the effect on the welfare of the child must be shown in order for the court to modify a custody decree based on change of circumstances. Gordon v. Gordon, 46 N.C. App. 495, 265 S.E.2d 425 (1980); Ramirez-Barker v. Barker, 107 N.C. App. 71, 418 S.E.2d 675 (1992).

While it is true that a parent's change of residence does not of itself amount to a substantial change of circumstances, the effects of such a move on the welfare of the child may well amount to a change of circumstances requiring modification of the original custody order. O'Briant v. O'Briant, 70 N.C. App. 360, 320 S.E.2d 277 (1984), rev'd on other grounds, 313 N.C. 432, 329 S.E.2d 370 (1985).

Relocation After Remarriage. — The trial court erred in amending the custody decree based on a finding of substantial change in circumstances where it found only that the proposed relocation of mother after her remarriage would adversely affect the relationship between father and his child, but made no other findings about the effect of the proposed relocation on the child and on the child's best interests. Evans v. Evans, 138 N.C. App. 135, 530 S.E.2d 576, 2000 N.C. App. LEXIS 536 (2000).

Removal of Child to Another Jurisdiction. — Before an order of custody is changed, more must be shown than mere removal of child from a jurisdiction which may enter an adverse decision to the removing parent. Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969).

Although it is not so as a matter of law, it will be a rare case where the child will not be adversely affected when a relocation of the custodial parent and child requires substantial alteration of a successful custody-visitation arrangement in which both parents have substantial contact with the child. Ramirez-Barker v. Barker, 107 N.C. App. 71, 418 S.E.2d 675 (1992).

Change in Custody Between Parents. — A change in custody from the father to the mother was a changed circumstance supporting modification of the mother's child support obligation. Kowalick v. Kowalick, 129 N.C. App. 781, 501 S.E.2d 671 (1998).

Adverse Effect on Child as Factor to Support Modification. — An adverse effect on a child as the result of a change in circumstances is an acceptable factor for the courts to consider and will support a modification of a prior custody order, but showing an adverse effect is not necessary for modification. Pulliam v. Smith, 348 N.C. 616, 501 S.E.2d 898 (1998).

Where parties crossed out a cohabitation provision on the face of their separation memorandum, the trial court only partially discharged its duty in finding that a change of circumstances occurred when husband began cohabiting with his girlfriend because it failed to determine whether plaintiff's wife had met her burden of showing the effect, if any, such change had upon the welfare of the children. Browning v. Helff, 136 N.C. App. 420, 524 S.E.2d 95, 2000 N.C. App. LEXIS 14 (2000).

Because the trial court carefully laid out in sequential order the facts regarding the father's relationship with a married woman, resulting in him resigning from his job, and culminating in his separation from his wife who provided at least 50 percent of the minor child's care, including helping the child with his homework, and then found that the child's grades had suffered as a result, it provided a nexus between the substantial change in circumstances and the affect on the child's welfare to overrule the father's motion to dismiss the mother's custody modification action; moreover, when balanced against the mother's attainment of both a stable living environment and a vast improvement in health after suffering from a brain tumor, the trial court's custody modification order in favor of the mother was upheld. Karger v. Wood, 174 N.C. App. 703, 622

S.E.2d 197, 2005 N.C. App. LEXIS 2609 (2005).

Father Met Burden of Showing Adverse Effect of Relocation. — Father met his burden of showing that the proposed relocation of mother and child to California likely would adversely affect the welfare of the child, and thus the "best interest" question was properly before the trial court. Ramirez-Barker v. Barker, 107 N.C. App. 71, 418 S.E.2d 675 (1992).

Decree Is Res Judicata Only as to Facts Then Existing and Before Court. — To modify a custody order, a court must find a change in circumstances. However, when facts pertinent to the custody issue existed at the time of the custody decree but were not disclosed to the court, the prior decree is res judicata only to the facts that were before the court, and other pertinent facts may be considered in subsequent custody determinations. Wehlau v. Witek, 75 N.C. App. 596, 331 S.E.2d 223 (1985).

Speculation as to Future Detrimental Change Insufficient. — A court cannot modify a custody order based on speculation or conjecture that a detrimental change may take place sometime in the future. Wehlau v. Witek, 75 N.C. App. 596, 331 S.E.2d 223 (1985).

Evidence of Husband's Suitability Did Not Negate Suitability of Former Wife. — The former husband's evidence that he was a suitable parent for custody did not negate the former wife's standing as a suitable parent for custody and did not represent a change of circumstances. Wehlau v. Witek, 75 N.C. App. 596, 331 S.E.2d 223 (1985).

Proof Required Absent Evidence of Change in Either Party's Fitness. — Where there is no evidence that the fitness or unfitness of either party has changed, the trial court may not modify a prior order unless sufficient change of circumstances adversely affecting the welfare of the child is shown. Wehlau v. Witek, 75 N.C. App. 596, 331 S.E.2d 223 (1985).

Increase in Father's Income. — The court is not warranted in ordering an increase of child support in the absence of any evidence of a change in conditions or of the need for such increase, particularly when the increase is awarded solely on the ground that the father's income has increased so that he is able to pay a larger amount. Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963); Dishmon v. Dishmon, 57 N.C. App. 657, 292 S.E.2d 293 (1982). See also, Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

Trial court erred in finding that a mother could not seek an increase in child support from a father; G.S. 50-13.7(a) provided that child support orders were modifiable at any time, so a provision of the divorce order which stated that the father's support obligation was not modifiable was void. Young v. Young, 169 N.C. App. 31, 609 S.E.2d 795, 2005 N.C. App. LEXIS 539 (2005).

Decrease in Father's Income. — Where father's income had decreased from $24,000.00 per month to $2083.33 per month, he had been voluntarily terminated, he had continuously sought employment since being terminated, but those efforts had been impaired due to criminal non-support actions instituted both in Florida and in North Carolina, and his estate had been "substantially depleted,"; although the court failed to use sequentially the words "substantial involuntary reduction" in income, its findings indisputably reflected precisely that. McGee v. McGee, 118 N.C. App. 19, 453 S.E.2d 531 (1995).

Trial court erred in modifying original child-support order, where most of its findings of fact were insufficient to support the modification, and the sole valid finding was an increase in father's annual income. Thomas v. Thomas, 134 N.C. App. 591, 518 S.E.2d 513 (1999).

Because the changes in circumstances necessary to support a modification should be determined from the date of the most recent child support order which addressed the obligation in question, and an allegation of a change to the parties' income, without more, was not sufficient to support a motion to modify child support; thus, the ex-husband's motion to modify child support was properly dismissed. Devaney v. Miller, 191 N.C. App. 208, 662 S.E.2d 672, 2008 N.C. App. LEXIS 1226 (2008).

Ability to Pay. — Where there was no evidence that the needs of defendant's minor children had changed; however, there was evidence that defendant's ability to pay his support payments had decreased, the decision of the trial court denying motion for reduction of support was remanded to the district court. Pittman v. Pittman, 114 N.C. App. 808, 443 S.E.2d 96 (1994).

A party's ability to pay child support is determined by the party's ability to pay at the time the award is made or modified. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

Involuntary Decrease in Income. — A significant involuntary decrease in a child support obligor's income satisfies the necessary showing even in the absence of any change affecting the child's needs. Hammill v. Cusack, 118 N.C. App. 82, 453 S.E.2d 539 (1995).

Voluntary Decrease in Income. — Father was not entitled to reduction in child and post-separation support payments under G.S. 50-13.7 and G.S. 50-16.9 despite being fired from job; evidence indicated that the father's unemployment was voluntary and that the father disregarded marital and parental obligations, as the father was fired for engaging in several incidents of intentional misconduct. Wolf v. Wolf, 151 N.C. App. 523, 566 S.E.2d 516, 2002 N.C. App. LEXIS 781 (2002).

Earning Capacity. — The father's earning capacity could not be used in determining his child support obligation, where the father was involuntarily terminated from his former job, and no evidence was presented that he acted in bad faith by deliberately depressing his income. Chused v. Chused, 131 N.C. App. 668, 508 S.E.2d 559 (1998).

Imposition of Earnings Capacity Rule. — Under G.S. 50-13.4 and this section, a husband's ability to pay child support is normally determined by his actual income at the time the award is made or modified. If, however, there is a finding that the husband is deliberately depressing his income or otherwise acting in deliberate disregard of his obligation to provide reasonable support for his child, his capacity to earn may be made the basis of the award. Under these circumstances, his motion to reduce the amount of child support will be denied. Goodhouse v. DeFravio, 57 N.C. App. 124, 290 S.E.2d 751 (1982); Harris v. Harris, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

A court may refuse to modify a support and/or alimony award on the grounds that husband has failed to exercise his reasonable capacity to earn because of a disregard of his marital and parental obligations to provide reasonable support for his wife and minor child. Wachacha v. Wachacha, 38 N.C. App. 504, 248 S.E.2d 375 (1978).

The determination that a husband's change in circumstances has been voluntarily effected by him in disregard of his marital and parental obligations justifying imposition of the earnings capacity rule is a conclusion of law based on the factual findings in the particular case. Wachacha v. Wachacha, 38 N.C. App. 504, 248 S.E.2d 375 (1978).

A party's capacity to earn income may become the basis of an award if it is found that the party deliberately depressed its income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

Trial court properly increased a father's child support obligation pursuant to G.S. 50-13.7(a), as the trial court made sufficient findings of fact to support its conclusion that the father retired and voluntarily reduced his income in deliberate disregard of his obligations, based on the fact that the father retired shortly after his wife won a large lottery award, and the trial court therefore properly imputed income to the father pursuant to Child Support Guidelines, N.C. Ann. R. (2003) 33, 35, at the level of the father's earnings prior to his retirement. Mason v. Erwin, 157 N.C. App. 284, 579 S.E.2d 120, 2003 N.C. App. LEXIS 641 (2003).

Where trial court made no findings as to self-employed father's present earnings, nor as to his reduction of income in bad faith that would support application of the earnings capacity rule, and made no findings as to a substantial change in his income compared to the findings in the previous order, the trial court's conclusion and order increasing his child support under the guidelines for self-employed individuals was not supported by the findings. Ford v. Wright, 170 N.C. App. 89, 611 S.E.2d 456, 2005 N.C. App. LEXIS 889 (2005).

A person's capacity to earn income may be made the basis of an award if there is a finding that the party deliberately depressed his or her income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child. Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991).

Consideration of Spouse's Capacity to Earn Held Error. — Trial court could not consider father's capacity to earn in computing his income where the evidence indicated that he lost his job due to no fault of his own, and the court's order contained no findings that he had deliberately stopped working to avoid his support obligations. Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991).

The court's conclusion underlying imposition of the earnings capacity rule must be based on evidence that tends to show that husband's actions resulting in the reduction of his income were not taken in good faith. Wachacha v. Wachacha, 38 N.C. App. 504, 248 S.E.2d 375 (1978).

Voluntary Expenses. — Fact that defendant had voluntarily assumed the responsibility of supporting his emancipated son was not a factor to be considered in determining a change of circumstances sufficient to support a reduction in support of his minor children. Dishmon v. Dishmon, 57 N.C. App. 657, 292 S.E.2d 293 (1982).

It was error for the trial court to reduce the amount of child support payments required of defendant by one-third where defendant's showing of changed circumstances related almost exclusively to additional expenses to which defendant had obligated himself, including sending a child who had reached the age of majority to college, the expenses of a new home and family, and additional travel and telephone expenses incident to visiting his children from out-of-state, and where defendant made no showing with respect to changed circumstances affecting the remaining minor children and made no showing that the expenses relating to the children's maintenance and support decreased by one-third when one of the children reached majority. Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

The fact that defendant voluntarily assumed the financial burden to send his eldest child to a high-tuition, out-of-state university did not justify consideration of this factor in lowering child support payments. Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

The trial court did not err in denying the husband credit for the purchase of two automobiles for his children, considering his history of delinquent payments and the lack of the wife's consent to these voluntary expenditures. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Waiver of Credit for Child's Receipt of Earnings. — There was no evidence that the husband ever objected to his unemancipated child's receipt of earnings. His right to credit for those earnings was therefore waived. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Inability to Claim Children as Dependents for Tax Purposes. — The husband was not entitled to credit for his inability to claim his children as dependents for income tax purposes. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Rehabilitation from Alcoholism. — In case in which custody of child was taken from the mother because of the mother's problem with alcohol, the district court's subsequent finding that the mother had made substantial progress in rehabilitation from alcoholism and that her accomplishments constituted a material change of circumstances affecting the welfare of the child were upheld. Perdue v. Perdue, 76 N.C. App. 600, 334 S.E.2d 86 (1985).

Inappropriate Conduct by Custodial Parent. — A change in custody from the father to the mother was justified, where the father lived with a homosexual partner and engaged in homosexual relationships and activities, including physical lovemaking, which was witnessed by the children; the father kept admittedly improper sexual material in the home; and the father's partner took the children out of the home without their father's knowledge of their whereabouts. Pulliam v. Smith, 348 N.C. 616, 501 S.E.2d 898 (1998).

Remarriage. — Remarriage in and of itself is not a sufficient change of circumstance to justify modification of a child custody order. Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123, cert. denied, 298 N.C. 568, 261 S.E.2d 122 (1979).

Remarriage without a finding of fact indicating the effect of remarriage on a child is not a sufficient change of circumstances to justify modification of a child custody order. Kelly v. Kelly, 77 N.C. App. 632, 335 S.E.2d 780 (1985).

Consideration of Needs of Father's Second Family. — In determining a father's ability to meet the required payments for the support of his children, some reasonable allowance must be made for his living expenses and for the fact that he has a second family. However, the needs of children of his first marriage cannot be made subservient to the needs of his second family. Beasley v. Beasley, 37 N.C. App. 255, 245 S.E.2d 820 (1978), aff'd, 296 N.C. 580, 251 S.E.2d 433 (1979).

Court erred in reducing a father's child support obligation for one child on the ground that he had a newborn child in his home; the fact that the father had a newborn child to care for did not constitute a significant and material change of circumstances. State ex rel. Cross v. Saunders, 168 N.C. App. 235, 607 S.E.2d 309, 2005 N.C. App. LEXIS 159 (2005).

Attainment of Majority by One of Several Children. — Where plaintiff agreed to support his children by the payment of a certain amount per month until the youngest reached 18, the fact that the oldest child had reached 18 was not a change in circumstances, and the court erred in ordering a reduction of payment by reason of the fact that the oldest child had reached 18. Hershey v. Hershey, 57 N.C. App. 692, 292 S.E.2d 141 (1982).

Where a person having custody under a prior order has become unfit or is no longer able or suited to retain custody, such a consideration is of utmost importance in inquiring into the matter of custody, but it is not alone determinative. In re Bowen, 7 N.C. App. 236, 172 S.E.2d 62 (1970).

If the parent who was awarded custody of children were subsequently to become unfit, it would be possible for the trial court, upon proper findings, to grant custody to a fit person. Where there is no evidence that the fitness or unfitness of either party has changed, the trial court may not modify a prior order awarding custody unless some other sufficient change of condition is shown. In re Poole, 8 N.C. App. 25, 173 S.E.2d 545 (1970).

Finding of Unfitness. — Where parent was found to be a fit and proper parent, and in a later order found to be an unfit parent, the finding of unfitness constituted a change in circumstances. Raynor v. Odom, 124 N.C. App. 724, 478 S.E.2d 655 (1996).

Where Person Denied Custody Under Prior Order Due to Unfitness Becomes Fit. — Where at the time of the first hearing the poor health and emotional instability of the mother rendered her unsuitable to have custody of the two oldest children of the parties, but subsequently this changed, the court was entitled, in view of these changed circumstances, to inquire again into the matter of custody and to determine whether the welfare of the children would be better served by placing them in the custody of their mother. Kenney v. Kenney, 15 N.C. App. 665, 190 S.E.2d 650 (1972).

Father's Interference With Mother's Relationship With Children. — Trial court properly granted a mother's motion, pursuant to G.S. 50-13.7, to modify a custody order and granted primary custody of the parties' two children to the mother; the trial court properly found a substantial change in circumstances based on the father's interference with the mother's relationship with the children, the trial court had jurisdiction pursuant to G.S. 50A-202(a), and the trial court properly denied the father's motions pursuant to G.S. 1A-1, Rule 59 and G.S. 1A-1, Rule 60 to stay the order and for a new trial. Senner v. Senner, 161 N.C. App. 78, 587 S.E.2d 675, 2003 N.C. App. LEXIS 1976 (2003).

Arbitrary termination of visitation rights of grandparents by mother constituted a substantial change of circumstances where the grandparents had established a continuing substantial relationship with their grandchildren since the entry of earlier custody order, and the court found sufficient facts to justify its conclusion that it was in the best interest of the grandchildren to maintain a continuing relationship with the grandparents through the granting of visitation privileges. Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

Parent Denied Custody Despite Doctor's Recommendation. — Although doctor recommended that custody should continue with mother, it was not an abuse of discretion for judge to order a change of custody of the child from mother to father where doctor testified that the child had severe emotional problems requiring "substantial immediate change", that the visitation schedule be limited, and that one parent (mother) exercise more control; the judge agreed with doctor that the child's problems needed immediate remedy; however, he believed that father was the parent to exercise more control. Correll v. Allen, 94 N.C. App. 464, 380 S.E.2d 580 (1989).

Bearing of Illegitimate Child. — Where wife who had left this State after she had been awarded custody of children later returned with an illegitimate child, there was a change of circumstances affecting the welfare of the children, which empowered the court to alter or modify the custody order if it was deemed necessary to do so to further the welfare of the children. Thomas v. Thomas, 259 N.C. 461, 130 S.E.2d 871 (1963).

Whether the birth of a child out of wedlock constitutes a substantial change of circumstances affecting the welfare of the child sufficient to justify a change in custody is to be determined by examining the facts of each case. Kelly v. Kelly, 77 N.C. App. 632, 335 S.E.2d 780 (1985), holding that under the circumstances the trial court found insufficient changes to justify a change in custody.

Minor child's hospitalization and its resulting costs constituted a substantial change in circumstances. Thus case was remanded to take into account the parties' abilities to provide support for the minor child's medical expenses and to enter an order modifying the support order. Lawrence v. Nantz, 115 N.C. App. 478, 445 S.E.2d 87 (1994).

Date from which to measure change in circumstances. — As a husband did not allege any change in circumstances under G.S. 50-13.7(a) after the date the separation agreement was incorporated into the final divorce decree, the date of the final divorce decree was the proper date from which to measure a change in circumstances in concluding that there had been no change in circumstances. Smart v. State, — N.C. App. —, 678 S.E.2d 720, 2009 N.C. App. LEXIS 1056 (July 7, 2009).

Change in Circumstances Shown. — In light of a prior instance of sexual abuse of children by one of mother's boyfriends and the court's express previous instruction that she not "bring dates to the same residence with the children," mother's admission that she allowed boyfriend to live in her home for several weeks and continued to see him, along with psychologist's testimony as to a deterioration in the children's behavior corresponding with boyfriend's involvement with their mother, involved a substantial change of circumstances. Best v. Best, 81 N.C. App. 337, 344 S.E.2d 363 (1986), overruled on other grounds, Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994).

The court's finding that father had improved, after finding him totally uninvolved at the time of the prior order, represented a changed circumstance justifying some modification at least with respect to the father. Best v. Best, 81 N.C. App. 337, 344 S.E.2d 363 (1986), overruled on other grounds, Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994).

The court's findings as to child's poor health and conduct when with defendant mother, and as to her improved state when with plaintiff father, supported by competent evidence as to the child's conduct, habits, health, schedule, treatment, and response at different times, justified changing the joint custody arrangement that was in force, for these findings indicated changed circumstances that were affecting the welfare of the child. Teague v. Teague, 84 N.C. App. 545, 353 S.E.2d 242 (1987).

The trial court did not err in transferring custody of the minor child to defendant where the financial strain caused by plaintiff's loss of her job and the birth of two additional children within two years out of wedlock clearly constitutes a substantial change of circumstances. White v. White, 90 N.C. App. 553, 369 S.E.2d 92 (1988).

The court's effective determination of a "substantial involuntary reduction" in father's income was adequate to support its conclusion that there had been a change of circumstances sufficient to warrant modification of previous child support order; thus the court did not err in failing to make findings concerning the actual past expenditures of the minor children prior to reaching its change of circumstances decision. McGee v. McGee, 118 N.C. App. 19, 453 S.E.2d 531 (1995).

In child custody action, findings supported trial court's conclusion that there had been a substantial change of circumstances since the order where father had consistently attempted to thwart efforts by the defendant to maintain and develop a mother-child relationship with child, where father threatened to stop or disallow visitation by the mother with the child, and where mother's home life and family situation changed and improved since the order. Hamilton v. Hamilton, 93 N.C. App. 639, 379 S.E.2d 93 (1989).

Evidence about child's psychological state supported judge's finding of a substantial change of circumstances and the change of custody of the child from the mother to the father where doctor testified that the disappearance of child's emotional equilibrium occurred during a period when the predominate parental influence upon him was mother and that a possible cause of the child's problems was his mother's hostility which centered around the child's visitations with father, visitations which were often interfered with by mother. Correll v. Allen, 94 N.C. App. 464, 380 S.E.2d 580 (1989).

Court properly modified support order to reflect changed circumstances where child's needs and related expenses had greatly increased. Brooker v. Brooker, 133 N.C. App. 285, 515 S.E.2d 234 (1999).

Order modifying custody was affirmed where trial court found, inter alia, that the mother's new fiancee was a convicted child abuser. McConnell v. McConnell, 151 N.C. App. 622, 566 S.E.2d 801, 2002 N.C. App. LEXIS 879 (2002).

Modification of a child custody order was in the child's best interest where the mother, although able to provide for the child, exposed the child to emotional harm and caused the deterioration of the child's relationship with his father. Jordan v. Jordan, 162 N.C. App. 112, 592 S.E.2d 1, 2004 N.C. App. LEXIS 18 (2004).

Modification of a child custody order was in the child's best interest where the trial court's findings were adequately supported by the evidence. Both parties testified that the mother allowed the child to view electronic mail messages that were sent by the father to the mother and the father also presented evidence that he had not been able to place telephone calls to the child as part of his visitation schedule. Jordan v. Jordan, 162 N.C. App. 112, 592 S.E.2d 1, 2004 N.C. App. LEXIS 18 (2004).

Modification of prior custody order was upheld where the mother's remarriage exposed the children to alcohol abuse, violent behavior, illegal drugs, and risk of physical harm, thus supporting the trial court's decision that there was a material and substantial change in circumstances and that modification would be of material benefit and in the children's best interest. Dreyer v. Smith, 163 N.C. App. 155, 592 S.E.2d 594, 2004 N.C. App. LEXIS 298 (2004).

Trial court's order increasing the husband's child support obligation was based on a material and substantial increase in both parties' incomes, living costs, and an increase in the costs of the needs and extra-curricular activities of the children. Meehan v. Lawrance, 166 N.C. App. 369, 602 S.E.2d 21, 2004 N.C. App. LEXIS 1731 (2004).

Prior custody order was properly modified for a substantial change in circumstances under G.S. 50-13.7(a) as the trial court properly considered events after the prior custody order in finding that: (1) a mother had given birth to the child's sibling; (2) the mother had separated from her husband; (3) the child was in first grade; (4) the child had been diagnosed with and had treatment recommended for ADHD; and (5) the child needed ADHD medication and a father was willing to provide it. Lang v. Lang, — N.C. App. —, 678 S.E.2d 395, 2009 N.C. App. LEXIS 1072 (July 7, 2009).

Showing of Changed Circumstances Held Insufficient. — Where there was no finding of the plaintiff's original child-oriented expenses and no finding that the needs of the children had increased other than the unsupported finding that the children were older and thus their needs had substantially increased, there was not a sufficient showing of a "change in circumstances" within the meaning of this section. Waller v. Waller, 20 N.C. App. 710, 202 S.E.2d 791 (1974).

In a case where the sole finding of fact regarding a change of circumstances was a general finding that the child was older and that inflation had occurred, this, standing alone, was inadequate to support an order of increased support payments. Holder v. Holder, 87 N.C. App. 578, 361 S.E.2d 891 (1987).

In a child custody order modifying the rights of defendant, the evidence was insufficient to show a substantial change in circumstances since the only change was defendant's new job enabling him to keep child with him at work and plaintiff's plans to marry, her increased income and that she no longer lived with her mother. Hinton v. Hinton, 87 N.C. App. 676, 362 S.E.2d 287 (1987).

Findings of fact found by the trial court held supported by the evidence and clearly and more than amply supported the court's conclusion that defendant had failed to show a substantial change of circumstances that would warrant a modification of consent judgment providing for alimony and child support. Outlaw v. Outlaw, 89 N.C. App. 538, 366 S.E.2d 247 (1988).

In an action to modify child support provisions of a separation agreement which has not previously been incorporated into an order or judgment of the court, the court is called upon, for the first time, to make a determination that the reasonable needs of the children are provided for in accordance with the abilities of those responsible for the children's support. Holderness v. Holderness, 91 N.C. App. 118, 370 S.E.2d 602 (1988).

Where the trial court found that defendant voluntarily quit his job, willfully and intentionally depressed his income, and failed to meet his burden of proof in showing a substantial change of circumstances, the court entered a judgment against defendant denying his motion to reduce child support by reason of substantial change of circumstances. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995).

As a substantial change in child's circumstances that was not present before the entry of the original child custody order was not shown, and the father's relocation to Hawaii was not a substantial change in circumstances affecting the child's welfare requiring that the joint custody order be amended allowing the father to move the child to Hawaii, trial court improperly modified the custody order, and the appellate court would vacate and remand the case to the trial court. Carlton v. Carlton, 145 N.C. App. 252, 549 S.E.2d 916, 2001 N.C. App. LEXIS 645 (2001), cert. denied, 536 U.S. 944, 122 S. Ct. 2630, 153 L. Ed. 2d 811 (2002).

Trial court did not abuse its discretion by finding that there had not been a change in circumstances affecting the welfare of a husband and wife's child because the mother spanked the child, the child expressed a desire to live with the husband, and the child had lived with the husband for four months, and the court's judgment denying the husband's motion for a change of custody was affirmed. Scott v. Scott, 157 N.C. App. 382, 579 S.E.2d 431, 2003 N.C. App. LEXIS 742 (2003).

There was insufficient evidence to support trial court's findings of a substantial change in circumstances justifying a modification of a child custody order based on findings that the parents' failure to communicate regarding issues with the minor child had resulted in trauma to the child and jeopardized the success of the joint custodial arrangement of the previous order; other than the mother's testimony regarding the child's normal reaction to a parental disagreement, no testimony was offered which supported a finding of emotional harm; indeed, the trial court made a specific finding of fact as to the current condition of the minor child, stating that he was very smart, very inquisitive and very happy, and daycare workers, grandparents, individuals who knew the parties, and both parents supported the trial court's finding as to the child's condition. Ford v. Wright, 170 N.C. App. 89, 611 S.E.2d 456, 2005 N.C. App. LEXIS 889 (2005).

There was insufficient evidence to support trial court's findings of a substantial change in circumstances justifying a modification of a child custody order based on findings that issues relating to domestic violence had not been effectively resolved; the trial court's findings reflected no substantial changes in the parties' communication difficulties from the prior order, the trial court had already considered the parties' past domestic troubles and communication difficulties in the prior custody order, and without findings of additional changes in circumstances or conditions, modification of the prior custody order was in error. Ford v. Wright, 170 N.C. App. 89, 611 S.E.2d 456, 2005 N.C. App. LEXIS 889 (2005).

Where an initial custody order awarded custody of a child to the paternal grandmother, the mother's motion to modify custody was properly denied under G.S. 50-13.7(a) because: (1) the "substantial change in circumstances" standard was properly applied to the motion to modify since the initial custody order was not on appeal; and (2) the mother did not present evidence that the mother's substantial change in circumstances affected the child. Warner v. Brickhouse, 189 N.C. App. 445, 658 S.E.2d 313, 2008 N.C. App. LEXIS 649 (2008).

Reduction of Custodial Parent's Income on Return to School. — Trial court erred in concluding reduction in income of father, custodial parent, due to leaving employment to return to school could not be considered on motion to increase wife's child support obligations. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Plaintiff who quit her job to attend college could claim a voluntary reduction in income as a change of circumstance. Schroader v. Schroader, 120 N.C. App. 790, 463 S.E.2d 790 (1995).

Interim Child Support Order. — An interim child support order is temporary and is subject to retroactive modification; the requisite showing of changed circumstances is not applicable until there is a final determination of child support based upon the merits of the case. Miller v. Miller, 153 N.C. App. 40, 568 S.E.2d 914, 2002 N.C. App. LEXIS 1070 (2002).

Showing of Substantial Change Not Necessary for Modification Where Prior Order Was Temporary. — Where trial court's prior order regarding custody and visitation was not, by its own language, permanent, the father was not required to show a substantial change in circumstances before the trial court modified its prior order to grant the father unsupervised visits. Anderson v. Lackey, 163 N.C. App. 246, 593 S.E.2d 87, 2004 N.C. App. LEXIS 381 (2004).

IV. VISITATION RIGHTS.

Custody Encompasses Visitation Rights. — Visitation privileges are but a lesser degree of custody. Thus, the word "custody," as used in this section, was intended to encompass visitation rights as well as general custody. Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978).

Jurisdiction of courts in custody and thus, visitation, cases is continuous. A decree determines only the present rights with respect to such custody and is subject to judicial alteration or modification upon a change of circumstances affecting the welfare of the child. In re Jones, 62 N.C. App. 103, 302 S.E.2d 259 (1983).

Visitation and child support rights are independent rights accruing primarily to the benefit of the minor child and one is not, and may not be made, contingent upon the other. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

Receipt of Support May Not Be Conditioned on Visitation. — A trial judge does not have authority to condition a minor child's receipt of support paid by the noncustodial parent on compliance with court-ordered visitation allowed the noncustodial parent by ordering that child support paid by defendant be placed in escrow if minor child fails or refuses to abide by the visitation privileges allowed defendant. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

An agreement by the parties that the court may change visitation privileges in a custody order without any showing of changed conditions does not relieve the court of its duty to determine whether changed circumstances affecting the welfare of the child justify a modification. Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978).

Trial court properly refused to consider issue of visitation rights on plaintiff's motion to set aside a child custody order, where such consideration would be a modification of the prior order's grant of exclusive custody to defendant, since the court may modify custody or visitation only upon a showing of changed circumstances and on adequate motion in the cause, and plaintiff's motion was inadequate for this purpose. Dishman v. Dishman, 37 N.C. App. 543, 246 S.E.2d 819 (1978).

Pervasive Interference with Visitation Rights Warranted Change in Custody. — Where the trial court made findings detailing a mother's pervasive interference with the father's visitation rights, as well as violent actions by the mother and her family at the father in the presence of the child, and these actions prevented the father from developing a relationship with his daughter resulting in an adverse effect on the welfare of the minor child, a change of custody was warranted. Hicks v. Alford, 156 N.C. App. 384, 576 S.E.2d 410, 2003 N.C. App. LEXIS 129 (2003).

Modification of Grandparents' Visitation Rights. — Before an order providing visitation for grandparents of a minor child may be modified, the party seeking modification must show changed circumstances and an abuse of discretion by the trial judge. In re Jones, 62 N.C. App. 103, 302 S.E.2d 259 (1983).

Failure to State Findings on Issue of Visitation. — Where there is no finding by the trial court that ordered visitations are in the children's best interest, the case must be remanded for proper findings and conclusions on the issue. Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978).

Best Interest of the Child Standard Proper as Visitation Order was Temporary. — Because of the outstanding issues and the order's specification that a further review hearing would be held in a period of time reasonably brief under the circumstances, the order was not a permanent order with respect to visitation; further, because the trial court correctly determined that the order was a temporary order with respect to visitation, it also properly applied a "best interests of the child" standard rather than requiring that the father demonstrate a change of circumstances. Lamond v. Mahoney, 159 N.C. App. 400, 583 S.E.2d 656, 2003 N.C. App. LEXIS 1501 (2003).

V. FINDINGS AND DISCRETION OF TRIAL COURT.

When Capacity to Pay May Be Basis for Award. — Under G.S. 50-13.4 and this section, a party's ability to pay child support is ordinarily determined by the party's actual income at time support award is made or modified. However, if there is a finding by the trial court that the party was acting in bad faith by deliberately depressing his or her income or otherwise disregarding the obligation to pay child support, then the party's capacity to earn may be the basis for the award. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Trial Court Required to Make Specific Findings. — It is not sufficient that there may be evidence in the record sufficient to support findings that could have been made; the trial court is required to make specific findings of fact with respect to factors listed in the statute. Such findings are required in order for the appellate court to determine whether the trial court gave "due regard" to the factors listed. Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991).

Modification of a custody decree must

be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the child. Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974); Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977); Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978); Ebron v. Ebron, 40 N.C. App. 270, 252 S.E.2d 235 (1979); Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123, cert. denied, 298 N.C. 568, 261 S.E.2d 122 (1979); Best v. Best, 81 N.C. App. 337, 344 S.E.2d 363 (1986), overruled on other grounds, Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994).

As Must an Increase in Child Support. — The court is not warranted in ordering an increase of child support in the absence of findings of fact supported by competent evidence to show a substantial change of condition affecting the welfare of the children. Ebron v. Ebron, 40 N.C. App. 270, 252 S.E.2d 235 (1979).

To properly determine a child's present reasonable needs, the trial court must hear evidence and make findings of specific fact on the actual past expenditures for the minor child, the present reasonable expenses of the minor child, and the parties' relative abilities to pay. Norton v. Norton, 76 N.C. App. 213, 332 S.E.2d 724 (1985).

Findings as to Child's Best Interests. — In making the best interest decision, the trial court is vested with broad discretion and can be reversed only upon a showing of abuse of discretion. Ramirez-Barker v. Barker, 107 N.C. App. 71, 418 S.E.2d 675 (1992).

In exercising its discretion in determining the best interest of the child in a relocation case, factors appropriately considered by the trial court include but are not limited to: the advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent. Ramirez-Barker v. Barker, 107 N.C. App. 71, 418 S.E.2d 675 (1992).

Findings as to Relative Abilities of Parties. — The court must make findings as to the relative abilities of the parties to provide support before the court can order a change in the amount of support payments. Daniels v. Hatcher, 46 N.C. App. 481, 265 S.E.2d 429 (1980).

Findings as to Past Expenditures. — The court must make findings of specific facts as to actual past expenditures in order to determine the amount of support necessary to meet the reasonable needs of the child for health, education, and maintenance. Ebron v. Ebron, 40 N.C. App. 270, 252 S.E.2d 235 (1979); Daniels v. Hatcher, 46 N.C. App. 481, 265 S.E.2d 429 (1980); Walker v. Tucker, 69 N.C. App. 607, 317 S.E.2d 923 (1984).

Finding That Father Is Fit. — That the father is a fit person to have sole or joint custody of the children, by itself, is no basis for modifying the order previously entered. Ratley v. Ratley, 99 N.C. App. 219, 392 S.E.2d 653 (1990).

Evaluation of Parties' Fitness. — The trial court, in deciding cases involving the custody of children, may be called upon to evaluate the emotional stability and fitness of the parties. In making such an evaluation, the court, sitting as the trier of fact, may exercise its own reason and common sense, and use the knowledge acquired by its observation and experience in everyday life. O'Briant v. O'Briant, 70 N.C. App. 360, 320 S.E.2d 277 (1984), rev'd on other grounds, 313 N.C. 432, 329 S.E.2d 370 (1985).

Finding of Failure to Prove Change. — While the court must make findings of fact to support its order, it is not required to make findings in addition to a finding that the moving party has failed to prove a change in circumstances sufficient to warrant modification of the custody order. Daniels v. Hatcher, 46 N.C. App. 481, 265 S.E.2d 429 (1980).

Conclusive Effect of Court's Finding. — A court's findings of fact in modifying a child custody order are conclusive on appeal if supported by competent evidence. In re Bowen, 7 N.C. App. 236, 172 S.E.2d 62 (1970); Daniels v. Hatcher, 46 N.C. App. 481, 265 S.E.2d 429 (1980).

The trial judge's findings of fact in custody orders are binding on the appellate courts if supported by competent evidence. Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974); Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123, cert. denied, 298 N.C. 568, 261 S.E.2d 122 (1979).

A finding by the district court that there has been no sufficient change of circumstances to justify modification of a custody order is conclusive and binding on the Court of Appeals if supported by competent evidence. Searl v. Searl, 34 N.C. App. 583, 239 S.E.2d 305 (1977). See also, In re Harrell, 11 N.C. App. 351, 181 S.E.2d 188 (1971).

Wide Discretion Is Vested in the Trial Judge. — Custody cases often involve difficult decisions; however, it is necessary that the trial judge be given wide discretion in making his determination, for the trial judge has the opportunity to see the parties in person and to hear the witnesses. Pruneau v. Sanders, 25 N.C. App. 510, 214 S.E.2d 288, cert. denied, 287 N.C. 664, 216 S.E.2d 911 (1975).

The trial judge, having the opportunity to see and hear the parties and the witnesses, is vested with broad discretion in cases involving the custody of children. O'Briant v. O'Briant, 70 N.C. App. 360, 320 S.E.2d 277 (1984), rev'd on other grounds, 313 N.C. 432, 329 S.E.2d 370 (1985).

And His Decision Will Not Be Upset Absent Abuse. — In determining child custody wide discretion is necessarily vested in the trial judge who has the opportunity to see the parties and hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion. In re Mason, 13 N.C. App. 334, 185 S.E.2d 433 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 513 (1972).

In determining matters of child custody, the trial court is vested with wide discretion, and his decision should not be upset absent a clear showing of an abuse of discretion. Hensley v. Hensley, 21 N.C. App. 306, 204 S.E.2d 228 (1974).

What represents the welfare of the child is frequently a difficult determination and the trial court is in the best position to observe the parties and evaluate the evidence. Therefore, the judgment of the trial court will not be disturbed on appeal if the evidence supports the findings of fact and those findings form a valid basis for the conclusions of law and order. Wehlau v. Witek, 75 N.C. App. 596, 331 S.E.2d 223 (1985).

If Evidence Supports Findings of Fact and Conclusions of Law. — Because the trial court has the opportunity to observe all the parties and evaluate evidence which sometimes appears differently in cold print, if the evidence supports the findings of fact by the trial court and those findings of fact form a valid basis for the conclusions of law, the judgment entered will not be disturbed on appeal. Paschall v. Paschall, 21 N.C. App. 120, 203 S.E.2d 337 (1974).

Even If There Is Evidence to the Contrary. — The scope of appellate review of a trial court's judgment awarding custody of children is well settled: The court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed, even though there is evidence to the contrary, or even though some incompetent evidence may have been admitted. In re Williamson, 32 N.C. App. 616, 233 S.E.2d 677 (1977); O'Briant v. O'Briant, 70 N.C. App. 360, 320 S.E.2d 277 (1984), rev'd on other grounds, 313 N.C. 432, 329 S.E.2d 370 (1985).

The court's findings in modifying a custody decree are conclusive if supported by competent evidence, even if there is evidence contra or incompetent evidence in the record. Best v. Best, 81 N.C. App. 337, 344 S.E.2d 363 (1986), overruled on other grounds, Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994); Vuncannon v. Vuncannon, 82 N.C. App. 255, 346 S.E.2d 274 (1986).

But the trial court may not sua sponte enter an order modifying a previously entered custody decree. Kennedy v. Kennedy, 107 N.C. App. 695, 421 S.E.2d 795 (1992).

Good Faith Finding Required. — Determination of the trial court that it was not necessary to make a finding of bad faith in reduction of income where the party seeking support modification was the custodial parent was not supported by current case law, nor was the trial court correct in concluding that when a custodial parent sought a change of child support based upon a reduction in income, that custodial parent had to request the court to make a finding of fact as to his or her good faith. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Must Be Sufficient Evidence of Proscribed Intent. — A trial court's conclusion underlying imposition of the earnings capacity rule must be based upon evidence that the actions which reduced the party's income were not taken in good faith. There must be sufficient evidence of the proscribed intent. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Error to Reduce Arrearage Absent Findings or Evidence. — Without the requisite, specific findings or evidence in the record on the child's needs and expenses, or on the relative abilities of the parties to provide support, the trial court erred in reducing the child support arrearage. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Modification Improper Without Sufficient Findings of Fact. — Without a finding of a substantial change of circumstances, a modification based solely on the ground that the defendant mother was over-protective was improper. Benedict v. Coe, 117 N.C. App. 369, 451 S.E.2d 320 (1994).

Court's Discretion To Permit Relocation. — Although most relocations will present both advantages and disadvantages for the child, when the disadvantages are outweighed by the advantages, as determined and weighed by the trial court, the trial court is well within its discretion to permit the relocation. Ramirez-Barker v. Barker, 107 N.C. App. 71, 418 S.E.2d 675 (1992).

Findings Held Insufficient. — In an action seeking an increase in child support over the amount set forth in separation agreement, the order which contained no specific findings with respect to the actual past or present expenses incurred for the support of the children was insufficient to support the court's conclusion that the reasonable needs of the children amounted to $2,800.00 per month. Holderness v. Holderness, 91 N.C. App. 118, 370 S.E.2d 602 (1988).

Where the factors listed by the trial court as dispositive on the substantial change of circumstance requirement were oriented toward parental fitness, not adverse alterations of the children's welfare, and were bare observations of plaintiff's or defendant's actions, not examples of how those actions adversely impacted the children, the findings, without more, did not meet the standard required to show circumstances must be so changed that the welfare of the child would be adversely affected unless the custody provision was modified. Garrett v. Garrett, 121 N.C. App. 192, 464 S.E.2d 716 (1995).

Award of additional retroactive child support for private schooling was denied where the trial court's limited findings failed to set forth the existence of a "sudden emergency" so unusual or extraordinary as to require plaintiff to expend sums in excess of defendant's existing support obligation, and the court's order contained no findings reflective of defendant's ability to pay during the period the emergency expenses were allegedly incurred. Biggs v. Greer, 136 N.C. App. 294, 524 S.E.2d 577, 2000 N.C. App. LEXIS 13 (2000).

While the record indicated that there may have been evidence to support the visitation decree, the trial court's sparse findings of fact did not support it; the findings, standing alone, were not sufficient to support the extension of physical, telephonic, and electronic visitation. Lamond v. Mahoney, 159 N.C. App. 400, 583 S.E.2d 656, 2003 N.C. App. LEXIS 1501 (2003).

A case involving a motion to modify child support under G.S. 50-13.7, was remanded for further findings of fact because, in entering an order deviating from the North Carolina Child Support Guidelines, the trial court did not make sufficient findings of fact regarding the reasonable needs of the children; the order only made findings regarding health insurance and the fact that the children did not need private schooling. Beamer v. Beamer, 169 N.C. App. 594, 610 S.E.2d 220, 2005 N.C. App. LEXIS 673 (2005).

When a father sought a modification of child support, remand was required because without a specific finding as to the father's income at the time of the hearing, the issue of whether his income had been involuntarily decreased could not be resolved. Armstrong v. Droessler, 177 N.C. App. 673, 630 S.E.2d 19, 2006 N.C. App. LEXIS 1221 (2006).

Trial court impermissibly modified child custody without finding a substantial change in circumstances; despite re-captioning the contempt order as one modifying custody, the trial court denied both parties an opportunity to submit evidence or present arguments regarding custody modification. In addition, the trial court made no findings of fact or conclusion of law regarding a substantial change in circumstances affecting the welfare of the minor child, only a best interest conclusion. Jackson v. Jackson, — N.C. App. —, 665 S.E.2d 545, 2008 N.C. App. LEXIS 1631 (2008).

VI. JURISDICTION.

Editor's Note. — *The cases cited below were decided prior to enactment of the Uniform Child Custody Jurisdiction Act, former G.S. 50A-1 et seq., and prior to enactment of the Uniform Child-Custody Jurisdiction and Enforcement Act, G.S. 50A-101 et seq.*

First Court to Acquire Jurisdiction Retains Jurisdiction. — Except as provided in G.S. 50-13.5(f), the ordinary rule of civil procedure applies to this section, namely, that the first court to acquire jurisdiction of a cause retains jurisdiction, to the exclusion of other courts. Thus, if a judgment involving the custody and the support of a minor child has been entered in this State, the judge trying a subsequent action for absolute divorce may not interfere with the earlier judgment. Only the court of this State which entered the earlier judgment for custody and support of the minor child may modify or vacate it, upon a motion in the cause and a showing of a change of circumstances. Tate v. Tate, 9 N.C. App. 681, 177 S.E.2d 455 (1970).

Section 50-13.5(f) contemplates only the institution of an action for custody and support. It does not affect the situation where custody and support have already been determined and one of the parties seeks a modification of the order establishing custody and support. In such a case, the court first obtaining jurisdiction retains jurisdiction to the exclusion of all other courts and is the only proper court to bring an action for the modification of an order establishing custody and support. Tate v. Tate, 9 N.C. App. 681, 177 S.E.2d 455 (1970).

Filing of a motion in a cause in which the court has not acquired jurisdiction does not serve to confer jurisdiction under this section. Hopkins v. Hopkins, 8 N.C. App. 162, 174 S.E.2d 103 (1970).

What Plaintiff Must Show to Obtain Modification of Another State's Order. — In order to invoke the aid of subsection (b) of this section, governing the entry of a new order for child custody or support modifying or superseding an order entered by a court of another state, a plaintiff must show (1) jurisdiction and (2) changed circumstances. Hopkins v. Hopkins, 8 N.C. App. 162, 174 S.E.2d 103 (1970).

For cases as to full faith and credit accorded to out-of-state decrees, decided prior to enactment of the Uniform Child Custody Jurisdiction Act, G.S. 50A-1 et seq., see Thomas v. Thomas, 248 N.C. 269, 103 S.E.2d 371 (1958); In re Marlowe, 268 N.C. 197, 150 S.E.2d 204 (1966); Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969); In re Kluttz, 7 N.C. App. 383, 172 S.E.2d 95 (1970).

Presence of Child. — For cases as to the effect of the presence of the child in this State on the jurisdiction of the courts of this State, decided prior to enactment of the Uniform Child Custody Jurisdiction Act, G.S. 50A-1 et seq., see Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969); Spence v. Durham, 283 N.C. 671, 198 S.E.2d 537 (1973), cert. denied, 415 U.S. 918, 94 S. Ct. 1417, 39 L. Ed. 2d 473 (1974); Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975); Pruneau v. Sanders, 25 N.C. App. 510, 214 S.E.2d 288, cert. denied, 287 N.C. 664, 216 S.E.2d 911 (1975).

VII. PROCEDURE.

This section provides the procedural mechanism permitting modification. Goodhouse v. DeFravio, 57 N.C. App. 124, 290 S.E.2d 751 (1982).

Reduction of Support Without Notice and Hearing Unconstitutional. — In an action seeking enforcement of the provisions of a separation agreement relating to child support, reduction of the child support payments without a proper proceeding and notice and opportunity to be heard deprived plaintiff of her constitutional rights under the due process provisions of the State and federal constitutions. Mann v. Mann, 57 N.C. App. 587, 291 S.E.2d 794 (1982).

Reliance on Previous Adjudication Order Sufficient. — Trial court's finding of fact and conclusions of law that, based on a previous adjudication order, the order granting the father exclusive custody of the children was in the best interests of the children was sufficient to support the modification pursuant to G.S. 50-13.7. In re A.S., 182 N.C. App. 139, 641 S.E.2d 400, 2007 N.C. App. LEXIS 484 (2007).

Valid Custody Order May Not Be Collaterally Modified. — A valid order awarding custody of the child of the marriage is conclusive upon the parties and may not be modified collaterally by a petition praying that the child's custody be awarded to petitioner during a certain period. Robbins v. Robbins, 266 N.C. 635, 146 S.E.2d 671 (1966).

A child support order may be modified or vacated only after an equitable distribution. Dorton v. Dorton, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

Modification of child support would be vacated and remanded where it was part of an equitable distribution judgment and thus appeared to have been decided and entered at the same time as the equitable distribution, rather than after the equitable distribution as required by subsection (f) of G.S. 50-20. Dorton v. Dorton, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

Proceeding Where Divorce Was Awarded Outside State. — When the parents were divorced outside this State, either parent may have the question of custody as between them determined in a special proceeding. In re Sauls, 270 N.C. 180, 154 S.E.2d 327 (1967). See also, § 50A-1 et seq.

Standing of County in Modification Action. — Where plaintiff mother, who received public assistance under the Aid to Families with Dependent Children Program, assigned to county her right to receive any support on behalf of her children, the county, by virtue of the assignment pursuant to G.S. 110-137, had an interest in the order for the support of plaintiff's children. Therefore, under subsection (a) of this section, the county had standing to make a motion in an action between plaintiff mother and defendant father to modify a child support order to require that the support be paid to the county. Cox v. Cox, 44 N.C. App. 339, 260 S.E.2d 812 (1979).

Premature Request for Modification. — Plaintiff's request that trial court alter provisions in incorporated separation agreement for modification of child support payments and payments for wife's separate maintenance after July, 1990, was properly denied as premature where the date in question had not yet occurred. Theokas v. Theokas, 97 N.C. App. 626, 389 S.E.2d 278 (1990).

Proper procedure to follow when a supported child reaches majority is to apply to the trial court for relief under this section. Tilley v. Tilley, 30 N.C. App. 581, 227 S.E.2d 640 (1976).

A husband had no authority to unilaterally attempt his own modification of child support payments upon one of his children reaching the age of 18, and being no longer a "minor" under G.S. 48A-2, even though the support order directed the husband to pay support for "his two minor children. . . ." The proper procedure for the husband to follow would have been to apply to the trial court for relief pursuant to this section. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Procedure and Contents of Order for Retrospective Increase. — An order for retrospective increase of an existing child support order must set out a conclusion of law that there was a substantial and material change in circumstances affecting the welfare of the child occasioned by a sudden emergency so as to warrant such an increase. The court's conclusion of law must be sustained by specific factual findings based upon competent evidence, reflecting the actual amount disbursed by a party within three years or less of the date of filing of the current motion, towards reasonably necessary expenditures made on behalf of the child. The findings also must reflect the ability to pay of the parent subject to the motion during the period for which increased support is sought. Biggs v. Greer, 136 N.C. App. 294, 524 S.E.2d 577, 2000 N.C. App. LEXIS 13 (2000).

Court Not Required to Weigh Children's Needs Against Obligor's Ability to Pay Absent Request by Obligor. — Grant of motion to modify obligor's child support was proper, because, inter alia, there had been a substantial change in circumstances in that it had been more than three years since the calculation of the obligor's child support obligation and the current obligations calculation was greater than 15 % of the prior obligation calculation, and trial court made findings concerning the obligor's earning capacity, but was not required to weigh the children's needs against the obligor's ability to pay the amount of support where the obligor did not request a deviation requiring the trial court to make such findings. Head v. Mosier, — N.C. App. —, 677 S.E.2d 191, 2009 N.C. App. LEXIS 669 (2009).

Arbitration. — While, in the absence of court proceedings, parties may settle their disputes by arbitration, once the issues are brought into court, the court may not delegate its duty to resolve those issues to arbitration. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Where the only issue before the trial court was the custody of plaintiff's and defendant's son and there was no motion to modify the child support, the trial court was without authority to issue an order modifying an earlier consent order setting child support. Royall v. Sawyer, 120 N.C. App. 880, 463 S.E.2d 578 (1995).

Attorney's Fees. — In an action by a mother to modify a father's child support pursuant to G.S. 50-13.7(a), the trial court properly granted attorney's fees to the mother pursuant to G.S. 50-13.6, because the trial court specifically found as a fact that the mother was a party acting in good faith to obtain reasonable support for her daughter, that the mother lacked sufficient means to pay her attorney fees, and that the father refused to provide support which was reasonable under the circumstances. Mason v. Erwin, 157 N.C. App. 284, 579 S.E.2d 120, 2003 N.C. App. LEXIS 641 (2003).

Appeal. — Where an initial custody order awarded custody of a child to the paternal grandmother and the mother's motion to modify custody was denied, the appellate court could not consider the mother's challenge to the initial custody order because the mother's notice of appeal from the denial of the motion to modify made no reference to the initial order and did not properly present the underlying judgment for review. Warner v. Brickhouse, 189 N.C. App. 445, 658 S.E.2d 313, 2008 N.C. App. LEXIS 649 (2008).

§ 50-13.7A. Custody and visitation upon military temporary duty, deployment, or mobilization.

(a) Purpose. — It is the purpose of this section to provide a means by which to facilitate a fair, efficient, and swift process to resolve matters regarding custody and visitation when a parent receives temporary duty, deployment, or mobilization orders from the military.

(b) Definitions. — As used in this section:

(1) The term "deployment" means the temporary transfer of a service member serving in an active-duty status to another location in support of combat or some other military operation.

(2) The term "mobilization" means the call-up of a National Guard or Reserve service member to extended active duty status. For purposes of this definition, "mobilization" does not include National Guard or Reserve annual training.

(3) The term "temporary duty" means the transfer of a service member from one military base to a different location, usually another base, for a limited period of time to accomplish training or to assist in the performance of a noncombat mission.

(c) Custody. — When a parent who has custody, or has joint custody with primary physical custody, receives temporary duty, deployment, or mobilization orders from the military that involve moving a substantial distance from the parent's residence or otherwise have a material effect on the parent's ability to exercise custody responsibilities:

(1) Any temporary custody order for the child during the parent's absence shall end no later than 10 days after the parent returns, but shall not impair the discretion of the court to conduct a hearing for emergency custody upon return of the parent and within 10 days of the filing of a verified motion for emergency custody alleging an immediate danger of irreparable harm to the child; and

(2) The temporary duty, mobilization, or deployment and the temporary disruption to the child's schedule shall not be a factor in a determination of change of circumstances if a motion is filed to transfer custody from the service member.

(d) Visitation. — If the parent with visitation rights receives military temporary duty, deployment, or mobilization orders that involve moving a substantial distance from the parent's residence or otherwise have a material effect on the parent's ability to exercise visitation rights, the court may delegate the parent's visitation rights, or a portion thereof, to a family member with a close and substantial relationship to the minor child for the duration of the parent's absence, if delegating visitation rights is in the child's best interest.

(e) Expedited Hearings. — Upon motion of a parent who has received military temporary duty, deployment, or mobilization orders, the court shall, for good cause shown, hold an expedited hearing in custody and visitation matters instituted under this section when the military duties of the parent have a material effect on the parent's ability, or anticipated ability, to appear in person at a regularly scheduled hearing.

(f) Electronic Communications. — Upon motion of a parent who has received military temporary duty, deployment, or mobilization orders, the court shall, upon reasonable advance notice and for good cause shown, allow the parent to present testimony and evidence by electronic means in custody and visitation matters instituted under this section when the military duties of the parent have a material effect on the parent's ability to appear in person at a regularly scheduled hearing. The phrase "electronic means" includes communication by telephone, video teleconference, or the Internet.

(g) [Best Interest of the Child. —] Nothing in this section shall alter the duty of the court to consider the best interest of the child in deciding custody or visitation matters. (2007-175, s. 2.)

Editor's Note. — Subsection (g) has been set out in the form above at the direction of the Revisor of Statutes.

The preamble to Session Laws 2007-175 provides: "Whereas, currently there are six major military bases in North Carolina; and

"Whereas, the military population of this State is the fourth largest in the nation, with active-duty service members numbering over 100,000; and

"Whereas, temporary duty, the deployment of an active-duty service member, or the mobilization of a member of the National Guard or Reserves, sometimes with little advance notice, can have a disruptive effect on custody or visitation arrangements involving minor children of service members; and

"Whereas, service members should be protected, as should their minor children, from the loss of custodial arrangements and disruption of family contact due to the service member's absence pursuant to military orders for temporary duty, deployment, or mobilization; and

"Whereas, other members of a service member's family, such as parents or current spouses, can provide love, comfort, care, and continuity to the service member's child through delegated visitation when a service member is absent due to military orders; and

"Whereas, the regular scheduling of hearings may be harmful to the interest of service members who, due to military orders, may need to have an expedited hearing or may need to use electronic means to give testimony when they cannot appear in person in court; and

"Whereas, the use of expedited hearings and testimony by electronic means, at the request of the service member who is absent or about to depart, would aid and promote fair, efficient, and prompt judicial processes for the resolution of family law matters; Now, therefore,"

Session Laws 2007-175, s. 3, made this section effective October 1, 2007, and applicable to custody or visitation actions instituted on or after that date.

§ 50-13.8. Custody of persons incapable of self-support upon reaching majority.

For the purposes of custody, the rights of a person who is mentally or physically incapable of self-support upon reaching his majority shall be the same as a minor child for so long as he remains mentally or physically incapable of self-support. (1967, c. 1153, s. 2; 1971, c. 218, s. 3; 1973, c. 476, s. 133; 1979, c. 838, s. 29; 1989, c. 210.)

Legal Periodicals. — For survey of 1972 caselaw on child support and pre-Chapter 48A consent judgments, see 51 N.C.L. Rev. 1091 (1973).

CASE NOTES

Termination of Obligation to Support. — Since the enactment of Chapter 48A in 1971, the decisions of the court and the Supreme Court have concluded that the father's legal obligation to support his child ceases when the child reaches the age of 18, provided that it is not shown that the child is insolvent, unmarried, and physically or mentally incapable of earning a livelihood. Nolan v. Nolan, 20 N.C. App. 550, 202 S.E.2d 344, cert. denied, 285 N.C. 234, 204 S.E.2d 24 (1974).

In the absence of an enforceable contract otherwise obligating a parent, North Carolina courts have no authority to order child support for a child who has attained the age of majority, unless the child has not completed secondary schooling, or, pursuant to this section, the child is mentally or physically incapable of self-support. Bridges v. Bridges, 85 N.C. App. 524, 355 S.E.2d 230 (1987).

Continuance of Obligation. — Ordinarily the law presumes that when a child reaches the age of 21 years (now 18 years) he will be capable of maintaining himself, and in such case the obligation of the father to provide support terminates. But where this presumption is rebutted by the fact of mental or physical incapacity, it no longer obtains, and the obligation of the father continues. Speck v. Speck, 5 N.C. App. 296, 168 S.E.2d 672 (1969).

Father Held Not Obligated to Support Mentally Retarded Son Beyond Twentieth Birthday. — Where petitioner mother moved the court to require respondent father to continue to pay child support for their mentally retarded son beyond his twentieth birthday and court ordered respondent to pay $600.00 per month continuing ongoing child support without regard to the child's chronological age in light of the plain and definite meaning of the section, the trial court erred and respondent was not obligated to support his son beyond his twentieth birthday. Yates v. Dowless, 93 N.C. App. 787, 379 S.E.2d 79, aff'd, 325 N.C. 703, 386 S.E.2d 200 (1989).

Defendant's Obligation Abrogated by Amendment of Section. — Where defendant's obligation, set out in a consent judgment, to continue supporting his disabled child beyond her minority had been abrogated by the 1979 amendment of this section, which eliminated the requirement compelling parents to continue supporting their disabled children beyond their minority, and he had not contracted to continue the payments apart from that obligation, an order requiring defendant to continue supporting the child had no legal basis. Jackson v. Jackson, 102 N.C. App. 574, 402 S.E.2d 869 (1991).

Failure of Action for Support for College Education to State Claim for Relief. — A daughter, over 18 years of age, who graduated from high school and who brought an action against her father to obtain support for her college education, failed to state a claim for relief, since North Carolina courts do not have authority to order child support for children who have reached their majority. Appelbe v. Appelbe, 75 N.C. App. 197, 330 S.E.2d 57, cert. denied, 314 N.C. 662, 336 S.E.2d 399 (1985).

Cited in Crouch v. Crouch, 14 N.C. App. 49, 187 S.E.2d 348 (1972).

§ 50-13.9. Procedure to insure payment of child support.

(a) Upon its own motion or upon motion of either party, the court may order at any time that support payments be made to the State Child Support Collection and Disbursement Unit for remittance to the party entitled to receive the payments. For child support orders initially entered on or after January 1, 1994, the immediate income withholding provisions of G.S. 110-136.5(c1) apply.

(b) After entry of an order by the court under subsection (a) of this section, the State Child Support Collection and Disbursement Unit shall transmit child support payments that are made to it to the custodial parent or other party entitled to receive them, unless a court order requires otherwise.

(b1) In a IV-D case:

(1) The designated child support enforcement agency shall have the sole responsibility and authority for monitoring the obligor's compliance with all child support orders in the case and for initiating any enforcement procedures that it considers appropriate.
(2) The clerk of court shall maintain all official records in the case.
(3) The designated child support enforcement agency shall maintain any other records needed to monitor the obligor's compliance with or to enforce the child support orders in the case, including records showing the amount of each payment of child support received from or on behalf of the obligor, along with the dates on which each payment was received. In any action establishing, enforcing, or modifying a child support order, the payment records maintained by the designated child support agency shall be admissible evidence, and the court shall permit the designated representative to authenticate those records.

(b2) In a non-IV-D case:
(1) Repealed by Session Laws 2005, ch. 389, s. 1.
(2) The clerk of court shall maintain all official records and all case data concerning child support matters previously enforced by the clerk of court.
(3) Repealed by Session Laws 2005, ch. 389, s. 1.

(c) In a IV-D case, the parties affected by the order shall inform the designated child support enforcement agency of any change of address or other condition that may affect the administration of the order. The court may provide in the order that a party failing to inform the court or, as appropriate, the designated child support enforcement agency, of a change of address within a reasonable period of time may be held in civil contempt.

(d) Upon affidavit of an obligee, the clerk or a district court judge may order the obligor to appear and show cause why the obligor should not be subjected to income withholding or adjudged in contempt of court, or both. The order shall require the obligor to appear and show cause why the obligor should not be subjected to income withholding or adjudged in contempt of court, or both, and shall order the obligor to bring to the hearing records and information relating to the obligor's employment, the obligor's licensing privileges, and the amount and sources of the obligor's disposable income. The order shall state:
(1) That the obligor is under a court order to provide child support, the name of each child for whose benefit support is due, and information sufficient to identify the order;
(2) That the obligor is delinquent and the amount of overdue support;
(2a) That the court may order the revocation of some or all of the obligor's licensing privileges if the obligor is delinquent in an amount equal to the support due for one month;
(3) That the court may order income withholding if the obligor is delinquent in an amount equal to the support due for one month;
(4) That income withholding, if implemented, will apply to the obligor's current payors and all subsequent payors and will be continued until terminated pursuant to G.S. 110-136.10;
(5) That failure to bring to the hearing records and information relating to his employment and the amount and sources of his disposable income will be grounds for contempt;
(6) That if income withholding is not an available or appropriate remedy, the court may determine whether the obligor is in contempt or whether any other enforcement remedy is appropriate.

The order may be signed by the clerk or a district court judge, and shall be served on the obligor pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure. On motion of the person to whom support is owed in a non-IV-D case, with the approval of the district court judge, if the district court judge finds it is in the best interest of the child, no order shall be issued.

(e), (f) Repealed by Session Laws 2005-389, s. 1.

(g) Nothing in this section shall preclude the independent initiation by a party of proceedings for civil contempt or for income withholding. (1983, c. 677, s. 1; 1985 (Reg. Sess., 1986), c. 949, ss. 3-6; 1989, c. 479; 1993, c. 517, s. 6; c. 553, s. 67.1; 1995, c. 444, s. 1; c. 538, s. 1.2; 1997-443, s. 11A.118(a); 1999-293, ss. 11-14; 2001-237, s. 7; 2005-389, s. 1; 2006-264, s. 97.)

§ 50-13.10. Past due child support vested; not subject to retroactive modification; entitled to full faith and credit.

(a) Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this State or any other state, except that a child support obligation may be modified as otherwise provided by law, and a vested past due payment is to that extent subject to divestment, if, but only if, a written motion is filed, and due notice is given to all parties either:

(1) Before the payment is due or
(2) If the moving party is precluded by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason from filing a motion before the payment is due, then promptly after the moving party is no longer so precluded.

(b) A past due child support payment which is vested pursuant to G.S. 50-13.10(a) is entitled, as a judgment, to full faith and credit in this State and any other state, with the full force, effect, and attributes of a judgment of this State, except that no arrearage shall be entered on the judgment docket of the clerk of superior court or become a lien on real estate, nor shall execution issue thereon, except as provided in G.S. 50-13.4(f)(8) and (10).

(c) As used in this section, "child support payment" includes all payments required by court or administrative order in civil actions and expedited process proceedings under this Chapter, by court order in proceedings under Chapter 49 of the General Statutes, and by agreements entered into and approved by the court under G.S. 110-132 or G.S. 110-133.

(d) For purposes of this section, a child support payment or the relevant portion thereof, is not past due, and no arrearage accrues:

(1) From and after the date of the death of the minor child for whose support the payment, or relevant portion, is made;
(2) From and after the date of the death of the supporting party;
(3) During any period when the child is living with the supporting party pursuant to a valid court order or to an express or implied written or oral agreement transferring primary custody to the supporting party;
(4) During any period when the supporting party is incarcerated, is not on work release, and has no resources with which to make the payment.

(e) When a child support payment that is to be made to the State Child Support Collection and Disbursement Unit is not received by the Unit when due, the payment is not a past due child support payment for purposes of this section, and no arrearage accrues, if the payment is actually made to and received on time by the party entitled to receive it and that receipt is evidenced by a canceled check, money order, or contemporaneously executed and dated written receipt. Nothing in this section shall affect the duties of the clerks or the IV-D agency under this Chapter or Chapter 110 of the General Statutes with respect to payments not received by the Unit on time, but the court, in any action to enforce such a payment, may enter an order directing the clerk or the IV-D agency to enter the payment on the clerk's or IV-D agency's records as having been made on time, if the court finds that the payment was in fact received by the party entitled to receive it as provided in this subsection. (1987, c. 739, s. 4; 1999-293, s. 15.)

Cross References. — As to liens on real and personal property of persons owing past due child support, see G.S. 44-86. As to discharge of liens on property of persons owing past due child support, see G.S. 44-87. As to legislation deleting the June 30, 1998 expiration date for all enactments and amendments by Session Laws 1997-433, see the editor's note under G.S. 44-86.

Legal Periodicals. — For article, "Using Hindsight to Change Child Support Obligations: A Survey of Retroactive Modification and Reimbursement of Child Support in North Carolina," see 10 Campbell L. Rev. 111 (1987).

CASE NOTES

Modification When One of Several Children Reaches Age 18. — While child support obligations ordered by a court terminate upon the child reaching age 18, unless the child is otherwise emancipated prior to reaching age 18 or the trial court in its discretion continues to enforce the payment obligation after the child reaches age 18 and while the child is in primary or secondary school, when one of two or more minor children for whom support is ordered reaches age 18, and when the support ordered to be paid is not allocated as to each individual child, the supporting parent has no authority to unilaterally modify the amount of the child support payment. The supporting parent must apply to the trial court for modification. Craig v. Craig, 103 N.C. App. 615, 406 S.E.2d 656 (1991).

Cases holding that where one of two minor children reaches the age of 18, a trial court may retroactively modify child support arrearages when equitable considerations exist which would create an injustice if modification is not allowed, were decided before this section became effective on October 1, 1987. Under this statute, if the supporting party is not disabled or incapacitated as provided by subdivision (a)(2), a past due, vested child support payment is subject to divestment only as provided by law, and if, but only if, a written motion is filed, and due notice is given to all parties before the payment is due. Craig v. Craig, 103 N.C. App. 615, 406 S.E.2d 656 (1991).

Retroactive Modification of Support Payments. — Child support payments may not be reduced retroactively so as to grant relief from arrearages, absent a compelling reason. Van Nynatten v. Van Nynatten, 113 N.C. App. 142, 438 S.E.2d 417 (1993).

It was error to reduce a parent's child support arrearage by an amount that represented past public assistance paid before the parent knew about the child because that reason did not meet any of the statutory conditions for retroactive reduction. Orange County ex rel. Harris v. Keyes, 158 N.C. App. 530, 581 S.E.2d 142, 2003 N.C. App. LEXIS 1188 (2003).

Expenses Already Incurred. — The General Assembly did not intend to equate retroactive payments with expenses already incurred. Thus, this section was not applicable and did not require plaintiff to file a motion to modify the support order before the minor child was hospitalized and had incurred medical expenses. Lawrence v. Nantz, 115 N.C. App. 478, 445 S.E.2d 87 (1994).

Oral agreement to modify child support payments would not justify noncompliance with the statute, and an obligor parent would still be required to apply to the court before altering his payments. Van Nynatten v. Van Nynatten, 113 N.C. App. 142, 438 S.E.2d 417 (1993).

Equitable Estoppel Did Not Bar Claim for Past Support. — Even assuming that on some set of facts equitable estoppel might properly bar a claim for child support arrears, it was inapplicable where husband, seeking to rely on equitable estoppel could not show that, in good faith reliance on the conduct of his ex-wife, he had changed his position for the worse; the only change made in his position was the retention to his benefit of money owed for the support of his children. Griffin v. Griffin, 96 N.C. App. 324, 385 S.E.2d 526 (1989).

Mother did not establish that she relied to her detriment on the parties' agreement to reduce child support; since the support order was not judicially modified, the separation agreement remained in full force and effect. Baker v. Showalter, 151 N.C. App. 546, 566 S.E.2d 172, 2002 N.C. App. LEXIS 776 (2002).

Full Faith and Credit. — Where the only issue was arrearages, a North Carolina trial court erred in failing to give full faith and credit to an Oregon child support order; the trial court's duty was to enforce the Oregon order until a subsequent North Carolina order was entered, and then to enforce a father's child support arrearages under both orders. New Hanover County v. Kilbourne, 157 N.C. App. 239, 578 S.E.2d 610, 2003 N.C. App. LEXIS 639 (2003).

Where defendant made no motion for modification of a foreign support order, the North Carolina trial court was without authority to modify, in any way for any reason, past due child support payments; and defendant was not entitled to credit for any sums given directly to the child outside of the foreign support order. Pieper v. Pieper, 108 N.C. App. 722, 425 S.E.2d 435 (1993).

Modification Not Retroactive. — Where plaintiff filed her motion to modify the child support payments on March 27, 1991 and the trial court entered an order on February 18, 1993 increasing defendant's child support obligation from $800 per month to $1,230 per month effective April 1, 1991, the trial court noted that on the the date this order was entered, the effective date of the time the payments were to begin had passed and ordered defendant to pay $9,890 to the Clerk of Superior Court representing the increase in child support payments for the months of April, 1991 through February, 1993; because April, 1991 was subsequent to the March 27, 1991 filing of the plaintiff's motion, the trial court's order was not a retroactive modification. Mackins v. Mackins, 114 N.C. App. 538, 442 S.E.2d 352, cert. denied, 337 N.C. 694, 448 S.E.2d 527 (1994).

Evidence of Emergency Situation. — A child support payment may not be retroactively increased without evidence of some emergency situation that required the expenditure of sums in excess of the amount of child support paid. Mackins v. Mackins, 114 N.C. App. 538, 442 S.E.2d 352, cert. denied, 337 N.C. 694, 448 S.E.2d 527 (1994).

Modification on Amount Accrued After Filing. — A trial court has the discretion to make a modification of a child support order effective from the date a petition to modify is filed as to support obligations that accrue after such date. Mackins v. Mackins, 114 N.C. App. 538, 442 S.E.2d 352, cert. denied, 337 N.C. 694, 448 S.E.2d 527 (1994).

Interest may be awarded on child support accruing on the date the complaint is filed. Taylor v. Taylor, 128 N.C. App. 180, 493 S.E.2d 819 (1997).

Applied in Williams v. Williams, 105 N.C. App. 615, 414 S.E.2d 80 (1992); Transylvania County Dep't of Social Servs. v. Connolly, 115 N.C. App. 34, 443 S.E.2d 892 (1994).

Cited in Tate v. Tate, 95 N.C. App. 774, 384 S.E.2d 48 (1989); Sikes v. Sikes, 330 N.C. 595, 411 S.E.2d 588 (1992); Snipes v. Snipes, 118 N.C. App. 189, 454 S.E.2d 864 (1995); Kelly v. Otte, 123 N.C. App. 585, 474 S.E.2d 131 (1996); Chused v. Chused, 131 N.C. App. 668, 508 S.E.2d 559 (1998); Biggs v. Greer, 136 N.C. App. 294, 524 S.E.2d 577, 2000 N.C. App. LEXIS 13 (2000).

§ 50-13.11. Orders and agreements regarding medical support and health insurance coverage for minor children.

(a) The court may order a parent of a minor child or other responsible party to provide medical support for the child, or the parties may enter into a written agreement regarding medical support for the child. An order or agreement for medical support for the child may require one or both parties to pay the medical, hospital, dental, or other health care related expenses.

(a1) The court shall order the parent of a minor child or other responsible party to maintain health insurance for the benefit of the child when health insurance is available at a reasonable cost. If health insurance is not presently available at a reasonable cost, the court shall order the parent of a minor child or other responsible party to maintain health insurance for the benefit of the child when health insurance becomes available at a reasonable cost. As used in this subsection, health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of service delivery mechanism. The court may require one or both parties to maintain dental insurance.

(b) The party ordered or under agreement to provide health insurance shall provide written notice of any change in the applicable insurance coverage to the other party.

(c) The employer or insurer of the party required to provide health, hospital, and dental insurance shall release to the other party, upon written request, any information on a minor child's insurance coverage that the employer or insurer may release to the party required to provide health, hospital, and dental insurance.

(d) When a court order or agreement for health insurance is in effect, the signature of either party shall be valid authorization to the insurer to process an insurance claim on behalf of a minor child.

(e) If the party who is required to provide health insurance fails to maintain the insurance coverage for the minor child, the party shall be liable for any health, hospital, or dental expenses incurred from the date of the court order or agreement that would have been covered by insurance if it had been in force.

(f) When a noncustodial parent ordered to provide health insurance changes employment and health insurance coverage is available through the new employer, the obligee shall notify the new employer of the noncustodial parent's obligation to provide health insurance for the child. Upon receipt of notice from the obligee, the new employer shall enroll the child in the employer's health insurance plan. (1989 (Reg. Sess., 1990), c. 1067, s. 1; 1991, c. 419, s. 2; c. 761, s. 42; 1997-433, s. 3.1; 1998-17, s. 1; 2003-288, s. 3.2.)

CASE NOTES

The trial court committed reversible error in ordering the defendant to carry health insurance for his five minor children by three different mothers without first determining its availability at a reasonable cost. The trial court has no discretion outside this section to order a parent to provide health insurance, not even under G.S. 50-13.11(a) in the guise of "medical support." Buncombe County ex rel. Blair v. Jackson, 138 N.C. App. 284, 531 S.E.2d 240, 2000 N.C. App. LEXIS 608 (2000).

Cited in Lawrence v. Nantz, 115 N.C. App. 478, 445 S.E.2d 87 (1994).

OPINIONS OF ATTORNEY GENERAL

Medical Child Support Provisions. — The medical child support enforcement provisions of House Bill 1563, 1993 (Reg. Sess., 1994), N.C. Session Laws c. 644, are inapplicable to the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan (now State Health Plan for Teachers and State Employees) and the governmental entities whose employees and retirees, along with their dependents, are eligible for coverage under the Plan or its HMO option. Medical child support orders nonetheless may be enforced directly against State employees and retirees who fail to enroll, or maintain coverage for, their eligible dependent children under the State Health Plan in accordance with the provisions of G.S. 50-13.4(f), 50-13.9 and this section. See opinion of Attorney General to Patricia Crawford, Associate General Counsel, University of North Carolina at Chapel Hill, — N.C.A.G. — (August 10, 1995).

§ 50-13.12. Forfeiture of licensing privileges for failure to pay child support or for failure to comply with subpoena issued pursuant to child support or paternity establishment proceedings.

(a) As used in this section, the term:

(1) "Licensing board" means a department, division, agency, officer, board, or other unit of state government that issues hunting, fishing, trapping, drivers, or occupational licenses or licensing privileges.

(2) "Licensing privilege" means the privilege of an individual to be authorized to engage in an activity as evidenced by hunting, fishing, or trapping licenses, regular and commercial drivers licenses, and occupational, professional, and business licenses.

(3) "Obligee" means the individual or agency to whom a duty of support is owed or the individual's legal representative.

(4) "Obligor" means the individual who owes a duty to make child support payments under a court order.

(5) "Occupational license" means a license, certificate, permit, registration, or any other authorization issued by a licensing board that allows an obligor to engage in an occupation or profession.

(b) Upon a finding by the district court judge that the obligor is willfully delinquent in child support payments equal to at least one month's child support, or upon a finding that a person has willfully failed to comply with a subpoena issued pursuant to a child support or paternity establishment proceeding, and upon findings as to any specific licensing privileges held by the obligor or held by the person subject to the subpoena, the court may revoke some or all of such privileges until the obligor shall have paid the delinquent amount in full, or, as applicable, until the person subject to the subpoena has complied with the subpoena. The court may stay any such revocation pertaining to the obligor upon conditions requiring the obligor to make full payment of the delinquency over time. Any such stay shall further be conditioned upon the obligor's maintenance of current child support. The court may stay the revocation pertaining to the person subject to the subpoena upon a finding that the person has complied with or is no longer subject to the subpoena. Upon an order revoking such privileges of an obligor that does not stay the revocation, the clerk of superior court shall notify the appropriate licensing board that the obligor is delinquent in child support payments and that the obligor's licensing privileges are revoked until such time as the licensing board receives proof of certification by the clerk that the obligor is no longer delinquent in child support payments. Upon an order revoking such privileges of a person subject to the subpoena that does not stay the revocation, the clerk of superior court shall notify the appropriate licensing board that the person has failed to comply with the subpoena issued pursuant to a child support or paternity establishment proceeding and that the person's licensing privileges are revoked until such time as the licensing board receives proof of certification by the clerk that the person is in compliance with or no longer subject to the subpoena.

(c) An obligor may file a request with the clerk of superior court for certification that the obligor is no longer delinquent in child support payments upon submission of proof satisfactory to the clerk that the obligor has paid the delinquent amount in full. A person whose licensing privileges have been revoked under subsection (b) of this section because of a willful failure to comply with a subpoena may file a request with the clerk of superior court for certification that the person has met the requirements of or is no longer subject to the subpoena. The clerk shall provide a form to be used for a request for certification. If the clerk finds that the obligor has met the requirements for reinstatement under this subsection, then the clerk shall certify that the obligor is no longer delinquent and shall provide a copy of the certification to the obligor. Upon request of the obligor, the clerk shall mail a copy of the certification to the appropriate licensing board. If the clerk finds that the person whose licensing privileges have been revoked under subsection (b) of this section for failure to comply with a subpoena has complied with or is no longer subject to the subpoena, then the clerk shall certify that the person has met the requirements of or is no longer subject to the subpoena and shall provide a copy of the certification to the person. Upon request of the person, the clerk shall mail a copy of the certification to the appropriate licensing board.

(d) If licensing privileges are revoked under this section, the obligor may petition the district court for a reinstatement of such privileges. The court may order the privileges reinstated conditioned upon full payment of the delinquency over time. Any order allowing license reinstatement shall additionally require the obligor's maintenance of current child support. If the licensing privileges of a person other than the obligor are revoked under this section for failure to comply with a subpoena, the person may petition the district court for reinstatement of the privileges. The court may order the privileges reinstated if the person has complied with or is no longer subject to the subpoena that was the basis for revocation. Upon reinstatement under this subsection, the clerk of superior court shall certify that the obligor is no longer delinquent and provide a copy of the certification to the obligor. Upon request of the obligor, the clerk shall mail a copy of the certification to the appropriate licensing board. Upon reinstatement of the person whose licensing privileges were revoked based on failure to comply with a subpoena, the clerk of superior court shall certify that the person has complied with or is no longer subject to the subpoena. Upon request of the person whose licensing privileges are reinstated, the clerk shall mail a copy of the certification to the appropriate licensing board.

(e) An obligor or other person whose licensing privileges are reinstated under this section may provide a copy of the certification set forth in either subsection (c) or (d) to each licensing agency to which the obligor or other person applies for reinstatement of licensing privileges. Upon request of the obligor or other person, the clerk shall mail a copy of the certification to the appropriate licensing board. Upon receipt of a copy of the certification, the licensing board shall reinstate the license.

(f) Upon receipt of notification by the clerk that an obligor's or other person's licensing privileges are revoked pursuant to this section, the board shall note the revocation on its records and take all necessary steps to implement and enforce the revocation. These steps shall not include the board's independent revocation process pursuant to Chapter 150B of the General Statutes, the Administrative Procedure Act, which process is replaced by the court process prescribed by this section. The revocation pertaining to an obligor shall remain in full force and effect until the board receives certification under this section that the obligor is no longer delinquent in child support payments. The revocation pertaining to the person whose licensing privileges were revoked on the basis of failure to comply with a subpoena shall remain in full force and effect until the board receives certification of reinstatement under subsection (d) of this section. (1995, c. 538, ss. 1, 1.1; 1997-433, s. 5.3; 1998-17, s. 1.)

§§ 50-14, 50-15: Repealed by Session Laws 1967, c. 1152, s. 1.

§ 50-16: Repealed by Session Laws 1967, c. 1152, s. 1; c. 1153, s. 1.

Cross References. — As to action or proceeding for custody of minor child, see G.S. 50-13.1 et seq.

§ 50-16.1: Repealed by Session Laws 1995, c. 319, s. 1.

Cross References. — For present definitions applicable to this Chapter, see G.S. 50-16.1A.

Legal Periodicals. — For article "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

For article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For note on enforcement of separation agreements by specific performance, see 16 Wake Forest L. Rev. 117 (1980).

For note on separability of support and property provisions in ambiguous separation agreements, see 16 Wake Forest L. Rev. 152 (1980).

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the State in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

For survey of 1981 family law, see 60 N.C.L. Rev. 1379 (1982).

For note, "Discarding the Dual Consent Judgment Approach in Family Law in Light of Walters v. Walters, 307 N.C. 381, 298 S.E.2d

338 (1983)," see 20 Wake Forest L. Rev. 297 (1984).

For note, "Alimony Modification and Cohabitation in North Carolina," see 63 N.C.L. Rev. 794 (1985).

For 1984 survey, "Equitable Distribution Without Consideration of Marital Fault," see 63 N.C.L. Rev. 1204 (1985).

For note, "The Contingent Fee Contract in Domestic Relations Cases," see 7 Campbell L. Rev. 427 (1985).

For comment, "Alimony Reform for North Carolina," see 18 N.C. Cent. L.J. 87 (1989).

For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

For note, "Kuder v. Schroeder: The North Carolina Court of Appeals Holds That a Professional Education Is Not Within the Spousal Duty of Support," see 72 N.C.L. Rev. 1784 (1994).

For survey, "Termination of Lump Sum Alimony upon the Remarriage of a Dependent Spouse: Potts v. Tutterow," see 73 N.C.L. Rev. 2432 (1995).

CASE NOTES

I. In General.
II. Alimony.
III. Alimony Pendente Lite.
IV. Dependent Spouse.
V. Supporting Spouse.

I. IN GENERAL.

Editor's Note. — *Some of the cases cited below were decided under former G.S. 50-16, which dealt with actions for alimony without divorce and some of the cases cited below were decided under former G.S. 50-16.1.*

Sections 50-16.1 Through 50-16.10 Construed in Pari Materia. — The statutes codified as G.S. 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982). See also, Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Jurisdiction Depends on Statute. — Jurisdiction over the subject matter of divorce or an action for alimony without divorce is given only by statute. Hodges v. Hodges, 226 N.C. 570, 39 S.E.2d 596 (1946).

As to surrender of marital rights under this section by a properly drawn separation agreement, see Lane v. Scarborough, 19 N.C. App. 32, 198 S.E.2d 45, rev'd on other grounds, 284 N.C. 407, 200 S.E.2d 622 (1973).

Status of Spouses Presents Mixed Questions of Law and Fact. — Determination of what constitutes a "dependent spouse" and what constitutes a "supporting spouse" requires an application of principles of statutory law to facts and involves mixed questions of law and fact. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

To Be Determined by Trial Judge. — The issues of who is a "dependent spouse" and who is a "supporting spouse," within the meaning of this section, should be decided by the trial judge. Bennett v. Bennett, 24 N.C. App. 680, 211 S.E.2d 835 (1975).

Defendant was not entitled to a jury trial on the issue of supporting and dependent spouse status, since issues of who is a dependent spouse and who is a supporting spouse are mixed questions of law and fact which can best be determined by the trial judge when he sets the amount of permanent alimony. Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243, cert. denied, 302 N.C. 734, 280 S.E.2d 449 (1981).

A supporting spouse is by definition married to a dependent spouse. Therefore, a determination that one spouse is a supporting spouse is a determination that the other is a dependent spouse and vice versa. Galloway v. Galloway, 40 N.C. App. 366, 253 S.E.2d 41 (1979).

Father was not entitled to accounting from mother for sums paid for child support pursuant to consent judgment. Glenn v. Glenn, 53 N.C. App. 515, 281 S.E.2d 83, cert. denied, 304 N.C. 390, 285 S.E.2d 832 (1981).

Procedure Where Grounds for Alimony Are Asserted Simultaneously as Grounds for Divorce. — While it is true that the determination of dependency properly rests with the trial judge, and not with the jury, where the grounds asserted for alimony are asserted simultaneously as grounds for divorce, the right to alimony depends on the legal entitlement to divorce, regardless of financial dependency. The ordinary and correct procedure in such cases, therefore, is to allow the jury to render its verdict on the "fault" issues of divorce, and then and only then to move to a bench hearing on dependency and the proper amount, if any, of alimony. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Consent Judgment Awarding Medical

Expenses. — With the consent of the parties, the trial court, which has general jurisdiction of all domestic matters, could properly enter consent judgment, providing for payment of wife's medical payments, even though it contained a provision which was outside of the pleadings. Davis v. Davis, 78 N.C. App. 464, 337 S.E.2d 190 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 893 (1986).

Under consent judgment in which the court found as a fact that there were no claims for support or alimony pending between the parties and ordered plaintiff to pay all necessary and reasonable medical expenses incurred by defendant, parties did not intend for medical expenses to constitute alimony payments; thus, the trial court erred in entering judgment ex meru motu declaring portions of consent judgment null and void and unenforceable ab initio and in striking them. Davis v. Davis, 78 N.C. App. 464, 337 S.E.2d 190 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 893 (1986).

Applied in In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969); Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970); Mitchell v. Mitchell, 12 N.C. App. 54, 182 S.E.2d 627 (1971); Crouch v. Crouch, 14 N.C. App. 49, 187 S.E.2d 348 (1972); Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972); Therrell v. Therrell, 19 N.C. App. 321, 198 S.E.2d 776 (1973); Ross v. Ross, 33 N.C. App. 447, 235 S.E.2d 405 (1977); Love v. Love, 41 N.C. App. 308, 254 S.E.2d 642 (1979); Fogleman v. Fogleman, 41 N.C. App. 597, 255 S.E.2d 269 (1979); Robbins v. Robbins, 43 N.C. App. 488, 259 S.E.2d 353 (1979); Harris v. Harris, 58 N.C. App. 314, 394 S.E.2d 602 (1982); Gray v. Snyder, 704 F.2d 709 (4th Cir. 1983); Roberts v. Roberts, 68 N.C. App. 163, 314 S.E.2d 781 (1984); Gilbert v. Gilbert, 71 N.C. App. 160, 321 S.E.2d 455 (1984); Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988); Cunningham v. Cunningham, 345 N.C. 430, 480 S.E.2d 403 (1997).

Cited in Blake v. Blake, 6 N.C. App. 410, 170 S.E.2d 87 (1969); Blair v. Blair, 8 N.C. App. 61, 173 S.E.2d 513 (1970); Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971); McConnell v. McConnell, 11 N.C. App. 193, 180 S.E.2d 465 (1971); Hill v. Hill, 13 N.C. App. 641, 186 S.E.2d 665 (1972); Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972); In re Cox, 17 N.C. App. 687, 195 S.E.2d 132 (1973); Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973); Orren v. Orren, 25 N.C. App. 106, 212 S.E.2d 394 (1975); Privette v. Privette, 30 N.C. App. 305, 227 S.E.2d 137 (1976); Reid v. Reid, 32 N.C. App. 750, 233 S.E.2d 620 (1977); Elmwood v. Elmwood, 295 N.C. 168, 244 S.E.2d 668 (1978); Davis v. Davis, 35 N.C. App. 111, 240 S.E.2d 488 (1978); Steele v. Steele, 36 N.C. App. 601, 244 S.E.2d 466 (1978); Hamilton v. Hamilton, 36 N.C. App. 755, 245 S.E.2d 399 (1978); Roberts v. Roberts, 38 N.C. App. 295, 248 S.E.2d 85 (1978); Cavendish v. Cavendish, 38 N.C. App. 577, 248 S.E.2d 340 (1978); Williams v. Williams, 42 N.C. App. 163, 256 S.E.2d 401 (1979); Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867 (1979); Hamilton v. Hamilton, 296 N.C. 574, 251 S.E.2d 441 (1979); Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979); Southern v. Southern, 43 N.C. App. 159, 258 S.E.2d 422 (1979); Wilhelm v. Wilhelm, 43 N.C. App. 549, 259 S.E.2d 319 (1979); Newsome v. Newsome, 43 N.C. App. 580, 259 S.E.2d 577 (1979); Fungaroli v. Fungaroli, 53 N.C. App. 270, 280 S.E.2d 787 (1981); Allison v. Allison, 51 N.C. App. 622, 277 S.E.2d 551 (1981); Rowe v. Rowe, 52 N.C. App. 646, 280 S.E.2d 182 (1981); Walters v. Walters, 54 N.C. App. 545, 284 S.E.2d 151 (1981); Barr v. Barr, 55 N.C. App. 217, 284 S.E.2d 762 (1981); Mims v. Mims, 305 N.C. 41, 286 S.E.2d 779 (1982); Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982); Henderson v. Henderson, 307 N.C. 401, 298 S.E.2d 345 (1983); Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985); Michael v. Michael, 77 N.C. App. 841, 336 S.E.2d 414 (1985); North Carolina Baptist Hosps. v. Harris, 319 N.C. 347, 354 S.E.2d 471 (1987); Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706 (1988); Shoffner v. Shoffner, 91 N.C. App. 399, 371 S.E.2d 749 (1988); Rudisill v. Rudisill, 102 N.C. App. 280, 401 S.E.2d 818 (1991); Caldwell v. Caldwell, 103 N.C. App. 380, 405 S.E.2d 588 (1991); Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993); Rogers v. Rogers, 111 N.C. App. 606, 432 S.E.2d 907 (1993); Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994); Potts v. Tutterow, 114 N.C. App. 360, 442 S.E.2d 90 (1994).

II. ALIMONY.

As to meaning of "alimony," see Rogers v. Vines, 28 N.C. 293 (1846); Taylor v. Taylor, 93 N.C. 418 (1885).

Subdivision (1) Contemplates "Permanent Alimony". — While the word "permanent" is not included in the definition of "alimony" in subdivision (1) of this section, the definition obviously contemplates what is commonly referred to as "permanent alimony." Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

Intent to Include Lump Sum Awards. — The legislature clearly intended to include lump sum awards as well as periodic support in the statutory definition of alimony. McCall v. Harris, 55 N.C. App. 390, 285 S.E.2d 335, cert. denied, 305 N.C. 301, 290 S.E.2d 703 (1982).

Trial judge may award alimony in a lump payment or monthly payments. Austin v. Austin, 12 N.C. App. 390, 183 S.E.2d 428 (1971).

Or May Combine Forms of Payment. — The fact that a trial judge used a combination of both a lump sum payment and a continuing monthly payment for alimony does not constitute an abuse of discretion. Austin v. Austin, 12 N.C. App. 390, 183 S.E.2d 428 (1971).

An award of alimony for specified period only is indubitably alimony in gross or "lump sum alimony." Whitesell v. Whitesell, 59 N.C. App. 552, 297 S.E.2d 172 (1982), cert. denied, 307 N.C. 583, 299 S.E.2d 653 (1983).

Award of Alimony Upheld. — Where the record revealed sufficient substantial evidence to permit a jury to find (1) that plaintiff was a "supporting spouse" and defendant was a "dependent spouse" as defined in this section, and (2) that plaintiff had abandoned defendant and willfully failed to provide her with necessary subsistence according to his means and conditions, so as to render her condition intolerable and her life burdensome, these permissible findings would support an award of alimony. Garner v. Garner, 10 N.C. App. 286, 178 S.E.2d 94 (1970).

As to the purpose and effect of former § 50-16, relating to alimony without divorce and custody of the children of the parties, see McFetters v. McFetters, 219 N.C. 731, 14 S.E.2d 833 (1941); Oldham v. Oldham, 225 N.C. 476, 35 S.E.2d 332 (1945); Reece v. Reece, 232 N.C. 95, 59 S.E.2d 363 (1950); Bateman v. Bateman, 233 N.C. 357, 64 S.E.2d 156 (1951); Fogartie v. Fogartie, 236 N.C. 188, 72 S.E.2d 226 (1952); Yow v. Yow, 243 N.C. 79, 89 S.E.2d 867 (1955); Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966); Myers v. Myers, 270 N.C. 263, 154 S.E.2d 84 (1967).

III. ALIMONY PENDENTE LITE.

The right of a wife to subsistence pending trial and to attorneys' fees was derived from the common law. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Purpose of Pendente Lite Awards. — The remedy of subsistence and counsel fees pendente lite is intended to enable the wife to maintain herself according to her station in life and employ counsel to meet her husband at trial upon substantially equal terms. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Amount of subsistence and counsel fees pendente lite is within the discretion of the court, but this discretion is limited by the factual conditions. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Pendente Lite Order Cannot Set Up Savings Account. — A pendente lite order is intended to go no further than provide subsistence and counsel fees pending the litigation. It cannot set up a savings account in favor of the plaintiff. Such is not the purpose and it cannot be made the effect of an order. Yearwood v. Yearwood, 287 N.C. 254, 214 S.E.2d 95 (1975).

IV. DEPENDENT SPOUSE.

Construction With Other Sections. — Whether a spouse is substantially in need of maintenance and support as defined by G.S. former 50-16.1(3) is determined by construing this statute in pari material with the terms of former G.S. 50-16.5 which prescribed factors for the trial court to consider in determining the amount of alimony. Fink v. Fink, 120 N.C. App. 412, 462 S.E.2d 844 (1995).

To be entitled to alimony, alimony pendente lite, or counsel fees, spouse must be a dependent spouse. Little v. Little, 18 N.C. App. 311, 196 S.E.2d 562 (1973).

This section keys all awards, in the nature of permanent alimony and alimony pendente lite, to a spouse who is a dependent spouse within the meaning of subdivision (3). Hinton v. Hinton, 17 N.C. App. 715, 195 S.E.2d 319 (1973).

To be entitled to alimony, a spouse must not only have one of the grounds set forth in G.S. 50-16.2, he or she must also be a "dependent spouse." Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

For a discussion of the legislative intent as to judicial determinations of dependency under subdivision (3) of this section in light of G.S. 59-16.5, see Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

"Dependent Spouse" Need Not Be Unable to Exist Without Other Spouse. — In order to be a "dependent spouse" for the purpose of receiving alimony pendente lite, one does not have to be unable to exist without the aid of the other spouse. Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970), overruled on other grounds, Stephenson v. Stephenson, 55 N.C. App. 250, 285 S.E.2d 281 (1981); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

But Must Be Unable to Maintain Accustomed Standard of Living. — The legislative intent in the use of the phrase "actually substantially dependent" in subdivision (4) of this section is clear. This term implies that the spouse seeking alimony must have actual dependence on the other in order to maintain standard of living in the manner to which that spouse had become accustomed during the last several years prior to separation. Thus, to qualify as a "dependent spouse" under subdivision (3) of this section, one must be actually without the means of providing for his or her accustomed standard of living. Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980); Knott v. Knott, 52 N.C. App. 543, 279 S.E.2d 72 (1981).

The term "accustomed standard of living of the parties" in G.S. 50-16.5(a) completes the contemplated legislative meaning of "maintenance and support" in subdivision (3) of this section. The latter phrase clearly means more than a level of mere economic survival.

Plainly it contemplates the economic standard established by the marital partnership for the family unit during the years in which the marital contract was intact. It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed. Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980); Knott v. Knott, 52 N.C. App. 543, 279 S.E.2d 72 (1981).

When One Is a Dependent Spouse. — The dependency of the spouse asserting the claim may be established by proof that such spouse is either (a) actually substantially dependent upon the other spouse for his or her maintenance and support, or (b) substantially in need of maintenance and support from the other spouse. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972); Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973); Loflin v. Loflin, 25 N.C. App. 103, 212 S.E.2d 403 (1975).

Determination that one is a "dependent spouse" within the meaning of subdivision (3) of this section is a consequence of two or more related propositions taken as premises, one being the fact that the relationship of spouse exists, and the other consisting of at least the finding that one of the two alternatives in subdivision (3) is a fact. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Presson v. Presson, 13 N.C. App. 81, 185 S.E.2d 17 (1971); Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973).

To find that one is a dependent spouse the trial court must make findings of fact sufficient to show (1) that a marital relationship between the parties exists; (2) either (a) that the spouse is actually substantially dependent upon the other spouse for his or her maintenance and support, or (b) that the spouse is substantially in need of maintenance and support from the other spouse; and (3) that the supporting spouse is capable of making the payments required. Little v. Little, 18 N.C. App. 311, 196 S.E.2d 562 (1973).

In determining whether one qualifies as a dependent spouse under subdivision (3) of this section, as well as in determining the amount of alimony to be awarded, the courts must consider the factors enumerated in G.S. 50-16.5, the section for determining the amount of alimony. These factors include the estates, earnings, earning capacity, condition, and accustomed standard of living of the parties, and other facts of the particular case. Beaman v. Beaman, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

To properly find a spouse dependent the court need only find that the spouse's reasonable monthly expenses exceed her monthly income and that the party has no other means with which to meet those expenses. Beaman v. Beaman, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

Lack of Capacity or Reasonable Opportunity May Render Spouse Dependent. — A wife is actually substantially dependent upon her husband for her maintenance and support or in substantial need of support by him if she is incapable of adequately providing for herself or is capable of adequately providing for herself but does not have a reasonable opportunity to do so. Galloway v. Galloway, 40 N.C. App. 366, 253 S.E.2d 41 (1979).

Where the trial court in an action for alimony pendente lite and permanent alimony found that plaintiff wife had been gainfully employed prior to her marriage to defendant and was "able-bodied, intelligent and capable to find employment," this finding was not sufficient to support the trial court's conclusion that plaintiff was not a dependent spouse within the meaning of subdivision (3) of this section, as it did not include a finding that the plaintiff had a reasonable opportunity but did not adequately support herself. Galloway v. Galloway, 40 N.C. App. 366, 253 S.E.2d 41 (1979).

Accustomed Standard of Living Is Determinative. — It is not necessary that a spouse be reduced to penury to be considered dependent; the accustomed standard of living is the proper measure. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

For a spouse to be "actually substantially dependent", he or she must have actual dependence on the other in order to maintain the standard of living to which he or she became accustomed during the last several years prior to the spouses' separation. To determine whether such actual dependence exists, the trial court must evaluate the parties' incomes and expenses measured by the standard of living of the family as a unit. Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

"Actually substantially dependent" means that the spouse seeking alimony must be actually dependent upon the other in order to maintain a standard of living in the manner to which that spouse had become accustomed during the last several years prior to separation. Patterson v. Patterson, 81 N.C. App. 255, 343 S.E.2d 595 (1986); Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

A spouse is "actually substantially dependent" if he or she is without the means to provide for his or her accustomed standard of living. Phillips v. Phillips, 83 N.C. App. 228, 349 S.E.2d 397 (1986).

The term "actually substantially dependent," as used in the first portion of the definition in subdivision (3), means that the spouse seeking alimony must have actual dependence on the other in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation; thus to qualify as a dependent spouse under that portion of subdivision (3), the spouse seeking alimony must be actually without means for providing for his or her accustomed standard of living. Caldwell v. Caldwell, 82 N.C. App. 225, 356 S.E.2d 821, cert. denied, 320 N.C. 791, 361 S.E.2d 72 (1987).

Absent Actual Dependence, Issue Is Substantial Need of Maintenance. — If the court determines that one spouse is not actually dependent on the other for such support, the court must then determine if one spouse is "substantially in need of maintenance and support" from the other, i.e., whether one spouse would be unable to maintain his or her accustomed standard of living, established prior to separation, without financial contribution from the other. In doing so, the court must determine and consider the following: (1) The standard of living, socially and economically, to which the parties as a family unit became accustomed during the several years prior to their separation; (2) the present earnings, prospective earning capacity, and any other condition, such as health, of each spouse at the time of the hearing; (3) whether the spouse seeking alimony has a demonstrated need for financial contribution from the other spouse in order to maintain the parties' accustomed standard of living, taking into consideration the spouse's reasonable expenses in light of that standard of living; and (4) the financial worth or "estate" of both spouses. The court must also consider fault and other facts of the particular case such as the length of the marriage and the contribution made by each spouse to the financial status of the family over the years. Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Even if a spouse is not actually substantially dependent, he or she is nevertheless a dependent spouse under the second part of the definition of subdivision (3) of this section if, considering the parties' earnings, earning capacity, estates, and other factors, the spouse seeking alimony demonstrates the need for financial contribution from the other spouse to maintain his or her accustomed standard of living. Phillips v. Phillips, 83 N.C. App. 228, 349 S.E.2d 397 (1986).

The test of being "substantially in need" refers to something less than being "actually substantially dependent." The analysis under this test is much more extensive and requires detailed and specific findings by the trial court. Patterson v. Patterson, 81 N.C. App. 255, 343 S.E.2d 595 (1986).

And Even Spouse Who Is Not "Actually Substantially Dependent" May Be Substantially in Need. — Even where a spouse is not "actually substantially dependent," the spouse may be a dependent spouse under the second part of subdivision (3) of this section if he or she is substantially in need of maintenance and support, the meaning of which is determined by construing this statute in pari materia with the terms of G.S. 50-16.5. Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

The phrase "substantially in need of" requires the spouse seeking alimony to establish that he or she would be unable to maintain his or her accustomed standard of living (established prior to separation) without financial contribution from the other. Patterson v. Patterson, 81 N.C. App. 255, 343 S.E.2d 595 (1986).

Maintenance of Accustomed Standard of Living by Borrowing. — The fact that a spouse can maintain his or her accustomed standard of living, by whatever means, pending the outcome of alimony litigation, does not determine the dependent spouse-supporting spouse issue. A finding that a spouse was forced to borrow substantial funds in order to maintain her accustomed standard of living would ordinarily lead to the conclusion that she was a dependent spouse. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Whether Spouse Is "Dependent" or "Supporting" Must Be Based on Findings. — The conclusions made by the court as to whether a spouse is "dependent" or "supporting" must be based on findings of fact sufficiently specific to indicate that the court properly considered the factors. In the absence of such findings, appellate courts cannot appropriately determine whether the order of the trial court is adequately supported by competent evidence, and therefore such an order must be vacated and the case remanded for necessary findings. It is not enough that there is evidence in the record from which such findings could have been made because it is for the trial court, and not the appellate court, to determine what facts are established by the evidence. Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Findings that plaintiff wife worked and had a separate income did not preclude the trial court from determining that plaintiff was a dependent spouse and that defendant was a supporting spouse, where there was plenary evidence to show that wife was substantially dependent upon defendant and in substantial need of his support. Radford v. Radford, 7 N.C. App. 569, 172 S.E.2d 897 (1970).

A finding that the wife is unemployed and that she has no income is not sufficient, where the sparse record does not foreclose the possibilities suggested in subdivision (3) of this section that the wife may be dependent upon and supported by someone other than her husband or that she may not need any support at all. Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973).

Burden of proving dependency is upon the spouse asserting the claim for alimony or alimony pendente lite. Loflin v. Loflin, 25 N.C. App. 103, 212 S.E.2d 403 (1975).

This section looks first to the ability of the spouses to maintain the standard of living to which they have become accustomed during the last years of the marriage. The burden on the applicant for alimony is to show the accustomed standard of living and lack of means to maintain that standard. Only then does the ability of the other spouse to pay become significant. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

The trial court must evaluate the parties' income and expenses measured by the standard of living of the family as a unit in order to determine if a spouse is "actually substantially dependent." Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

Discretion of Trial Court. — Once a trial court determines that a spouse is dependent and is entitled to alimony, its award will not be disturbed on appeal absent a showing of abuse of discretion. Phillips v. Phillips, 83 N.C. App. 228, 349 S.E.2d 397 (1986).

Spouse Not Dependent. — Where there was no showing that plaintiff had a substantial need for support from defendant or to maintain plaintiff's accustomed station in life, she was in no sense a dependent spouse within the meaning of subdivision (3) of this section. Lemons v. Lemons, 22 N.C. App. 303, 206 S.E.2d 327 (1974).

Trial court's conclusion that plaintiff wife was the "dependent spouse" entitled to support was not supported by findings of fact where the court found that defendant husband's income was "very significantly lower than same [had] been in the past" and also that plaintiff was "unable to continue to maintain her accustomed station in life," but there was no finding or evidence that defendant deliberately depress his income in an effort to avoid his obligations, and it was apparent that the trial court disregarded defendant's own inability to maintain the station in life to which he was formerly accustomed in its determination of dependency. Taylor v. Taylor, 46 N.C. App. 438, 265 S.E.2d 626 (1980).

Findings of fact supported by competent evidence of record fully supported the trial judge's conclusion that plaintiff was no longer a "dependent spouse", which conclusion supported his order terminating defendant's spousal support obligations, as only a "dependent spouse" is entitled to alimony. Marks v. Marks, 316 N.C. 447, 342 S.E.2d 859 (1986).

Where the uncontradicted evidence disclosed that the year before the parties separated, the plaintiff had an income of $18,339.97 and the defendant had an income of $20,475.11, and the year they separated, the plaintiff's income was $19,301.46 and the defendant's income was $24,447.26, and that during the last year that they lived together, they maintained separate bank accounts and divided household expenses, evidence did not support the ultimate finding that the plaintiff was substantially and materially dependent upon the defendant for her support and maintenance, and the trial court erred in awarding the plaintiff alimony. Caldwell v. Caldwell, 82 N.C. App. 225, 356 S.E.2d 821, cert. denied, 320 N.C. 791, 361 S.E.2d 72 (1987).

Trial court did not err by finding wife's pleadings were insufficient on their face and dismissing her action for alimony pendente lite; plaintiff asserted in her complaint that she was a "dependent spouse," but the only support she offered for this conclusion was evidence of her husband's salary and she did not present any evidence that she needed assistance to subsist during the prosecution or defense of the suit. Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989), cert. denied, 326 N.C. 50, 389 S.E.2d 94 (1990).

Spouse Held Dependent. — Where defendant had not been regularly employed for 18 or 19 years prior to the separation and was completely supported by her husband, and her time was devoted to housework and rearing her children, it was clear from this evidence that plaintiff was a dependent spouse within the purview of subdivision (3) of this section. Hudson v. Hudson, 21 N.C. App. 412, 204 S.E.2d 697 (1974).

Where the evidence was not such as to require the court to find that defendant was capable of earning far greater income than she currently earned and showed that for the last five years of the parties' marriage defendant had earned insufficient income to meet her reasonable needs, there was sufficient evidence to support the court's conclusion that defendant was a dependent spouse, and the court's findings that plaintiff's net monthly income was $1,753 and that his reasonable expenses were $1,242 were sufficient to support the conclusion that plaintiff was a supporting spouse. Beaman v. Beaman, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

Where plaintiff's budget of $2800 per month was both reasonable and commensurate with the standard of living which the couple maintained prior to the date of the separation, plaintiff had no income producing assets, but earned a net income of $1353 per month, and defendant's gross income was nearly four times that of plaintiff, these findings supported trial court's determination that plaintiff was a dependent spouse and that defendant was a supporting spouse. Ellinwood v. Ellinwood, 94 N.C. App. 682, 381 S.E.2d 162 (1989).

V. SUPPORTING SPOUSE.

"Supporting Spouse" Defined. — A "supporting spouse" is a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support. A spouse meets the definition if he or she qualifies under either test, which essentially is the same as that applied for "dependent spouse." The primary issue is not the supporting spouse's ability to pay, but whether the spouse seeking alimony is a dependent spouse. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Determination that one is a "supporting spouse" within the meaning of subdivision (4) of this section is a consequence of two or more related propositions taken as premises, one being that the relationship of spouse exists, and the other consisting of the finding that one of the three (now two) alternatives in subdivision (4) is a fact. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

As to the former presumption in subdivision (4) of this section, prior to its amendment in 1981, that the husband was the "supporting spouse," see Rayle v. Rayle, 20 N.C. App. 594, 202 S.E.2d 286 (1974).

§ 50-16.1A. Definitions.

As used in this Chapter, unless the context clearly requires otherwise, the following definitions apply:

(1) "Alimony" means an order for payment for the support and maintenance of a spouse or former spouse, periodically or in a lump sum, for a specified or for an indefinite term, ordered in an action for divorce, whether absolute or from bed and board, or in an action for alimony without divorce.

(2) "Dependent spouse" means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.

(3) "Marital misconduct" means any of the following acts that occur during the marriage and prior to or on the date of separation:

- a. Illicit sexual behavior. For the purpose of this section, illicit sexual behavior means acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in G.S. 14-27.1(4), voluntarily engaged in by a spouse with someone other than the other spouse;
- b. Involuntary separation of the spouses in consequence of a criminal act committed prior to the proceeding in which alimony is sought;
- c. Abandonment of the other spouse;
- d. Malicious turning out-of-doors of the other spouse;
- e. Cruel or barbarous treatment endangering the life of the other spouse;
- f. Indignities rendering the condition of the other spouse intolerable and life burdensome;
- g. Reckless spending of the income of either party, or the destruction, waste, diversion, or concealment of assets;
- h. Excessive use of alcohol or drugs so as to render the condition of the other spouse intolerable and life burdensome;
- i. Willful failure to provide necessary subsistence according to one's means and condition so as to render the condition of the other spouse intolerable and life burdensome.

(3a) through (3d) Reserved for future codification purposes.

(3e) "Payor" means any payor, including any federal, State, or local governmental unit, of disposable income to an obligor. When the payor is an employer, payor means employer as defined under 20 U.S.C. § 203(d) of the Fair Labor Standards Act.

(4) "Postseparation support" means spousal support to be paid until the earlier of any of the following:

a. The date specified in the order for postseparation support.
b. The entry of an order awarding or denying alimony.
c. The dismissal of the alimony claim.
d. The entry of a judgment of absolute divorce if no claim of alimony is pending at the time of entry of the judgment of absolute divorce.
e. Termination of postseparation support as provided in G.S. 50-16.9(b).

Postseparation support may be ordered in an action for divorce, whether absolute or from bed and board, for annulment, or for alimony without divorce. However, if postseparation support is ordered at the time of the entry of a judgment of absolute divorce, a claim for alimony must be pending at the time of the entry of the judgment of divorce.

(5) "Supporting spouse" means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent for maintenance and support or from whom such spouse is substantially in need of maintenance and support. (1995, c. 319, s. 2; 1998-176, s. 8; 2005-177, s. 1.)

Editor's Note. — Prior to the year 1872 there was no statute regulating the question of alimony without divorce, but in this State it was held that this relief in proper cases could be granted by courts of equity. See Crews v. Crews, 175 N.C. 168, 95 S.E. 149 (1918). By Laws 1872, c. 193, the legislature provided for this relief, but in that act there was no provision whereby the wife could obtain alimony during the determination of the issues involved in her suit. See Hodges v. Hodges, 82 N.C. 122 (1880). In 1919, an amendment was added whereby the wife might apply for an allowance for her subsistence during the pendency of her main action. See Laws 1919, c. 24.

Session Laws 1995, c. 319, which repealed former G.S. 50-16.1 and enacted this section in its place, in s. 12 provides that the act applies to civil motions filed on or after October 1, 1995, and shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995.

Former G.S. 50-16.1, prior to its repeal by Session Laws 1995, c. 319, read as follows: "**Definitions.**

"As used in the statutes relating to alimony and alimony pendente lite unless the context otherwise requires, the term:

(1) 'Alimony' means payment for the support and maintenance of a spouse, either in lump sum or on a continuing basis, ordered in an action for divorce, whether absolute or from bed and board, or an action for alimony without divorce.

(2) 'Alimony pendente lite' means alimony ordered to be paid pending the final judgment of divorce in an action for divorce, whether absolute or from bed and board, or in an action for annulment, or on the merits in an action for alimony without divorce.

(3) 'Dependent spouse' means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.

(4) 'Supporting spouse' means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support."

Session Laws 1998-176, s. 1 added subdivision (4a), which was redesignated as subdivision (3e) at the direction of the Revisor of Statutes.

Subdivision (4), as amended by Session Laws 2005-177, s. 1, effective October 1, 2005, is applicable to all postseparation support orders issued on or after that date.

Legal Periodicals. — For article, "Giving Credit Where Credit is Due: North Carolina Recognizes Custodial Obligations as a Factor in Determining Alimony Entitlements," see 74 N.C.L. Rev. 2128 (1996).

For an article on the 1995 amendments to North Carolina alimony statutes, see 76 N.C.L. Rev. 2017 (1998).

CASE NOTES

Postseparation support, like alimony pendente lite, is intended to be only temporary and ceases when an award of alimony is either allowed or denied by the trial court.

Wells v. Wells, 132 N.C. App. 401, 512 S.E.2d 468 (1999).

Termination of Postseparation Support. — Although the General Assembly may have intended postseparation support to be a temporary measure, the statutory definition of postseparation support provides for only three possible termination dates, the death of either spouse or the remarriage of the receiving spouse. Marsh v. Marsh, 136 N.C. App. 663, 525 S.E.2d 476, 2000 N.C. App. LEXIS 103 (2000).

Postseparation Support After Divorce. — Postseparation support may continue despite a judgment of divorce if the postseparation support order does not specify a termination date and there is no court order awarding or denying alimony. Marsh v. Marsh, 136 N.C. App. 663, 525 S.E.2d 476, 2000 N.C. App. LEXIS 103 (2000).

Trial court did not err in refusing to award the wife post-separation support pursuant to G.S. 50-16.1A(4) as a result of the wife's misconduct pursuant to G.S. 50-16.2A(d); the trial court's finding of subjection of the husband to indignities pursuant to G.S. 50-16.1A(3)(f) was sufficient, as it found that, while the husband was a supporting spouse, the wife forceably removed the husband from the house on two occasions under false domestic violence complaints and engaged in other improper behavior. Evans v. Evans, 169 N.C. App. 358, 610 S.E.2d 264, 2005 N.C. App. LEXIS 609 (2005).

Postseparation Support Replaced Alimony Pendente Lite. — Postseparation support (PSS) effectively replaced alimony pendente lite and must in general operate under the same principle that entitlement findings by the trial court during a PSS hearing are not final and binding at subsequent proceedings, since to treat PSS otherwise would deter many dependent spouses from seeking needed support for fear they would be bound by a ruling based on incomplete evidence. Wells v. Wells, 132 N.C. App. 401, 512 S.E.2d 468 (1999).

Postseparation Support. — Postseparation support is only intended to be temporary and ceases when an award of alimony is either allowed or denied by the trial court, and therefore is interlocutory and not appealable. Rowe v. Rowe, 131 N.C. App. 409, 507 S.E.2d 317 (1998).

Trial court was not required to find a change of circumstances in entering an alimony order in a divorce case because at the time of the hearing, the only order in effect was a postseparation support order; the alimony award thus did not "modify" a prior alimony order, but rather terminated an existing temporary postseparation support. Langdon v. Langdon, 183 N.C. App. 471, 644 S.E.2d 600, 2007 N.C. App. LEXIS 1106 (2007).

Because the trial court failed to make factual findings as to the parties' financial needs, accustomed standard of living, separate and marital debt obligations, and the expenses reasonably necessary to support each of them, its post-separation support and alimony awards to the husband under G.S. 50-16.3A(a), (b), and (c) were reversed. Crocker v. Crocker, 190 N.C. App. 165, 660 S.E.2d 212, 2008 N.C. App. LEXIS 874 (2008).

Dependent Spouse. — Where the trial court found that the ex-husband had a net monthly income of approximately $5,400 and reasonable monthly expenses in the amount of $4,200, yielding a surplus of $1,200, and the ex-wife's reasonable needs exceeded her income by $1,400, there was no abuse of discretion in finding the ex-wife was a dependent spouse and the ex-husband was a supporting spouse and awarding the ex-wife $1,200 per month in alimony. Rhew v. Felton, 178 N.C. App. 475, 631 S.E.2d 859, 2006 N.C. App. LEXIS 1560, appeal dismissed, review denied, 636 S.E.2d 810 (2006).

Evidence supported the finding that the wife was a dependent spouse and the husband was a supporting spouse pursuant to G.S. 50-16.1A, where the findings of fact demonstrated that, during the marriage and at the time of the hearing, the wife had an income-expenses deficit of $627.00 per month and the husband had an income-expense surplus. Helms v. Helms, 191 N.C. App. 19, 661 S.E.2d 906, 2008 N.C. App. LEXIS 1173 (2008).

Finding of Marital Misconduct as Related to Alimony. — Where trial court specifically found, while addressing the alimony issue, that despite the marital misconduct of the wife, she should be given credit for her career sacrifices that no doubt helped the husband succeed in his military goals, the trial court thereby fully addressed the question of the wife's misconduct as it related to alimony. Cunningham v. Cunningham, 171 N.C. App. 550, 615 S.E.2d 675, 2005 N.C. App. LEXIS 1371 (2005).

Description of Property Met Requirements. — Trial court's findings included a description of the real property owned by the parties and their personal savings; contrary to the husband's claim, the findings met the requirements of G.S. 50-16.1A(2). Phillips v. Phillips, 185 N.C. App. 238, 647 S.E.2d 481, 2007 N.C. App. LEXIS 1735 (2007).

Applied in Vadala v. Vadala, 145 N.C. App. 478, 550 S.E.2d 536, 2001 N.C. App. LEXIS 662 (2001).

Cited in Coombs v. Coombs, 121 N.C. App. 746, 468 S.E.2d 807 (1996); Hanley v. Hanley, 128 N.C. App. 54, 493 S.E.2d 337 (1997); Glass v. Glass, 131 N.C. App. 784, 509 S.E.2d 236 (1998); Rhew v. Rhew, 138 N.C. App. 467, 531 S.E.2d 471, 2000 N.C. App. LEXIS 634 (2000); Harris v. Harris, 188 N.C. App. 477, 656 S.E.2d 316, 2008 N.C. App. LEXIS 228 (2008).

§ 50-16.2: Repealed by Session Laws 1995, c. 319, s. 1.

Cross References. — As to alimony generally, see G.S. 50-16.3A.

Editor's Note. — Session Laws 1995, c. 319, which repealed this section, in section 12 provides that the act applies to civil motions filed on or after that date, and shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995. This section, prior to the repeal by S.L. 1995, c. 319, read as follows: **"Grounds for alimony.**

"A dependent spouse is entitled to an order for alimony when:

(1) The supporting spouse has committed adultery.

(2) There has been an involuntary separation of the spouses in consequence of a criminal act committed by the supporting spouse prior to the proceeding in which alimony is sought, and the spouses have lived separate and apart for one year, and the plaintiff or defendant in the proceeding has resided in this State for six months.

(3) The supporting spouse has engaged in an unnatural or abnormal sex act with a person of the same sex or of a different sex or with a beast.

(4) The supporting spouse abandons the dependent spouse.

(5) The supporting spouse maliciously turns the dependent spouse out of doors.

(6) The supporting spouse by cruel or barbarous treatment endangers the life of the dependent spouse.

(7) The supporting spouse offers such indignities to the person of the dependent spouse as to render his or her condition intolerable and life burdensome.

(8) The supporting spouse is a spendthrift.

(9) The supporting spouse is an excessive user of alcohol or drugs so as to render the condition of the dependent spouse intolerable and the life of the dependent spouse burdensome.

(10) The supporting spouse willfully fails to provide the dependent spouse with necessary subsistence according to his or her means and condition so as to render the condition of the dependent spouse intolerable and the life of the dependent spouse burdensome."

Legal Periodicals. — For article, "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

For article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

For note discussing the application of the compulsory counterclaim provision of G.S. 1A-1, Rule 13 in divorce suits, see 57 N.C.L. Rev. 439 (1979).

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article, "Divisibility of Advanced Degrees in North Carolina — An Examination and Proposal," see 15 N.C. Cent. L.J. 1 (1984).

For note, "Alimony Modification and Cohabitation in North Carolina," see 63 N.C.L. Rev. 794 (1985).

For 1984 survey, "Estoppel and Foreign Divorce," see 63 N.C.L. Rev. 1189 (1985).

For 1984 survey, "Equitable Distribution Without Consideration of Marital Fault," see 63 N.C.L. Rev. 1204 (1985).

For 1984 survey, "The Brief Death of Alienation of Affections and Criminal Conversation in North Carolina," see 63 N.C.L. Rev. 1317 (1985).

For comment, "Alimony Reform for North Carolina," see 18 N.C. Cent. L.J. 87 (1989).

For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

For article, "Maintenance, Alimony, and the Rehabilitation of Family Care," see 71 N.C.L. Rev. 721 (1993).

For note, "Kuder v. Schroeder: The North Carolina Court of Appeals Holds That a Professional Education Is Not Within the Spousal Duty of Support," see 72 N.C.L. Rev. 1784 (1994).

CASE NOTES

I. In General.
II. Adultery.
III. Abandonment.
IV. Indignities to the Person.
V. Excessive Use of Drugs or Alcohol.
VI. Willful Failure to Provide.
VII. Spendthrift.

I. IN GENERAL.

Editor's Note. — *Some of the cases cited below were decided under former G.S. 50-14, which dealt with alimony in actions for divorce a mensa et thoro, and former G.S. 50-16, which dealt with actions for alimony without divorce.*

Sections 50-16.1 Through 50-16.10 in Pari Materia. — The statutes codified as G.S. 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982). See also, Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Lack of Grounds. — The plain and definite meaning of G.S. 50-16.11 is that when a jury or trial judge finds that none of the grounds on which a spouse alleges entitlement to permanent alimony pursuant to G.S. 50-15.2 exists, the trial court, in its discretion, may order recoupment of any alimony pendente lite paid by the supporting spouse. Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994).

Purpose of Alimony. — Alimony is not awarded as a punishment for a broken marriage, but for demonstrated need. Lemons v. Lemons, 22 N.C. App. 303, 206 S.E.2d 327 (1974).

Effect of Voluntary Dismissal with Prejudice. — Defendant wife's voluntary dismissal with prejudice of her suit for permanent alimony based on adultery and abandonment amounted to a concession that none of the grounds entitling her to permanent alimony existed and resulted in a final judgment on the merits with res judicata implications; the case would therefor be remanded for a hearing to consider whether husband should recoup the alimony pendente lite paid. Riviere v. Riviere, 134 N.C. App. 302, 517 S.E.2d 673 (1999).

Every ground for divorce from bed and board also serves as a ground for alimony. Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

Procedure Where Grounds for Alimony Are Asserted Simultaneously as Grounds for Divorce. — While it is true that the determination of dependency properly rests with the trial judge, and not with the jury, where the grounds asserted for alimony are asserted simultaneously as grounds for divorce, the right to alimony depends on the legal entitlement to divorce, regardless of financial dependency. The ordinary and correct procedure in such cases, therefore, is to allow the jury to render its verdict on the "fault" issues of divorce, and then and only then to move to a bench hearing on dependency and the proper amount, if any, of alimony. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Equitable Distribution Decided Before Permanent Alimony. — When both permanent alimony and equitable distribution are requested, the equitable distribution should be decided first. Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Identification of Support Payments. — Whether support payments are in fact alimony does not depend on whether order refers to it as "alimony" but instead on whether support payments constitute "reciprocal consideration" for property settlement provision of order. Hayes v. Hayes, 100 N.C. App. 138, 394 S.E.2d 675 (1990).

An alimony award should follow equitable distribution, duly taking into account the division of the marital property and the resulting estates of the parties. Patterson v. Patterson, 81 N.C. App. 255, 343 S.E.2d 595 (1986).

Only a dependent spouse is entitled to alimony or alimony pendente lite. Galloway v. Galloway, 40 N.C. App. 366, 253 S.E.2d 41 (1979).

To be entitled to alimony, a spouse must not only have one of the grounds set forth in this section, he or she must also be a "dependent spouse." Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Only Dependent Spouse Is Entitled to Alimony or Alimony Pendente Lite. — Only a dependent spouse is entitled to alimony in North Carolina. Fink v. Fink, 120 N.C. App. 412, 462 S.E.2d 844 (1995).

The statutory policy behind the requirement that only a "dependent spouse" is entitled to alimony is to protect a nonsupporting spouse from serious economic harm by making payments to a spouse who does not need support. Fact that defendant husband agreed to pay monthly alimony was proof that he needed no further protection. Cox v. Cox, 36 N.C. App. 573, 245 S.E.2d 94 (1978).

For a spouse to be "actually substantially dependent" upon the other spouse, he or she must have actual dependence on the other in order to maintain the standard of living to which he or she became accustomed during the last several years prior to the spouses' separation. To determine whether such actual dependence exists, the trial court must evaluate the parties' incomes and expenses measured by the standard of living of the family as a unit. Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Conclusions as to "Dependent" or "Supporting" Status Must Be Based on Findings. — The conclusions made by the court as to whether a spouse is "dependent" or "supporting" must be based on findings of fact sufficiently specific to indicate that the court properly considered the factors. In the absence of such findings, appellate courts cannot appropriately determine whether the order of the trial court is adequately supported by competent evidence, and therefore such an order must be vacated and the case remanded for necessary findings. It is not enough that there is evidence in the record from which such findings could have been made because it is for the trial court, and not the appellate court, to determine what facts are established by the evidence. Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Absent Actual Dependence, Issue Is Substantial Need of Maintenance. — If the court determines that one spouse is not actually dependent on the other for such support, the court must then determine if one spouse is "substantially in need of maintenance and support" from the other, i.e., whether one spouse would be unable to maintain his or her accustomed standard of living, established prior to separation, without financial contribution from the other. In doing so, the court must determine and consider the following: (1) The standard of living, socially and economically, to which the parties as a family unit became accustomed during the several years prior to their separation; (2) the present earnings, prospective earning capacity, and any other condition, such as health, of each spouse at the time of the hearing; (3) whether the spouse seeking alimony has a demonstrated need for financial contribution from the other spouse in order to maintain the parties' accustomed standard of living, taking into consideration the spouse's reasonable expenses in light of that standard of living; and (4) the financial worth or "estate" of both spouses. The court must also consider fault and other facts of the particular case such as the length of the marriage and the contribution made by each spouse to the financial status of the family over the years. Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Effect of Consent Judgment on Dependency Requirement. — A finding of dependency is not required where judgments ordering payment of alimony are entered by consent. Allison v. Allison, 51 N.C. App. 622, 277 S.E.2d 551, appeal dismissed and cert. denied, 303 N.C. 543, 281 S.E.2d 660 (1981).

"Supporting Spouse" Defined. — A "supporting spouse" is a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support. A spouse meets the definition if he or she qualifies under either test, which essentially is the same as that applied for "dependent spouse." The primary issue is not the supporting spouse's ability to pay, but whether the spouse seeking alimony is a dependent spouse. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Enforcement of Duty of Support. — The law imposes a continuing legal duty upon a husband to support his wife. Such duty is enforceable in a variety of ways: through criminal sanctions imposed for willful abandonment coupled with nonsupport, and through civil decrees granting alimony, alimony pendente lite, or alimony without divorce on the basis of misconduct or failure to support. Gray v. Snyder, 704 F.2d 709 (4th Cir. 1983).

Attempt to Limit Duty of Support. — Husband's duty of support is considered to be so fraught with a public interest that any contractual undertaking between a husband and wife who are living together and not contemplating imminent separation, which purports to quantify or limit that duty is void as against public policy under North Carolina law. Gray v. Snyder, 704 F.2d 709 (4th Cir. 1983).

An order of alimony without divorce and child support is temporary in nature, and if future circumstances justify a change, defendant is at liberty to seek relief in the trial court by motion in the cause. Fonvielle v. Fonvielle, 8 N.C. App. 337, 174 S.E.2d 67 (1970).

In a wife's action for alimony without divorce and for child support, the Court of Appeals will not disturb an order of the trial court requiring the husband to make substantial payments to the wife for alimony and for support of the minor children, notwithstanding the husband's contention that he anticipates a substantial decrease in earning, since the order is temporary in nature and is subject to modification upon change of circumstances. Fonvielle v. Fonvielle, 8 N.C. App. 337, 174 S.E.2d 67 (1970).

Effect of Reconciliation or Death of Party. — Alimony is in its nature a provision for a wife (now spouse) separated from her husband (spouse) and it cannot continue after reconciliation or the death of either party. Rogers v. Vines, 28 N.C. 293 (1846).

Defenses to Alimony. — In defense to a claim for alimony, the supporting spouse may claim that the dependent spouse has committed any of the acts set forth in this section. Skamarak v. Skamarak, 81 N.C. App. 125, 343 S.E.2d 559 (1986).

The affirmative defense of condonation must be carried by the defendant. Privette v. Privette, 30 N.C. App. 305, 227 S.E.2d 137 (1976).

Noneconomic Marital Fault Irrelevant to Equitable Distribution. — While noneconomic marital fault is relevant to alimony, it is irrelevant to the equitable distribution of marital property. This distinction is recognized by G.S. 50-20(f). Smith v. Smith, 314 N.C. 80, 331 S.E.2d 682 (1985).

Fault Was Considered Only for Spousal Dependency. — As it was clear that the trial court only considered fault for purposes of dependency, and because it concluded that the wife was not a dependent spouse, the trial court did not need to reach the issue of fault under G.S. 50-16.2(1) (1995) (repealed). Rice v. Rice, 159 N.C. App. 487, 584 S.E.2d 317, 2003 N.C. App. LEXIS 1496 (2003).

Findings Which Support an Award of Alimony. — Where the record reveals sufficient substantial evidence to permit a jury to find (1) that plaintiff is a "supporting spouse" and defendant is a "dependent spouse" as defined in G.S. 50-16.1, and (2) that plaintiff has abandoned defendant and has willfully failed to provide her with necessary subsistence according to his means and condition, so as to render her condition intolerable and her life burdensome, these permissible findings would support an award of alimony. Garner v. Garner, 10 N.C. App. 286, 178 S.E.2d 94 (1970).

In suits for alimony, the order granting alimony must contain one of the 10 grounds for alimony listed in this section as a conclusion of law. Findings of fact to support that conclusion must be made, and usually the finding or findings of fact necessary will involve the actions of the supporting spouse. Steele v. Steele, 36 N.C. App. 601, 244 S.E.2d 466 (1978).

Post-Separation Failure to Provide Necessary Subsistence. —Absent a valid separation agreement waiving all alimony rights under G.S. 50-16.6(b), post-separation failure to provide a dependent-spouse with necessary subsistence gives rise to an action for alimony. Brown v. Brown, 104 N.C. App. 547, 410 S.E.2d 223 (1991), cert. denied, 331 N.C. 383, 417 S.E.2d 789 (1992).

Accustomed Standard of Living Determinative. — It is not necessary that a spouse be reduced to penury to be considered dependent; the accustomed standard of living is the proper measure. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Accustomed Standard of Living Required. — Pursuant to G.S. 50-16.2(1) (1995) (repealed) regarding alimony, the trial court failed to make any findings with respect to the accustomed standard of living during the marriage and, instead, simply made findings regarding the separate "estates" of the parties during the marriage; as the point in evaluating the parties' accustomed standard of living was to consider the pooling of resources that marriage allowed, the trial court's findings were insufficient. Rice v. Rice, 159 N.C. App. 487, 584 S.E.2d 317, 2003 N.C. App. LEXIS 1496 (2003).

Burden on Applicant for Alimony. — This section looks first to the ability of the spouses to maintain the standard of living to which they have become accustomed during the last years of the marriage. The burden on the applicant for alimony is to show the accustomed standard of living and lack of means to maintain that standard. Only then does the ability of the other spouse to pay become significant. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

The issues raised by the pleadings must be passed upon by a jury before permanent alimony may be awarded. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

For case in which evidence was held sufficient to support a judgment for wife, see Bateman v. Bateman, 233 N.C. 357, 64 S.E.2d 156 (1951).

For case in which nonsuit was held proper for failure of evidence to support allegations of complaint, see Crouse v. Crouse, 236 N.C. 763, 73 S.E.2d 922 (1953).

Termination of Spousal Support Obligation. — Findings of fact supported by competent evidence of record fully supported the trial judge's conclusion that plaintiff was no longer a "dependent spouse", which conclusion supported his order terminating defendant's spousal support obligations, as only a "dependent spouse" is entitled to alimony. Marks v. Marks, 316 N.C. 447, 342 S.E.2d 859 (1986).

Applied in Taylor v. Taylor, 9 N.C. App. 260, 175 S.E.2d 604 (1970); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972); Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973); Medlin v. Medlin, 17 N.C. App. 582, 195 S.E.2d 65 (1973); Powell v. Powell, 25 N.C. App. 695, 214 S.E.2d 808 (1975); Fogleman v. Fogleman, 41 N.C. App. 597, 255 S.E.2d 269 (1979); Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979); Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979); Odom v. Odom, 47 N.C. App. 486, 267 S.E.2d 420 (1980); Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243 (1981); Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981); Hinton v. Hinton, 70 N.C. App. 665, 321 S.E.2d 161 (1984); Coombs v. Coombs, 121 N.C. App. 746, 468 S.E.2d 807 (1996).

Cited in Richardson v. Richardson, 4 N.C. App. 99, 165 S.E.2d 678 (1969); Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975); Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976); Reid v. Reid, 29 N.C. App. 754, 225 S.E.2d 649 (1976); Stallings v. Stallings, 36 N.C. App. 643, 244 S.E.2d 494 (1978); Roberts v. Roberts, 38 N.C. App. 295, 248 S.E.2d 85 (1978); Hamilton v. Hamilton, 296 N.C. 574, 251 S.E.2d 441 (1979); Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867 (1979); Knott v. Knott, 52 N.C. App. 543, 279 S.E.2d 72 (1981); Rowe v. Rowe, 52 N.C. App. 646, 280 S.E.2d 182 (1981); Walters v. Walters, 54 N.C. App. 545, 284 S.E.2d 151 (1981); Barr v. Barr, 55 N.C. App. 217, 284 S.E.2d 762 (1981); Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982); Gebb v. Gebb, 77 N.C. App. 309, 335 S.E.2d 221 (1985); Whedon v. Whedon, 313 N.C. 200, 328 S.E.2d 437 (1985); Phillips v. Phillips, 83 N.C. App. 228, 349 S.E.2d 397 (1986); Perkins v. Perkins, 85 N.C. App. 660, 355 S.E.2d 848 (1987); Shook

v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989); Rogers v. Rogers, 111 N.C. App. 606, 432 S.E.2d 907 (1993); Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993); Cunningham v. Cunningham, 345 N.C. 430, 480 S.E.2d 403 (1997).

II. ADULTERY.

To determine whether the dependent spouse was entitled to alimony and, if so, in what amount, the trial judge was required to weigh evidence of adultery by the supporting spouse as well as evidence of indignities offered by both the supporting and the dependent spouse. Baker v. Baker, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

Section Does Not Distinguish Between Pre-Separation and Post-Separation Adultery. — Until the State grants them an absolute divorce, a couple, though separated from each other, continues to be wife and husband; therefore, this section, which sets down the fault grounds for alimony, does not distinguish between pre-separation and post-separation adultery. Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988).

As to allegation of adultery in defendant's answer and cross-action, see Anthony v. Anthony, 8 N.C. App. 20, 173 S.E.2d 617 (1970).

As to evidence of adultery, see VanDooren v. VanDooren, 37 N.C. App. 333, 246 S.E.2d 20, cert. denied, 295 N.C. 653, 248 S.E.2d 258 (1978), decided prior to the amendment of §§ 8-56 and 50-10 by Session Laws 1983 (Reg. Sess., 1984), c. 1037.

Revival of Adultery After Condonation. — An allegation of adultery cannot be held fatally defective on the ground that it sets forth facts amounting to condonation when the complaint also alleges acts of misconduct committed by defendant after the reconciliation, which revive the old grounds. Brooks v. Brooks, 226 N.C. 280, 37 S.E.2d 909 (1946).

Sexual Intercourse with Third Party During Period of Separation Is Adultery. — Voluntary sexual intercourse by a spouse with a third party during the period of separation required by G.S. 50-6 is adultery as contemplated by this section, and is a ground for alimony. Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988).

III. ABANDONMENT.

This section does not define abandonment. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971).

What Is "Abandonment". — One spouse abandons the other, within the meaning of this section, where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without intent of renewing it. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971); Bowen v. Bowen, 19 N.C. App. 710, 200 S.E.2d 214 (1973); Murray v. Murray, 37 N.C. App. 406, 246 S.E.2d 52 (1978), aff'd, 296 N.C. 405, 250 S.E.2d 276 (1979); Robbins v. Robbins, 43 N.C. App. 488, 259 S.E.2d 353 (1979); Tan v. Tan, 49 N.C. App. 516, 272 S.E.2d 11 (1980), cert. denied, 302 N.C. 402, 279 S.E.2d 356 (1981); Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

An action under this section for permanent alimony based on abandonment involves the withdrawal of the supporting spouse from the house and from cohabitation with the dependent spouse. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Abandonment is a legal conclusion which must be based upon factual findings supported by competent evidence. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

The burden of proof as to each of the elements of abandonment is on the party seeking alimony. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

Three Distinct Elements Must Be Proven. — It has been held that one spouse abandons the other, within the meaning of this statute, where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without intent of renewing it. This definition establishes three distinct elements which must be proven by the dependent spouse to entitle her to alimony on the basis of abandonment. Murray v. Murray, 37 N.C. App. 406, 246 S.E.2d 52 (1978), aff'd, 296 N.C. 405, 250 S.E.2d 276 (1979).

Case-by-Case Determination. — Since there is no all-inclusive definition as to what will justify abandonment, each case must be determined in large measure upon its own circumstances. Tan v. Tan, 49 N.C. App. 516, 272 S.E.2d 11 (1980), cert. denied, 302 N.C. 402, 279 S.E.2d 356 (1981).

"Constructive Abandonment". — One spouse may abandon the other without physically leaving the home. In that event, the physical departure of the other spouse from the home is not an abandonment by that spouse. The constructive abandonment by the defaulting spouse may consist of either affirmative acts of cruelty or of a willful failure, as by a willful failure to provide adequate support. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971).

There is no willful failure, and thus no constructive abandonment, where the defect of which the departing spouse complains is due to the illness or physical disability of the remaining spouse and his or her consequent inability to act. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971).

Constructive abandonment may be shown by mental or physical cruelty or willful failure of the defaulting spouse to fulfill obligations of the marriage. Ellinwood v. Ellinwood, 88 N.C. App. 119, 362 S.E.2d 584 (1987).

Proof of constructive abandonment may not be based on evidence of actions after the parties separated. Ellinwood v. Ellinwood, 88 N.C. App. 119, 362 S.E.2d 584 (1987).

Abandonment Requires That Separation Be Done Willfully. — A contention that abandonment imports willfulness is an exercise in semantics. To the contrary, abandonment requires that the separation or withdrawal be done willfully and without just cause or provocation. Mode v. Mode, 8 N.C. App. 209, 174 S.E.2d 30 (1970).

The causes leading to the abandonment are relevant and proper subjects for inquiry in an action for alimony without divorce based upon the husband's abandonment. Mode v. Mode, 8 N.C. App. 209, 174 S.E.2d 30 (1970).

When Spouse Is Justified in Leaving. — Ordinarily the withdrawing spouse is not justified in leaving the other unless the conduct of the latter is such as would likely render it impossible for the withdrawing spouse to continue the marital relation with safety, health, and self-respect. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

Maintenance of Nuisance May Be Adequate Provocation for Subsequent Abandonment. — The maintenance of numbers of dogs and cats, constituting a nuisance to the plaintiff, may be adequate provocation on the part of the defendant for the subsequent abandonment of the defendant by the plaintiff. Therrell v. Therrell, 19 N.C. App. 321, 198 S.E.2d 776 (1973).

Providing of Support Does Not Negative Abandonment. — The husband's willful failure to provide adequate support for his wife may be evidence of his abandonment of her, but the mere fact that he provides adequate support for her does not in itself negative abandonment as that term is used in G.S. 50-7(1). Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966) (decided under former § 50-16); Bowen v. Bowen, 19 N.C. App. 710, 200 S.E.2d 214 (1973).

A wife is entitled to her husband's society and the protection of his name and home in cohabitation. The permanent denial of these rights may be aggravated by leaving her destitute or may be mitigated by a liberal provision for her support, but if the cohabitation is brought to an end without justification, without the consent of the wife and without the intention of renewing it, the matrimonial offense of desertion is complete. Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966), decided under former § 50-16.

A husband may be deemed to have abandoned his wife within the meaning of G.S. 50-7(1), and thus be liable for alimony, notwithstanding the fact that, after cohabitation is brought to an end, he voluntarily provides her with adequate support. Whether his withdrawal from the home, followed by such support, constitutes an abandonment which is ground for suit by the wife for divorce from bed and board, and therefore ground for suit by her for alimony without divorce, depends upon whether his withdrawal from the home was justified by the conduct of the wife. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

Voluntary abandonment of husband by wife without legal justification will not entitle her to alimony in her suit for divorce from bed and board. McManus v. McManus, 191 N.C. 740, 133 S.E. 9 (1926).

A wife who has abandoned her husband without just cause or who, by her wrongful conduct, has forced him to leave home, has no right to alimony. Parker v. Parker, 261 N.C. 176, 134 S.E.2d 174 (1964).

And Husband May Prove as Defense That Wife Separated Herself from Him. — In an action by a wife for alimony without divorce, this section does not preclude the husband, who has left the home, from proving as a defense that it was actually the wife who separated herself from him though she did not leave the home. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971).

Where the pleadings place in issue the crucial question of whether the husband has separated himself from the wife, there is nothing in the language or meaning of the statute which precludes the husband from proving as a defense that in point of fact and in legal contemplation it was the wife who separated herself from the husband. Caddell v. Caddell, 236 N.C. 686, 73 S.E.2d 923 (1953).

Where in his answer defendant alleged that he separated himself from his wife at her bidding after an altercation to avoid continual abuse, nagging and assaults by plaintiff, and that he had provided plaintiff and their children with a furnished house, paid bills for necessaries and given them cash weekly, and had theretofore furnished them with necessary subsistence in accordance with his means in life, the answer raised issues of fact determinative of the right to the relief sought, which issues had to be submitted to the jury, and the granting of plaintiff's motion for judgment on the pleadings was error. Masten v. Masten, 216 N.C. 24, 3 S.E.2d 274 (1939).

Consent to Departure Not Shown. — Where the evidence at most disclosed a marital relationship that was sometimes rocky and a sexual relationship which, in the husband's estimation, left something to be desired, and the trial court's findings, based upon competent evidence, were that throughout the marriage the wife was a capable homemaker and good mother, that the couple enjoyed recreational activities with family and mutual friends, and that when problems arose in the relationship, the wife sought counseling for the couple, the wife met her burden of proof for lack of justification for the husband's departure; and the fact that the wife had, in effect, given husband an ultimatum to either faithfully commit to the marriage or to "make a clean break" did not mean that as a legal matter she consented to the termination of their cohabitation. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

Cruelty Causing Wife to Leave Home. — When the husband by cruel treatment renders the life of the wife intolerable or puts her in such fear for her safety that she is compelled to leave the home, the abandonment is his, and is sufficient ground for alimony without divorce. Eggleston v. Eggleston, 228 N.C. 668, 47 S.E.2d 243 (1948).

A wife may establish a right to alimony by a showing that she was compelled to leave home in fear of her safety as a result of defendant's assaults and cruel treatment. Gaskins v. Gaskins, 273 N.C. 133, 159 S.E.2d 318 (1968).

Plaintiff May Rely on Cumulative Effect of Many Years of Mistreatment. — In an action for alimony without divorce, the plaintiff has the right to rely on the cumulative effect of many years of mistreatment by the husband, and her testimony cannot be limited to events which occurred immediately prior to the alleged abandonment. Mode v. Mode, 8 N.C. App. 209, 174 S.E.2d 30 (1970).

Allegations on Ground of Abandonment. — The plaintiff in an action for alimony without divorce on the ground of abandonment is not required to allege the acts and conduct relied upon as the basis of the action with that degree of particularity as is required when the cause of action is based on such indignities to the person as to render her condition intolerable and her life burdensome. Richardson v. Richardson, 4 N.C. App. 99, 165 S.E.2d 678 (1969).

Where a complaint otherwise contained sufficient allegations to support a cause on grounds of abandonment, the fact that the action for alimony without divorce on complaint referred to the repealed G.S. 50-16 rather than to G.S. 50-16.1 was not fatal. Richardson v. Richardson, 4 N.C. App. 99, 165 S.E.2d 678 (1969).

An action for alimony on the ground of abandonment is a claim of "injury to person or property" under G.S. 1-75.4(3). Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Findings of Trial Court Held Insufficient on Question of Abandonment. — The findings and conclusions of the trial court were held insufficient to resolve the question raised by the defendant as to whether the plaintiff did in fact abandon the defendant, either actually or constructively, and would therefore be vacated and remanded for more detailed findings and conclusions with respect to the defendant's claim for alimony. Soares v. Soares, 86 N.C. App. 369, 357 S.E.2d 418 (1987).

IV. INDIGNITIES TO THE PERSON.

The fundamental characteristic of indignities is that it must consist of a course of conduct or continued treatment which renders the condition of the injured party intolerable and life burdensome. The indignities must be repeated and persisted in over a period of time. Traywick v. Traywick, 28 N.C. App. 291, 221 S.E.2d 85 (1976).

What Constitutes Indignities Depends upon Circumstances. — The acts of a husband which will constitute such indignities to the person of his wife as to render her condition intolerable and her life burdensome largely depend upon the facts and circumstances in each particular case. And such facts and circumstances are for the jury to pass upon, unaffected by any temporary order entered for subsistence and attorneys' fees. Barwick v. Barwick, 228 N.C. 109, 44 S.E.2d 597 (1947).

In cases involving alimony without divorce on the grounds that the supporting spouse has offered such indignities to the dependent spouse as to render his or her condition intolerable and his or her life burdensome, the Supreme Court has not set an undeviating rule as to what constitutes such indignities, but leaves it to the courts to deal with each particular case and to determine it upon its own peculiar circumstances. Presson v. Presson, 12 N.C. App. 109, 182 S.E.2d 614 (1971).

While husband often neglected his wife while participating in rescue squad activities, and on occasion called her names in public, thus contributing to his wife's suspicions and irritation, his conduct was not such as to cause her condition to become intolerable and her life burdensome. Furthermore, the husband did not abandon his wife, but left the marital residence for "just cause" (wife's criticism and accusations). Therefore, the wife was not entitled to alimony as a matter of law. Puett

v. Puett, 75 N.C. App. 554, 331 S.E.2d 287 (1985).

If the wife is compelled to leave the home of the husband because he offers such indignities to her person as to render her condition intolerable and her life burdensome, his acts constitute in law an abandonment of the wife by the husband, and allegations to this effect are sufficient to state a cause of action for alimony without divorce. Barwick v. Barwick, 228 N.C. 109, 44 S.E.2d 597 (1947).

A wife is not always entitled to alimony when her husband "threatens" her, however mildly, on several occasions. Traywick v. Traywick, 28 N.C. App. 291, 221 S.E.2d 85 (1976).

Sexual cohabitation after acts of cruelty cannot be considered as condonation in the sense in which it would be after an act of adultery. The effort to endure unkind treatment as long as possible is commendable; and it is obviously a just rule that the patient endurance by one spouse of the continuing ill treatment of the other should never be allowed to weaken his or her right to relief under subdivision (7) of this section. Privette v. Privette, 30 N.C. App. 305, 227 S.E.2d 137 (1976).

Complaint Merely Alleging Cruelty and Indignities Fails to Give Fair Notice. — Where the complaint merely alleges that the defendant treated the plaintiff cruelly and offered indignities to her person but does not refer to any transactions, occurrences or series of transactions or occurrences intended to be proved, nor mention any specific act of cruelty or indignity committed by the defendant, the alleged cruelty and alleged indignities may consist of nothing more than occasional nagging of the plaintiff or pounding on a table. Such a complaint does not give defendant fair notice of plaintiff's claim. Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973).

V. EXCESSIVE USE OF DRUGS OR ALCOHOL.

Habitual Drunkenness. — Allegations in a complaint that defendant had been an habitual drunkard during the prior three years were sufficient to state a cause of action for alimony without divorce under the term "shall be a drunkard" within the meaning of former G.S. 50-16. Best v. Best, 228 N.C. 9, 44 S.E.2d 214 (1947).

VI. WILLFUL FAILURE TO PROVIDE.

Proof of Husband's Earning Capacity. — In an action by a wife for relief in the form of alimony under subdivision (10) of this section, proof of the husband's earnings and his earning capacity was clearly relevant to a determination of "necessary subsistence according to his ... means and conditions," and the trial court erred in ordering all such evidence to be excluded. VanDooren v. VanDooren, 37 N.C. App. 333, 246 S.E.2d 20, cert. denied, 295 N.C. 653, 248 S.E.2d 258 (1978).

VII. SPENDTHRIFT.

A spendthrift is a person who spends money profusely and improvidently. Skamarak v. Skamarak, 81 N.C. App. 125, 343 S.E.2d 559 (1986).

Refusal to Submit Issue Held Error. — In an action filed by the plaintiff, asking, inter alia, for a divorce from bed and board from the defendant, in which the defendant properly raised the issue of spendthrift and offered evidence to support his allegation, the trial court erred in refusing to submit the issue of spendthrift to the jury. Skamarak v. Skamarak, 81 N.C. App. 125, 343 S.E.2d 559 (1986).

§ 50-16.2A. Postseparation support.

(a) In an action brought pursuant to Chapter 50 of the General Statutes, either party may move for postseparation support. The verified pleading, verified motion, or affidavit of the moving party shall set forth the factual basis for the relief requested.

(b) In ordering postseparation support, the court shall base its award on the financial needs of the parties, considering the parties' accustomed standard of living, the present employment income and other recurring earnings of each party from any source, their income-earning abilities, the separate and marital debt service obligations, those expenses reasonably necessary to support each of the parties, and each party's respective legal obligations to support any other persons.

(c) Except when subsection (d) of this section applies, a dependent spouse is entitled to an award of postseparation support if, based on consideration of the factors specified in subsection (b) of this section, the court finds that the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay.

(d) At a hearing on postseparation support, the judge shall consider marital misconduct by the dependent spouse occurring prior to or on the date of separation in deciding whether to award postseparation support and in deciding the amount of postseparation support. When the judge considers these acts by the dependent spouse, the judge shall also consider any marital misconduct by the supporting spouse in deciding whether to award postseparation support and in deciding the amount of postseparation support.

(e) Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation. (1995, c. 319, s. 2.)

Editor's Note. — Session Laws 1995, c. 319, s. 12, provides that this section is effective October 1, 1995, is applicable to civil actions filed on or after that date, and is not applicable to pending litigation or future motions in the cause seeking to modify orders or judgments in effect on that date.

Legal Periodicals. — For article, "Giving Credit Where Credit is Due: North Carolina Recognizes Custodial Obligations as a Factor in Determining Alimony Entitlements," see 74 N.C.L. Rev. 2128 (1996).

CASE NOTES

Summary judgment was appropriate where a premarital agreement signed by the parties irrefutably barred the wife's claims for postseparation support, alimony and equitable distribution; the language in the subject agreement—drafted by the wife's attorney—was sufficiently "express" to constitute a valid and enforceable waiver of the wife's claims for postseparation support pursuant to G.S. 50-16.2A and alimony pursuant to G.S. 50-16.3A. Stewart v. Stewart, 141 N.C. App. 236, 541 S.E.2d 209, 2000 N.C. App. LEXIS 1439 (2000).

Misconduct Found. — Trial court did not err in refusing to award the wife post-separation support pursuant to G.S. 50-16.1A(4) as a result of the wife's misconduct pursuant to G.S. 50-16.2A(d); the trial court's finding of subjection of the husband to indignities pursuant to G.S. 50-16.1A(3)(f) was sufficient, as it found that, while the husband was a supporting spouse, the wife forceably removed the husband from the house on two occasions under false domestic violence complaints and engaged in other improper behavior. Evans v. Evans, 169 N.C. App. 358, 610 S.E.2d 264, 2005 N.C. App. LEXIS 609 (2005).

Findings of Fact Lacking. — Because the trial court failed to make factual findings as to the parties' financial needs, accustomed standard of living, separate and marital debt obligations, and the expenses reasonably necessary to support each of them, its post-separation support and alimony awards to the husband under G.S. 50-16.3A(a), (b), and (c) were reversed. Crocker v. Crocker, 190 N.C. App. 165, 660 S.E.2d 212, 2008 N.C. App. LEXIS 874 (2008).

Order Supported by Evidence. — Order of postseparation support was supported by evidence that the husband's income from interest, dividends, capital gains, and partnerships averaged $622,136 per year. Squires v. Squires, 178 N.C. App. 251, 631 S.E.2d 156, 2006 N.C. App. LEXIS 1410 (2006).

Cited in Glass v. Glass, 131 N.C. App. 784, 509 S.E.2d 236 (1998); Langdon v. Langdon, 183 N.C. App. 471, 644 S.E.2d 600, 2007 N.C. App. LEXIS 1106 (2007).

§ **50-16.3:** Repealed by Session Laws 1995, c. 319, s. 1.

Cross References. — As to postseparation support, see G.S. 50-16.2A.

Editor's Note. — It was formerly held that alimony pendente lite could not be awarded in the absence of a statute conferring this power. Wilson v. Wilson, 19 N.C. 377 (1837); Reeves v. Reeves, 82 N.C. 348 (1880). In 1852, the legislature passed an act authorizing the courts, upon a petition for divorce and alimony, to decree the petitioner a sum sufficient for her support during the pendency of the suit. See Everton v. Everton, 50 N.C. 202 (1857). In Medlin v. Medlin, 175 N.C. 529, 95 S.E. 857 (1918), the court overruled the former doctrine mentioned above, and stated that the courts possessed the right to grant alimony pendente lite by virtue of the common law, the practice having come down from the English ecclesiastical courts.

The effect of this holding was to make the statute remedial in its nature, affirmative in its terms and cumulative in its effect, not abrogating the common law existent on the subject nor withdrawing from the court any powers already possessed in administering its principles. Medlin v. Medlin, 175 N.C. 529, 95 S.E. 857 (1918), overruling Reeves v. Reeves, 82 N.C. 348 (1880), on this point.

Session Laws 1995, c. 319, which repealed this section, in section 12 provides that the act applies to civil motions filed on or after that date, and shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995. This section, prior to the repeal by Session Laws 1995, c. 319, read as follows: "**Grounds for alimony pendente lite.**

"(a) A dependent spouse who is a party to an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce, shall be entitled to an order for alimony pendente lite when:

(1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and

(2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof.

(b) The determination of the amount and the payment of alimony pendente lite shall be in the same manner as alimony, except that the same shall be limited to the pendency of the suit in which the application is made."

Legal Periodicals. — As to basis of award of alimony pendente lite in North Carolina, see 39 N.C.L. Rev. 189 (1961).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For 1984 survey, "Estoppel and Foreign Divorce," see 63 N.C.L. Rev. 1189 (1985).

For note, "The Contingent Fee Contract in Domestic Relations Cases," see 7 Campbell L. Rev. 427 (1985).

For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

CASE NOTES

I. In General.
II. Prerequisites.
III. Discretion and Findings of Trial Court.
IV. Amount.
V. Review on Appeal.

I. IN GENERAL.

Editor's Note. — *Some of the cases cited below were decided under former G.S. 50-15 and 50-16, which dealt with alimony pendente lite in actions for divorce and in actions for alimony without divorce, respectively.*

Constitutionality. — Defendant's contention that the provisions of former G.S. 50-16 empowering the court to allow subsistence and counsel fees pendente lite to plaintiff in her action for alimony without divorce were unconstitutional as depriving him of a property right without trial by jury was untenable, since he was under the duty to support plaintiff until the adjudication of issues relieving him of that duty, and since such allowance by the court did not form any part of the ultimate relief sought nor affect the final rights of the parties. Peele v. Peele, 216 N.C. 298, 4 S.E.2d 616 (1939).

Sections 50-16.1 Through 50-16.10 Construed in Pari Materia. — The statutes codified as G.S. 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982).

Section 50-16.9 does not list factors to help in the modification decision, but the alimony statutes, G.S. 50-16.1 through 50-16.10, have been read in pari materia because they deal with the same subject matter. Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Right to Alimony Pending Trial Is Grounded on Common Law. — The right of a defendant wife to an allowance for her subsistence pending trial and for counsel fees in a suit for absolute divorce by her husband was not derived from former G.S. 50-15 or 50-16, but was grounded on the common law. Branon v. Branon, 247 N.C. 77, 100 S.E.2d 209 (1957).

Common-Law Principle Not Abrogated. — Former G.S. 50-15 did not abrogate the principle on which alimony was allowed at common law. Cameron v. Cameron, 231 N.C. 123, 56 S.E.2d 384 (1949).

Allowance as a Legal Right. — Generally, excluding statutory grounds for denial, allowance of support to an indigent wife (dependent spouse) while prosecuting a meritorious suit against her husband (supporting spouse) under this section is so strongly entrenched in practice as to be considered an established legal right. Butler v. Butler, 226 N.C. 594, 39 S.E.2d 745 (1946); Yow v. Yow, 243 N.C. 79, 89 S.E.2d 867 (1955); Garner v. Garner, 270 N.C. 293, 154 S.E.2d 46 (1967).

Purpose of alimony pendente lite is to give a dependent spouse immediate support and allow her to maintain her action. Giving supporting spouse credit for equitable distribution purposes for various payments made as part of alimony pendente lite would defeat the purpose of alimony pendente lite by penalizing the dependent spouse in the final distribution of the marital assets. Morris v. Morris, 90 N.C. App. 94, 367 S.E.2d 408 (1988).

When the wife (dependent spouse) is the defendant she has a right to claim alimony pendente lite. Webber v. Webber, 79 N.C. 572 (1878); Barker v. Barker, 136 N.C. 316, 48 S.E. 733 (1904).

Since the decision to the contrary in Reeves v. Reeves, 82 N.C. 348 (1980), is expressly abrogated in Medlin v. Medlin, 175 N.C. 529, 95 S.E. 857 (1918), the wife (dependent spouse) may be allowed alimony pending the action and counsel fees in a suit against her for divorce, even though she seeks no affirmative relief and merely endeavors to defeat her husband's (supporting spouse's) case. It follows, therefore, that in an action by the husband for an absolute divorce, the wife may deny the validity of the cause of action alleged by the husband, or plead an affirmative defense to it, and obtain upon a proper showing in either event allowances from the estate or earnings of the husband for her support during the pendency of the action and for counsel fees for her attorneys. Johnson v. Johnson, 237 N.C. 383, 75 S.E.2d 109 (1953).

When the husband (supporting spouse) sues the wife (dependent spouse) for an absolute divorce, the wife may plead a cause of action for divorce from bed and board as a cross-action, and obtain upon a proper showing allowances from the estate or earnings of her husband for her support during the pendency of the action and for counsel fees for her attorneys. Johnson v. Johnson, 237 N.C. 383, 75 S.E.2d 109 (1953).

And this is true although she may be concluded by the judgment against her in her former and independent action for divorce a mensa under the provisions of the statute. Medlin v. Medlin, 175 N.C. 529, 95 S.E. 857 (1918).

Lapse of seven years from the time of the separation does not bar a cross-action for divorce a mensa on the ground of constructive abandonment or application for alimony pendente lite, either by laches or any statute of limitation. Nall v. Nall, 229 N.C. 598, 50 S.E.2d 737 (1948).

Purpose of support pendente lite is to provide for the reasonable and proper support of the wife (dependent spouse) in an emergency situation, pending the final determination of her rights. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968); Dixon v. Dixon, 6 N.C. App. 623, 170 S.E.2d 561 (1969).

The purpose of alimony pendente lite is to provide the dependent spouse with reasonable living expenses during the pendency of litigation. Roberts v. Roberts, 30 N.C. App. 242, 226 S.E.2d 400 (1976).

The purpose of temporary alimony is to enable the dependent spouse to maintain herself according to her accustomed station in life pending the final determination of the issues. Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867 (1979).

So That She May Maintain Her Action. — The granting of alimony pendente lite is given by statute for the very purpose that the wife (dependent spouse) have immediate support and be able to maintain her action. It is a matter of urgency. Williams v. Williams, 261 N.C. 48, 134 S.E.2d 227 (1964); Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968).

And to Place Her on a More Equal Footing. — The purpose of the speedy proceedings for alimony pendente lite is to give the dependent spouse subsistence and counsel fees pending trial of the action on its merits. This result places the dependent spouse on a more nearly equal footing with the supporting spouse for purposes of preparing for and prosecuting the dependent spouse's claim. Black v. Black, 30 N.C. App. 403, 226 S.E.2d 858, appeal dismissed, 290 N.C. 775, 229 S.E.2d 31 (1976).

The remedy established for the subsistence of the wife (dependent spouse) pending the trial and final determination of the issues involved and for her counsel fees is intended to enable her to maintain herself according to her station in life and to have sufficient funds to employ adequate counsel to meet her husband (supporting spouse) at the trial upon substantially equal terms. Fogartie v. Fogartie, 236 N.C. 188, 72 S.E.2d 226 (1952); Myers v. Myers, 270 N.C. 263, 154 S.E.2d 84 (1967); Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968); Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971); Newsome v. Newsome, 22 N.C. App. 651, 207 S.E.2d 355 (1974).

While Affording Some Protection to Supporting Spouse. — The purpose of former G.S. 50-15 was to afford the wife (dependent spouse) present pecuniary relief pending the progress of the action, and to afford the husband (supporting spouse) some measure of protection in a motion so important, which was made and to be determined before the merits of the controversy were ascertained and the rights of the parties settled regularly by final judgment. Morris v. Morris, 89 N.C. 109 (1883).

Purpose Is Not to Determine Rights. — The purpose of a hearing for alimony pendente lite is to give the dependent spouse reasonable subsistence pending trial and without delay. It is not to determine property rights or finally determine what alimony the dependent spouse may receive if she wins her case on the merits. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961); Kohler v. Kohler, 21 N.C. App. 339, 204 S.E.2d 177 (1974).

Nor to Establish Savings Account for Dependent Spouse. — The purpose of alimony pendente lite is to provide for the reasonable support of the dependent spouse pending final determination of her rights, and not to establish a savings account for her. Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867 (1979).

A pendente lite order is intended to go no further than provide subsistence and counsel fees pending the litigation. It cannot set up a savings account in favor of the plaintiff. Sguros v. Sguros, 252 N.C. 408, 114 S.E.2d 79 (1960); Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968).

Section Does Not Involve an Accounting. — The provision for temporary subsistence pending trial on the merits does not involve an accounting between husband and wife. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

Question of the alleged ownership of assets by an infant is beyond the scope of a hearing for alimony pendente lite. Kohler v. Kohler, 21 N.C. App. 339, 204 S.E.2d 177 (1974).

Order Does Not Determine Final or Ultimate Rights of the Parties. — Order granting or denying subsistence pendente lite, with or without counsel fees, whether or not containing findings of fact, is not a final determination of and does not affect the final rights of the parties. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968).

When the facts are investigated and findings are made as a guide to the court in making temporary allowances, they do not affect the ultimate rights of the parties at the final hearing. Harris v. Harris, 258 N.C. 121, 128 S.E.2d 123 (1962).

The final merits of the action are not before the trial judge upon a pendente lite hearing. Therefore, upon a pendente lite hearing, the trial judge may not determine the ultimate property rights of the parties. Black v. Black, 30 N.C. App. 403, 226 S.E.2d 858, appeal dismissed, 290 N.C. 775, 229 S.E.2d 31 (1976).

Determination of rights to a joint savings account is a matter for final hearing on all the merits, and not for hearing on alimony pendente lite. Roberts v. Roberts, 30 N.C. App. 242, 226 S.E.2d 400 (1976).

No Present Right to Disbursement of Eminent Domain Deposit for Land Owned by Entirety. — A wife separated from her husband and seeking alimony pendente lite had no present right to disbursement of money deposited by the State Highway Commission (now Board of Transportation) as a credit against just compensation for land owned by the wife and her husband as tenants by entirety. North Carolina State Hwy. Comm'n v. Myers, 270 N.C. 258, 154 S.E.2d 87 (1967).

It was error to order defendant to pay monthly premiums on two life insurance policies in which the child was named as primary beneficiary, because such payments provided nothing to meet the immediate needs of the child pending hearing of the case on its merits. Davis v. Davis, 11 N.C. App. 115, 180 S.E.2d 374 (1971).

Allowance for Children. — Where in passing upon a motion of plaintiff in her action for divorce a mensa for alimony, etc., pendente lite, if the trial judge has found facts sufficient upon the evidence, he may award the custody of the minor children, who have been removed by the defendant from the State, to the plaintiff, with an additional allowance for them from the time they may be placed in her custody. Jones v. Jones, 173 N.C. 279, 91 S.E. 960 (1917).

Effect of Reconciliation and Resumption of Marital Relations. — Where an order for alimony pendente lite has been rendered, but subsequent thereto there is a reconciliation and a resumption of marital relations in the home, the necessity for alimony ceases, and a judge has no power to reactivate the order for alimony pendente lite. However, the original cause is still pending and upon a subsequent separation and need for subsistence for the wife, the courts are open for whatever relief may be justified by the situation then existing. Hester v. Hester, 239 N.C. 97, 79 S.E.2d 248 (1953).

An order requiring defendant to pay alimony pendente lite to plaintiff was voided when the parties subsequently resumed the marital relationship. O'Hara v. O'Hara, 46 N.C. App. 819, 266 S.E.2d 59 (1980).

Final Order Terminates Order for Subsistence Pendente Lite. — Ordinarily, a final order for alimony without divorce terminates an order for subsistence pendente lite. Harris v. Harris, 258 N.C. 121, 128 S.E.2d 123 (1962).

A final order in a case for alimony without divorce terminates an order for alimony pendente lite. Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970), overruled on other grounds, Stephenson v. Stephenson, 55 N.C. App. 250, 285 S.E.2d 281 (1981).

Ordinarily, the award of permanent alimony terminates an order for subsistence pendente lite or counsel fees. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

But Relief Ordered at Previous Hearing May Be Continued as Permanent Alimony. — When the court on the final hearing finds facts based on the defendant's admissions and his testimony given at the hearing, the court may determine that the relief sought by plaintiff and ordered at a previous hearing should be continued as permanent alimony, subject to the further orders of the court. Harris v. Harris, 258 N.C. 121, 128 S.E.2d 123 (1962).

Specific Performance of Alimony Provisions of Separation Agreement. — The trial court had authority under G.S. 1A-1, Rule 65 to grant specific performance of the alimony provisions of a separation agreement in order to preserve the status quo pending final determination of the merits of an action on the agreement. Gibson v. Gibson, 49 N.C. App. 156, 270 S.E.2d 600 (1980).

Recovery of Attorneys' Fees When Alimony Modification Is Sought After Absolute Divorce. — Section 50-16.4 is applicable any time a dependent spouse can show that she has the grounds for alimony pendente lite, even though the proceeding was not brought for that purpose. That any time includes times subsequent to the determination of the issues in her favor at the trial of her cause on the merits. Thus, if she meets the three requirements of G.S. 50-16.3(a) for alimony pendente lite, she can recover her attorneys' fees even though she sought alimony modification subsequent to absolute divorce. Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Applied in Williams v. Williams, 12 N.C. App. 170, 182 S.E.2d 667 (1971); Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971); Medlin v. Medlin, 17 N.C. App. 582, 195 S.E.2d 65 (1973); Little v. Little, 18 N.C. App. 311, 196 S.E.2d 562 (1973); Robinson v. Robinson, 26 N.C. App. 178, 215 S.E.2d 179 (1975); Hill v. Hill, 27 N.C. App. 423, 219 S.E.2d 273 (1975); Davis v. Davis, 35 N.C. App. 111, 240 S.E.2d 488 (1978); Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979); Blair v. Blair, 44 N.C. App. 605, 261 S.E.2d 301 (1980).

Cited in Hatcher v. Hatcher, 7 N.C. App. 562, 173 S.E.2d 33 (1970); Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970); Blair v. Blair, 8 N.C. App. 61, 173 S.E.2d 513 (1970); Fonvielle v. Fonvielle, 8 N.C. App. 337, 174 S.E.2d 67 (1970); Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975); Bridges v. Bridges, 29 N.C. App. 209, 223 S.E.2d 845 (1976); Wilhelm v. Wilhelm, 43 N.C. App. 549, 259 S.E.2d 319 (1979); Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985); Benfield v. Pilot Life Ins. Co., 82 N.C. App. 293, 346 S.E.2d 283 (1986); Holder v. Holder, 87 N.C. App. 578, 361 S.E.2d 891 (1987); Evans v. Evans, 111 N.C. App. 792, 434 S.E.2d 856 (1993).

II. PREREQUISITES.

Prerequisites for Obtaining Alimony Pendente Lite. — In order to obtain alimony pendente lite, the applicant must be (1) a dependent spouse, (2) entitled to the relief demanded in the action, and (3) without sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof. Hogue v. Hogue, 20 N.C. App. 583, 202 S.E.2d 327 (1974); Ross v. Ross, 33 N.C. App. 447, 235 S.E.2d 405 (1977); Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867 (1979).

This section establishes the requirements for an award of alimony pendente lite. In the first place, the applicant must be a dependent spouse. Once it is established that the applicant is a dependent spouse it must appear that such spouse: (1) Prima facie, is entitled to the relief demanded in the action, i.e., absolute divorce, divorce from bed and board, annulment, or alimony without divorce; and (2) Does not have sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof. Cabe v. Cabe, 20 N.C. App. 273, 201 S.E.2d 203 (1973).

To obtain alimony pendente lite, the dependent spouse must show, among other things, that he or she is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and that he or she has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof. Fore v. Fore, 15 N.C. App. 226, 189 S.E.2d 520 (1972); Simmons v. Simmons, 22 N.C. App. 68, 205 S.E.2d 582 (1974).

In order for a spouse to be entitled to alimony pendente lite under this section, the trial court must make findings of fact to show three requirements: (1) the existence of a marital relationship; (2) that the spouse is either (a) actually or substantially dependent upon the other spouse for maintenance and support, or (b) is substantially in need of maintenance and support from the other spouse; and (3) that the supporting spouse is capable of making the required payments. Hampton v. Hampton, 29 N.C. App. 342, 224 S.E.2d 197 (1976); Robbins v. Robbins, 43 N.C. App. 488, 259 S.E.2d 353 (1979).

Prerequisites for Award of Counsel Fees. — The clear and unambiguous language of this section and G.S. 50-16.4 provides as prerequisites for determination of an award of counsel fees the following: (1) The spouse is entitled to the relief demanded; (2) The spouse is a dependent spouse; and (3) The dependent spouse has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972); Therrell v. Therrell, 19 N.C. App. 521, 199 S.E.2d 164 (1973); Townson v. Townson, 26 N.C. App. 75, 214 S.E.2d 444 (1975); Knott v. Knott, 52 N.C. App. 543, 279 S.E.2d 72 (1981);

Whedon v. Whedon, 313 N.C. 200, 328 S.E.2d 437 (1985).

Before attorneys' fees may be awarded to the dependent spouse in an alimony case under this section and G.S. 50-16.4 and before attorneys' fees may be awarded to the interested party in a custody, support, or custody and support suit under G.S. 50-13.6, that person must have insufficient means to defray the expense of the suit; that is, he or she must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

As to allowance of attorneys' fees, see also Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978).

Both Grounds Stated in Subsection (a) Must Exist. — The two subdivisions of subsection (a) of this section are connected by the word "and", and it is therefore mandatory that the grounds stated in both of these subdivisions shall be found to exist before an award of alimony pendente lite may be made. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Mitchell v. Mitchell, 12 N.C. App. 54, 182 S.E.2d 627 (1971); Presson v. Presson, 13 N.C. App. 81, 185 S.E.2d 17 (1971); Whitney v. Whitney, 15 N.C. App. 151, 189 S.E.2d 629 (1972); Hogue v. Hogue, 20 N.C. App. 583, 202 S.E.2d 327 (1974).

Wife who was not entitled to alimony, was not entitled to attorneys' fees for the prosecution of her claim for alimony pendente lite. Puett v. Puett, 75 N.C. App. 554, 331 S.E.2d 287 (1985).

Only a dependent spouse is entitled to alimony or alimony pendente lite. Galloway v. Galloway, 40 N.C. App. 366, 253 S.E.2d 41 (1979).

Income of Dependent Spouse Must Be Insufficient for Support and Expenses of Suit. — A married woman (dependent spouse) is entitled to alimony pendente lite from husband's (supporting spouse's) estate when the income from her separate estate is not sufficient for her support and to defray the necessary expenses in prosecuting her suit. Miller v. Miller, 75 N.C. 70 (1876).

Spouse with Ample Means Is Not Entitled to Allowance. — The right of alimony pendente lite is predicated upon the justice of affording the wife (dependent spouse) sufficient means to cope with her husband (supporting spouse) in presenting their case before the court, and a finding, supported by evidence, that wife has earnings and means of support equal to that of her husband sustains the court's order denying her motion for alimony pendente lite. Oliver v. Oliver, 219 N.C. 299, 13 S.E.2d 549 (1941).

Where wife (spouse) has a monthly income substantially larger than her husband's (spouse's), the requirements of subsection (a)(2) of this section are not made to appear, and it is error to award alimony pendente lite and counsel fees pendente lite. Davis v. Davis, 11 N.C. App. 115, 180 S.E.2d 374 (1971).

But mere fact that wife (dependent spouse) has property or means of her own does not prohibit an award of alimony pendente lite. Strother v. Strother, 29 N.C. App. 223, 223 S.E.2d 838 (1976); Robbins v. Robbins, 43 N.C. App. 488, 259 S.E.2d 353 (1979).

Nor Relieve Supporting Spouse of Duty. — The fact that the wife has separate property of her own does not relieve the husband of his duty to maintain for his wife the standard of living to which she has become accustomed. Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867 (1979).

The clear and unambiguous language of this section and G.S. 50-16.4 require that to receive attorneys' fees in an alimony case it must be determined that (1) the spouse is entitled to the relief demanded; (2) the spouse is a dependent spouse; and (3) the dependent spouse has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof. All three of these determinations must be made in order to support an award of attorneys' fees. Taylor v. Taylor, 46 N.C. App. 438, 265 S.E.2d 626 (1980).

No Allowance Where Dependent Spouse Has No Case. — Discretion in allowance of support to a wife (dependent spouse), while suing her husband (supporting spouse) is confined to consideration of necessities of the wife on the one hand and the means of the husband on the other, but to warrant such allowance the court is expected to look into the merits of the action and would not be justified in allowing subsistence and counsel fees where the plaintiff, in law, has no case. Garner v. Garner, 270 N.C. 293, 154 S.E.2d 46 (1967).

Court Must Look to Merits to Determine If Case for Relief Has Been Made. — In order to warrant the allowance of alimony pendente lite, the court must look to the merits of the action to determine if the petitioning party in law has made out a case entitling her to the relief demanded. Therrell v. Therrell, 19 N.C. App. 321, 198 S.E.2d 776 (1973).

In passing on a motion for alimony pendente lite the judge is expected to look into the merits of the action and determine in his sound legal discretion, after considering the allegations of the complaint and the evidence of the respective parties, whether or not the movant is entitled to the relief sought. Parker v. Parker, 261 N.C. 176, 134 S.E.2d 174 (1964).

Complaint Must Allege Facts Constituting Cause of Action. — Alimony pendente lite and counsel fees should not be awarded unless the plaintiff alleges in her complaint facts sufficient to constitute a good cause of action. Ipock v. Ipock, 233 N.C. 387, 64 S.E.2d 283 (1951).

But Kind of Divorce Warranted by Petition Is Immaterial. — Upon an application for alimony pendente lite, it is unnecessary to decide whether the petition warrants a divorce a vinculo or only a divorce a mensa et thoro. Little v. Little, 63 N.C. 22 (1868).

Burden upon Dependent Spouse. — Upon the application of a dependent spouse for alimony pendente lite, the burden is upon her to establish (1) that she is entitled to relief in her action and, (2) that she does not have sufficient means whereon to subsist during the prosecution of her claim or to defray the necessary expenses thereof. In re Mason, 13 N.C. App. 334, 185 S.E.2d 433 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 513 (1972).

Each case presents different circumstances, and the burden is upon the applicant for alimony, or alimony pendente lite, to offer evidence to establish need. Cabe v. Cabe, 20 N.C. App. 273, 201 S.E.2d 203 (1973).

Mere Institution of Suit Is Not Enough. — A wife (dependent spouse) is not entitled to an order for support pendente lite merely because she has instituted an action and alleged grounds for divorce or alimony. Deal v. Deal, 259 N.C. 489, 131 S.E.2d 24 (1963).

Nor Is Mere Separation. — Former G.S. 50-15 did not authorize the judge, in passing on a motion for alimony pendente lite, to award a wife (dependent spouse) subsistence and counsel fees merely because she and her husband (supporting spouse) had separated. Parker v. Parker, 261 N.C. 176, 134 S.E.2d 174 (1964).

Dependent Spouse Must Show Lack of Provocation. — As a prerequisite to any allowance to a wife (dependent spouse), she must show that she did not by her own conduct provoke the wrongs and abuses of which she complains. Deal v. Deal, 259 N.C. 489, 131 S.E.2d 24 (1963).

But it need not be found as a fact that the plaintiff was a faithful, dutiful and obedient wife (spouse). Lassiter v. Lassiter, 92 N.C. 129 (1885).

Wrongful Abandonment by Dependent Spouse. — Former G.S. 50-16 did not contemplate that a wife who wrongfully abandoned and separated herself from her husband should be awarded subsistence and counsel fees. Byerly v. Byerly, 194 N.C. 532, 140 S.E. 158 (1927); Reece v. Reece, 232 N.C. 95, 59 S.E.2d 363 (1950); Deal v. Deal, 259 N.C. 489, 131 S.E.2d 24 (1963).

In a wife's (dependent spouse's) action for an allowance pendente lite the husband (supporting spouse) is not precluded from asserting and proving as a defense to his wife's action and motion that she has separated herself from him or abandoned him. Deal v. Deal, 259 N.C. 489, 131 S.E.2d 24 (1963).

Separation by Mutual Agreement. — The court properly denied a wife's motion for an interim award of alimony pendente lite and counsel fees in her suit for alimony without divorce, where there were findings that (1) the plaintiff and her husband had separated by mutual agreement, (2) the husband did not abandon the wife, and (3) the husband was guilty of no misconduct that would support an award of alimony. Harper v. Harper, 9 N.C. App. 341, 176 S.E.2d 48 (1970).

Effect of Separation Agreement. — The existence of a separation agreement was not a bar to an award of alimony pendente lite under former G.S. 50-16. Wilson v. Wilson, 261 N.C. 40, 134 S.E.2d 240 (1964).

Under former G.S. 50-16 the reasonableness of a separation agreement did not have to be determined before the court could award temporary allowances. Oldham v. Oldham, 225 N.C. 476, 35 S.E.2d 332 (1945); Williams v. Williams, 261 N.C. 48, 134 S.E.2d 227 (1964).

Where in proceedings by wife to secure her subsistence and reasonable counsel fees under this section it was alleged that a separation agreement was procured by fraud, sufficiently pleaded, objection that the validity of the separation contract had to be determined first in an independent action was untenable, as former G.S. 50-16 expressly provided that alimony could be granted "pending the trial and final determination of the issues." Taylor v. Taylor, 197 N.C. 197, 148 S.E. 171 (1929).

The cases of Oldham v. Oldham, 225 N.C. 476, 35 S.E.2d 332 (1945) and Taylor v. Taylor, 197 N.C. 197, 148 S.E. 171 (1929), holding that in an action for alimony without divorce the validity or reasonableness of a separation agreement need not be determined before the court can award temporary allowances, although decided under former G.S. 50-16, relating to actions for alimony without divorce, were equally applicable to a motion for temporary alimony under former G.S. 50-15, pending the trial of an action for divorce from bed and board. Williams v. Williams, 261 N.C. 48, 134 S.E.2d 227 (1964).

Adultery. — Under former G.S. 50-16, there was no defense limiting the power of the trial court to award subsistence pendente lite except the defense of the wife's adultery. Oldham v. Oldham, 225 N.C. 476, 35 S.E.2d 332 (1945); Williams v. Williams, 261 N.C. 48, 134 S.E.2d 227 (1964). See also, Branon v. Branon, 247 N.C. 77, 100 S.E.2d 209 (1957).

Validity of Marriage. — Under Session Laws 1919, c. 24, it was not required that an issue involving the validity of the marriage be first determined before wife could sustain her civil action against her husband for an allowance for reasonable subsistence and counsel fees pending trial and final determination of the issue relating to the validity of the marriage. Barbee v. Barbee, 187 N.C. 538, 122 S.E. 177 (1924).

Pleadings Held Insufficient. — Trial court did not err by finding wife's pleadings were insufficient on their face and dismissing her action for alimony and alimony pendente lite; plaintiff asserted in her complaint that she was a "dependent spouse," but the only support she offered for this conclusion was evidence of her husband's salary and she did not present any evidence that she needed assistance to subsist during the prosecution or defense of the suit. Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989), cert. denied, 326 N.C. 50, 389 S.E.2d 94 (1990).

Order for Temporary Alimony Held Error. — Trial court erred in ordering husband to pay wife temporary alimony and counsel fees retroactively from Dec. 21, 1987, the date of the entry of the order, to Aug. 1, 1984, approximately one month after the date the parties separated; wife's failure to claim alimony pendente lite and counsel fees at the time the parties separated demonstrated a total lack of need for an order of temporary alimony and counsel fees and the record vividly disclosed that wife was able to support herself and employ counsel to protect her interest during the pendency of the action. Haywood v. Haywood, 95 N.C. App. 426, 382 S.E.2d 798, cert. denied, 325 N.C. 706, 388 S.E.2d 454 (1989).

Award Upheld. — In an action by a wife for a divorce a mensa, where acts of cruelty were alleged as the ground of separation, and an estimate was made of the value of the defendant's estate, it was held that there was sufficient evidence to decree alimony and fix the amount. Pain v. Pain, 80 N.C. 322 (1879).

Allegations were held sufficient where acts were alleged which were well calculated to make wife's condition intolerable and her life burdensome and the bill set forth an estimate of the amount of the defendant's property. Gaylord v. Gaylord, 57 N.C. 74 (1858).

Where the complaint of wife seeking a divorce alleged facts which, if believed, entitled her to the relief demanded, and it was supplemented by an affidavit that the husband was trying to dispose of his property and had offered his land for sale with the avowed purpose of leaving the State, and that the children were small and needed the mother's care, it was proper to grant an order for alimony pendente lite, and it was also competent for the court to award to the mother the custody of the younger children. Scroggins v. Scroggins, 80 N.C. 319 (1879).

Where the allegations in the complaint were not controverted, it was sufficient if the judge found that no answer was filed and adjudged alimony to be paid. Zimmerman v. Zimmerman, 113 N.C. 432, 18 S.E. 334 (1893).

Where, in husband's action for divorce on ground of adultery, wife filed an answer denying the charges and set up a cross-action for divorce from bed and board, the finding by the court that the wife denied the charge of adultery under oath, that the court did not find that she was guilty of adultery, that the husband had abandoned her and that she was financially unable to defray the necessary and proper expenses of the action and was without means of support, and that the husband was financially able to make the payments ordered, was sufficient to support the court's order of alimony pendente lite. Covington v. Covington, 215 N.C. 569, 2 S.E.2d 558 (1939).

Plaintiff was entitled to an order for subsistence pendente lite where the facts found by the judge showed that the defendant abandoned his wife, without any fault or provocation on her part, and without providing for her any maintenance and support. Bailey v. Bailey, 243 N.C. 412, 90 S.E.2d 696 (1956).

Award Held Improper. — Where the finding that plaintiff wife was a "dependent spouse" amounted to a mere conclusion unsupported by a finding of fact, and where there were no findings upon which to conclude that wife was entitled to the relief demanded under subsection (a)(1) of this section, the trial court erred in ordering alimony pendente lite and counsel fees. Kornegay v. Kornegay, 15 N.C. App. 751, 190 S.E.2d 646 (1972).

III. DISCRETION AND FINDINGS OF TRIAL COURT.

Amount of Subsistence and Counsel Fees Is in Trial Court's Discretion. — The amount allowed for subsistence pendente lite and counsel fees is within the discretion of the trial court, and the court's decision is not reviewable except in case of abuse of discretion or error of law. Phillips v. Phillips, 223 N.C. 276, 223 N.C. 279, 25 S.E.2d 848, 25 S.E.2d 848 (1943); Cunningham v. Cunningham, 234 N.C. 1, 65 S.E.2d 375 (1951); Mercer v. Mercer, 253 N.C. 164, 116 S.E.2d 443 (1960); Griffith v. Griffith, 265 N.C. 521, 144 S.E.2d 589 (1965); Miller v. Miller, 270 N.C. 140, 153 S.E.2d 854 (1967); Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968); Harper v. Harper, 9 N.C. App. 341, 176 S.E.2d 48 (1970); Austin v. Austin, 12 N.C. App. 390, 183 S.E.2d 428 (1971); Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972); Strother v. Strother, 29 N.C. App. 223, 223 S.E.2d 838 (1976).

The amount of the allowance to plaintiff for subsistence pendente lite and counsel fees is a matter for the trial judge. He has full power to act without the intervention of the jury, and his discretion in this respect is not reviewable, except in case of an abuse of discretion. Fogartie v. Fogartie, 236 N.C. 188, 72 S.E.2d 226 (1952); Rowland v. Rowland, 253 N.C. 328, 116 S.E.2d 795 (1960); Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961); Harrell v. Harrell, 256 N.C. 96, 123 S.E.2d 220 (1961).

Where attorneys' fees may be properly awarded, the amount of the award rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

But This Discretion Is Not Absolute and Unreviewable. — The allowance of support and counsel fees pendente lite in a suit for divorce or alimony without divorce is not an absolute discretion to be exercised at the pleasure of the court and unreviewable, but is to be exercised within certain limits and with respect to factual conditions. Butler v. Butler, 226 N.C. 594, 39 S.E.2d 745 (1946); Garner v. Garner, 270 N.C. 293, 154 S.E.2d 46 (1967); Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968); Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971). But see, Tiedemann v. Tiedemann, 204 N.C. 682, 169 S.E. 422 (1933).

Discretion in making allowances pendente lite is confined to consideration of the necessities of the wife on the one hand, and the means of the husband on the other. Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968).

Mixed Questions of Law and Fact. — Determination of what constitutes a "dependent spouse" and what constitutes a "supporting spouse" requires an application of principles of statutory law to facts and therefore involves mixed questions of law and fact. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Trial Judge Must Look into the Merits. — In considering a motion for alimony pendente lite, the court may not exercise an absolute and unreviewable discretion based solely upon the allegations of the complaint and the plaintiff's evidence offered in support thereof, while refusing to hear the evidence of the defendant. The judge is expected to look into the merits of the action and determine, in his sound legal discretion, after considering the allegations of the complaint and the evidence of the respective parties, whether or not the movant is entitled to the relief sought. Ipock v. Ipock, 233 N.C. 387, 64 S.E.2d 283 (1951); Parker v. Parker, 261 N.C. 176, 134 S.E.2d 174 (1964).

And Consider a Number of Factors. — While the amount of alimony pendente lite to be awarded rests within the sound discretion of the trial judge, the judge must take into consideration a number of factors, including the accustomed standard of living of the parties and the estate of earnings of each party. Cornelison v. Cornelison, 47 N.C. App. 91, 266 S.E.2d 707 (1980).

The facts required by the statutes must be alleged and proved to support an order for subsistence pendente lite. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972); Guy v. Guy, 27 N.C. App. 343, 219 S.E.2d 291 (1975); Ross v. Ross, 33 N.C. App. 447, 235 S.E.2d 405 (1977).

And the Court Must Make Findings of Fact and Conclusions of Law Thereon. — In suits for alimony pendente lite, the grounds listed under this section are conclusions of law necessary to justify an order granting such alimony. The court, therefore, must conclude as a matter of law that the party seeking alimony pendente lite (1) is the dependent spouse, (2) is a party in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce and, (3) from all the evidence presented pursuant to G.S. 50-16.8(f), (a) is entitled to the relief demanded in the action, and (b) is shown to lack sufficient means whereon to subsist during the prosecution or defense of the suit. Specific facts which support such a conclusion must be found. Steele v. Steele, 36 N.C. App. 601, 244 S.E.2d 466 (1978).

This section requires the trial judge to conclude as a matter of law that the spouse seeking alimony pendente lite is the dependent spouse within the meaning of G.S. 50-16.1(3); that such spouse is a party in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce; that such spouse is entitled to the relief demanded; and that such spouse is shown to lack sufficient means whereon to subsist during the course of the litigation. Cornelison v. Cornelison, 47 N.C. App. 91, 266 S.E.2d 707 (1980).

It is necessary for the trial judge to make findings from which it can be determined, upon appellate review, that an award of alimony pendente lite is justified and appropriate in the case. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Travis v. Travis, 27 N.C. App. 575, 219 S.E.2d 512 (1975).

Evidentiary or Subsidiary Facts Need Not Be Found. — In an action for alimony pendente lite the trial court is not required to find evidentiary or subsidiary facts. The court need only find the ultimate facts in issue. Orren v. Orren, 25 N.C. App. 106, 212 S.E.2d 394 (1975).

But Findings of Ultimate Facts Must Be Made. — In making findings of fact under subsection (f) of G.S. 50-16.8 it is not necessary that the trial judge make detailed findings as to each allegation and evidentiary fact presented. It is necessary that he find the ultimate facts sufficient to establish that the dependent spouse is entitled to an award of alimony pendente lite under the provisions of subsection (a) of this section. Blake v. Blake, 6 N.C. App. 410, 170 S.E.2d 87 (1969); Robbins v. Robbins, 43 N.C. App. 488, 259 S.E.2d 353 (1979).

The judge must find ultimate facts sufficient to establish that the dependent spouse is entitled to an award of alimony pendente lite under the provisions of subsection (a) of this section. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Finding on Right to Relief Is Essential. — It is essential that a sufficient finding be made that the dependent spouse is entitled to the relief sought. Whitney v. Whitney, 15 N.C. App. 151, 189 S.E.2d 629 (1972); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

Dependency Must Be Found. — Absent a finding of fact in the order of alimony pendente lite that the plaintiff was a dependent spouse, alimony pendente lite may not be awarded. Musten v. Musten, 36 N.C. App. 618, 244 S.E.2d 699 (1978).

As Must Financial Need. — While it is not necessary in awarding alimony pendente lite on the basis of dependency for the trial judge to find that the wife (dependent spouse) would be unable to exist without support, it is necessary that the trial judge find facts which establish that she is substantially in need of maintenance and support. Newsome v. Newsome, 22 N.C. App. 651, 207 S.E.2d 355 (1974).

In order to recover counsel fees, this section requires a finding that plaintiff is unable to defray the expense of prosecuting the suit. Davis v. Davis, 62 N.C. App. 573, 302 S.E.2d 886 (1983).

Due regard must also be given to the ability of the supporting spouse to pay. Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867 (1979).

Lack of Findings as to Dependent Spouse's Means Is Reversible Error. — Failure to make specific findings as to the sufficiency of dependent spouse's means of subsistence during the prosecution of her action and of defraying the necessary expenses thereof constitutes reversible error. Mitchell v. Mitchell, 12 N.C. App. 54, 182 S.E.2d 627 (1971).

Findings of Fact Necessary for Award of Attorneys' Fees. — In order to award attorneys' fees in alimony cases the trial court must make findings of fact showing that fees are allowable and that the amount awarded is reasonable. Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978).

Where the order appealed from is deficient in findings to establish that plaintiff is entitled to alimony pendente lite pursuant to this section, the award of counsel fees under G.S. 50-16.4 is also unsupported and must be reversed. Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973).

Where the findings of fact are insufficient to support an award for alimony pendent lite, they are likewise insufficient to support an award of counsel fees. Newsome v. Newsome, 22 N.C. App. 651, 207 S.E.2d 355 (1974).

Trial judge is not required to make negative findings justifying denial of an application by dependent spouse for alimony pendente lite. In re Mason, 13 N.C. App. 334, 185 S.E.2d 433 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 512 (1972).

Findings in alimony pendente lite motion are solely for purpose of that motion and are not competent evidence on the final hearing of the same issues. Perkins v. Perkins, 85 N.C. App. 660, 355 S.E.2d 848, cert. denied, 320 N.C. 633, 360 S.E.2d 92 (1987).

IV. AMOUNT.

Determination of Amount Is Made in Same Manner as Alimony. — The determination of the amount and the payment of alimony pendente lite is to be made in the same manner as alimony, except that alimony pendente lite shall be limited to the pendency of the suit in which the application is made. Blake v. Blake, 6 N.C. App. 410, 170 S.E.2d 87 (1969).

The amount of alimony pendente lite is to be determined in the discretion of the trial judge in the same manner as the amount of alimony is determined. Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970).

Award Should Be Based on Supporting Spouse's Earnings. — If the husband (supporting spouse) is honestly and in good faith engaged in a business to which he is properly adapted, and is making a good faith effort to earn a reasonable income, the award should be based on the amount which he is earning when the award is made. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

But Amount of Allowance Is Not Necessarily Dependent upon Earnings. — The granting of a support allowance and the amount thereof does not necessarily depend upon the earnings of the husband. One who is able-bodied and capable of earning may be ordered to pay subsistence. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

When Award Will Be Based on Capacity to Earn. — To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that the husband (supporting spouse) was failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for his wife (dependent spouse). Conrad v. Conrad, 252 N.C. 412, 113 S.E.2d 912 (1960); Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

An award of alimony pendente lite may not be based on the earning capacity of the supporting spouse in the absence of a finding that the defendant is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support. Gobble v. Gobble, 35 N.C. App. 765, 242 S.E.2d 516 (1978).

Allowance When Supporting Spouse Denies Having Property. — Where the husband (supporting spouse) denies having any property, but admits that he is an able-bodied man, the court may order an allowance without inquiry into the value of his property. Muse v. Muse, 84 N.C. 35 (1881).

Consideration of Dependent Spouse's Station in Life. — In determining the need for maintenance and support, the court will give due consideration to the plaintiff's accustomed station in life. Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867 (1979).

Allowance of Reasonable Amount. — In an action for alimony without divorce, upon issuance of summons and the filing of a verified complaint setting forth facts sufficient to entitle the complainant to the relief sought, the judge has power to require the payment by the husband of a reasonable amount for the wife's subsistence and counsel fees pendente lite. Perkins v. Perkins, 232 N.C. 91, 59 S.E.2d 356 (1950).

Award Upheld. — Award of $400.00 per month for support and maintenance pendente lite upheld. Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706, cert. denied, 321 N.C. 330, 368 S.E.2d 875 (1988).

V. REVIEW ON APPEAL.

Appeal as a Matter of Right. — An order requiring payment of alimony pendente lite and counsel fees affects a substantial right from which an appeal lies as a matter of right. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Scope of Review. — Proper exercise of the trial judge's authority in granting alimony, alimony pendente lite, or counsel fees is a question of law, reviewable on appeal. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

Reviewable Question of Law in Award of Attorneys' Fees. — The facts required by this section and G.S. 50-16.4 must be alleged and proved to support an order for attorneys' fees. Whether these requirements have been met is a question of law that is reviewable on appeal. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Order denying alimony pendente lite and attorneys' fees is an interlocutory decree from which an immediate appeal does not lie. Wilson v. Wilson, 90 N.C. App. 144, 367 S.E.2d 363 (1988).

Denial of Attorneys' Fees Held Interlocutory. — Denial of attorneys' fees under G.S. 50-16.4 was not a final order of the trial court, where at the time appellant's motion was filed there had been no determination that his client, defendant, was entitled to alimony pendente lite under this section, so that appellant was not yet entitled to attorneys' fees under G.S. 50-16.4, and as appellant could appeal the denial of his motion after final judgment, or could bring a separate lawsuit to collect his fees, no substantial right of appellant was affected by the Court of Appeals' failure to entertain an interlocutory appeal on this issue. Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

Weight of Evidence is for Trier of Facts. — While the sufficiency of the findings of fact to support the award is reviewable on appeal, the weight to be accorded the evidence is solely for the trier of the facts. Cornelison v. Cornelison, 47 N.C. App. 91, 266 S.E.2d 707 (1980).

Conclusive Effect of Findings. — If the findings of fact are supported by competent evidence, they are conclusive on appeal, even though the evidence would support contrary findings. Cornelison v. Cornelison, 47 N.C. App. 91, 266 S.E.2d 707 (1980).

Effect of Appeal. — When an order arising from a domestic case is appealed, the cause is taken out of the jurisdiction of the trial court and put into the jurisdiction of the appellate court. Pending the appeal, the trial judge is functus officio and is without authority to act in the matter. Traywick v. Traywick, 31 N.C. App. 363, 229 S.E.2d 220 (1976).

Remand on Appeal. — The district court had jurisdiction to entertain a motion in the cause and to adjudge defendant guilty of contempt for failure to comply with order for alimony pendente lite after the judgment on the merits had been reversed on other grounds, new trial had been ordered and the case had been certified back to the trial court by the Court of Appeals. Traywick v. Traywick, 31 N.C. App. 363, 229 S.E.2d 220 (1976).

§ 50-16.3A. Alimony.

(a) Entitlement. — In an action brought pursuant to Chapter 50 of the General Statutes, either party may move for alimony. The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those set out in subsection (b) of this section. If the court finds that the dependent spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, the court shall not award alimony. If the court finds that the supporting spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, then the court shall order that alimony be paid to a dependent spouse. If the court finds that the dependent and the supporting spouse each participated in an act of illicit sexual behavior during the marriage and prior to or on the date of separation, then alimony shall be denied or awarded in the discretion of the court after consideration of all of the circumstances. Any act of illicit sexual behavior by either party that has been condoned by the other party shall not be considered by the court.

The claim for alimony may be heard on the merits prior to the entry of a judgment for equitable distribution, and if awarded, the issues of amount and of whether a spouse is a dependent or supporting spouse may be reviewed by the court after the conclusion of the equitable distribution claim.

(b) Amount and Duration. — The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term. In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including:

(1) The marital misconduct of either of the spouses. Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation;
(2) The relative earnings and earning capacities of the spouses;
(3) The ages and the physical, mental, and emotional conditions of the spouses;
(4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
(5) The duration of the marriage;
(6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;
(7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
(8) The standard of living of the spouses established during the marriage;
(9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
(10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
(11) The property brought to the marriage by either spouse;
(12) The contribution of a spouse as homemaker;
(13) The relative needs of the spouses;
(14) The federal, State, and local tax ramifications of the alimony award;
(15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.
(16) The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

(c) Findings of Fact. — The court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment. Except where there is a motion before the court for summary judgment, judgment on the pleadings, or other motion for which the Rules of Civil Procedure do not require special findings of fact, the court shall make a specific finding of fact on each of the factors in subsection (b) of this section if evidence is offered on that factor.

(d) In the claim for alimony, either spouse may request a jury trial on the issue of marital misconduct as defined in G.S. 50-16.1A. If a jury trial is requested, the jury will decide whether either spouse or both have established marital misconduct. (1995, c. 319, s. 2; c. 509, s. 135.2(b); 1998-176, s. 11.)

Editor's Note. — Session Laws 1995, c. 319, s. 12, provides that this section is effective October 1, 1995, is applicable to civil actions filed on or after that date, and is not applicable to pending litigation or future motions in the cause seeking to modify orders or judgments in effect on that date.

Legal Periodicals. — For article, "Giving Credit Where Credit is Due: North Carolina Recognizes Custodial Obligations as a Factor in Determining Alimony Entitlements," see 74 N.C.L. Rev. 2128 (1996).

CASE NOTES

"New Action" Under Rule 41(a)(1). — An alimony claim made pursuant to subsection (a) of this section and filed within one year of plaintiff's dismissal of her first claim (under repealed G.S. 50-16.6(a)) failed to qualify as "a new action based on the same claim" under G.S. 1A-1, Rule 41(a)(1), because the claim for alimony under this section was distinct from that set out by the repealed section in that it deferred to the court's discretion the decision of whether to award alimony where both the supporting and dependent spouse "each participated in an act of illicit sexual behavior," whereas the old section foreclosed a dependent spouse from recovering. Brannock v. Brannock, 135 N.C. App. 635, 523 S.E.2d 110, 1999 N.C. App. LEXIS 1240 (1999).

Severance pay is properly includable in a spouse's income for the purposes of determining the amount and duration of an alimony award. Glass v. Glass, 131 N.C. App. 784, 509 S.E.2d 236 (1998).

Amounts Paid Into Investments May Be Classified as Expenses. — The trial court did not abuse its discretion by characterizing the funds reflecting a marital pattern of savings as a reasonable expense where defendant was still employed and had a comfortable and significantly higher income than plaintiff, who was not working, but the trial court's inclusion of this investment income amount as an expense for the plaintiff but not for the defendant did constitute an abuse of discretion. Bryant v. Bryant, 139 N.C. App. 615, 534 S.E.2d 230, 2000 N.C. App. LEXIS 979 (2000), cert. denied, 353 N.C. 261, 546 S.E.2d 91 (2000).

Amounts paid into savings accounts by the parties from their respective incomes are includable as income for the purpose of determining alimony. Glass v. Glass, 131 N.C. App. 784, 509 S.E.2d 236 (1998).

Consideration of Wife's Investment Portfolio Proper. — Trial court had the authority to evaluate wife's investment portfolio under G.S. 50-16.3A(b)(15) in determining the amount and duration of alimony. Francis v. Francis, 169 N.C. App. 442, 612 S.E.2d 141, 2005 N.C. App. LEXIS 647 (2005).

Findings of Fact. — The findings of fact required to support the amount, duration, and manner of payment of an alimony award are sufficient if findings of fact have been made on the ultimate facts at issue in the case and the findings of fact show the trial court properly applied the law in the case; however, the findings of fact need not set forth the weight given to the factors in subsection (b) by the trial court when determining the appropriate amount, duration, and manner of payment, as the weight given the factors is within the sound discretion of the trial court. Friend-Novorska v. Novorska, 143 N.C. App. 387, 545 S.E.2d 788, 2001 N.C. App. LEXIS 302 (2001), aff'd, 354 N.C. 564, 556 S.E.2d 294 (2001).

Remand was required where a trial court, while making sufficient ultimate findings of fact to support an award of permanent alimony, failed to state findings of fact as to the reasoning for the duration of the award and the manner of payment. Fitzgerald v. Fitzgerald, 161 N.C. App. 414, 588 S.E.2d 517, 2003 N.C. App. LEXIS 2196 (2003).

While the trial court's findings were sufficiently specific to indicate that the trial judge properly considered each of the statutory factors, the alimony award was improper because the trial court made no findings with respect to the wife's medical benefits or potential income from her IRA, as required by G.S. 50-16.3A(b)(4) although evidence of the sources of income was presented at the hearing; without such findings, it was not known where the trial court properly considered the factor. Phillips v. Phillips, 185 N.C. App. 238, 647 S.E.2d 481, 2007 N.C. App. LEXIS 1735 (2007).

Trial court's findings of fact were more than sufficient to demonstrate the court's consideration of the statutory factors under G.S. 50-16.3A because the court considered: (1) the duration of the parties' marriage; (2) the status of the parties' minor children; (3) the parties' ages and education levels; (4) the parties' relative incomes and earning capacities; (5) the parties' expenses, debts, and financial obligations; (6) the parties' standard of living; and (7) the marital misconduct of one of the parties. Hartsell v. Hartsell, 189 N.C. App. 65, 657 S.E.2d 724, 2008 N.C. App. LEXIS 428 (2008).

Because the trial court failed to make factual findings as to the parties' financial needs, accustomed standard of living, separate and marital debt obligations, and the expenses reasonably necessary to support each of them, its post-separation support and alimony awards to the husband under G.S. 50-16.3A(a), (b), and (c) were reversed. Crocker v. Crocker, 190 N.C. App. 165, 660 S.E.2d 212, 2008 N.C. App. LEXIS 874 (2008).

Actual findings by the trial court were insufficiently detailed or specific where, other than the parties' contributions to retirement and stock, the trial court made no findings regarding the parties' standard of living during the marriage and the parties' respective living expenses since the separation. Rhew v. Rhew, 138 N.C. App. 467, 531 S.E.2d 471, 2000 N.C. App. LEXIS 634 (2000).

Calculating Income. — There was no evidence to support the trial court's conclusion that the husband would pick up additional business to offset established income losses of some $80,000 per year; thus, the court incorrectly determined the husband's income for alimony purposes. Glass v. Glass, 131 N.C. App. 784, 509 S.E.2d 236 (1998).

The amount of alimony pendente lite does not bind the trial court as to the amount of permanent alimony it must eventually award. Bookholt v. Bookholt, 136 N.C. App. 247, 523 S.E.2d 729, 1999 N.C. App. LEXIS 1376 (1999).

Findings as to Duration of Alimony Award. — Where an action was filed on 16 July 1993, pre-dating this section, and where the prior applicable version of the alimony provisions contained no requirement that there be findings relative to the duration of any alimony award, the trial court did not err in mandating a lifetime award and making no other findings relative to the duration of the award. Bookholt v. Bookholt, 136 N.C. App. 247, 523 S.E.2d 729, 1999 N.C. App. LEXIS 1376 (1999).

While the trial court made sufficient findings regarding the reasons for the amount and manner of payment, the trial court failed to make findings concerning the reasons for the duration of the alimony payments; therefore, the court remanded the alimony order for further findings of fact concerning the duration of the alimony award. Cunningham v. Cunningham, 171 N.C. App. 550, 615 S.E.2d 675, 2005 N.C. App. LEXIS 1371 (2005).

Trial court erred in failing to specify the duration of the alimony award. Squires v. Squires, 178 N.C. App. 251, 631 S.E.2d 156, 2006 N.C. App. LEXIS 1410 (2006).

Findings on Marital Misconduct. — The trial court properly considered postseparation expenditures by the wife for clothing totalling $23,520, but such evidence did not require a finding of marital misconduct by the wife, where the court found that both parties spent excessively. Glass v. Glass, 131 N.C. App. 784, 509 S.E.2d 236 (1998).

The trial court was required to make specific findings as to the existence of marital misconduct, where the wife presented evidence that the husband communicated with other women during the marriage, met with one of them in an apartment, and hugged and kissed another. Friend-Novorska v. Novorska, 131 N.C. App. 867, 509 S.E.2d 460 (1998).

Trial judge held that plaintiff wife's conduct constituted marital misconduct without just cause or excuse, and that the wife caused defendant husband to suffer indignities so that an award of alimony would not be equitable pursuant to G.S. 50-16.3A. The judgment was reversed and remanded where the appellate court found the trial court simply adopted the husband's testimony without making independent findings of fact adequate to support its conclusions of law. Schmeltzle v. Schmeltzle, 147 N.C. App. 127, 555 S.E.2d 326, 2001 N.C. App. LEXIS 1053 (2001).

Where the evidence of the post-separation sexual intercourse between defendant and plaintiff's husband corroborated the pre-separation relationship between these parties, the trial court properly denied defendant's motion for JNOV regarding plaintiff's alienation of affection claim. Pharr v. Beck, 147 N.C. App. 268, 554 S.E.2d 851, 2001 N.C. App. LEXIS 1144 (2001), overruled in part by McCutchen v. McCutchen, 360 N.C. 280, 624 S.E.2d 620 (2006) But see Johnson v. Peare, 148 N.C. App. 199, 557 S.E.2d 189 (2001), as to criminal conversation case.

Remand Where Court Made Unsupported Findings. — Trial court correctly considered relevant factors, including wife's constructive abandonment of husband, in denying her claim for permanent alimony; nevertheless, case would be remanded because the record revealed that the trial court made at least three findings of fact which were not supported by the evidence. Alvarez v. Alvarez, 134 N.C. App. 321, 517 S.E.2d 420 (1999).

Case was remanded for further findings of fact because the trial court did not provide the basis for the amount and duration of the alimony award pursuant to G.S. 50-16.3A(b). Hartsell v. Hartsell, 189 N.C. App. 65, 657 S.E.2d 724, 2008 N.C. App. LEXIS 428 (2008).

Trial court erred by speculating about the results of the pending equitable distribution between the parties where no evidence was presented as to the likely outcome of the equitable distribution. Rhew v. Rhew, 138 N.C. App. 467, 531 S.E.2d 471, 2000 N.C. App. LEXIS 634 (2000).

Failure to State Grounds in Pleading. — Wife did not sufficiently plead her claim for alimony when her counterclaim for this relief only requested a certain monthly amount of alimony because she did not specify the grounds upon which she based her alimony claim, so her husband was not put on notice of such grounds and could not defend against them, as required by G.S.1A-1-8(a)(1). Coleman v. Coleman, 182 N.C. App. 25, 641 S.E.2d 332, 2007 N.C. App. LEXIS 475 (2007).

Summary judgment was appropriate where a premarital agreement signed by the parties irrefutably barred the wife's claims for postseparation support, alimony and equitable distribution; the language in the subject agreement—drafted by the wife's attorney—was sufficiently "express" to constitute a valid and enforceable waiver of the wife's claims for postseparation support pursuant to G.S. 50-16.2A and alimony pursuant to G.S. 50-16.3A. Stewart v. Stewart, 141 N.C. App. 236, 541 S.E.2d 209, 2000 N.C. App. LEXIS 1439 (2000).

Standard of Living of the Spouses Established During the Marriage. — Former G.S. 50-16.5 clearly stated that the trial court is to consider the parties' "accustomed standard of living," not the potential standard of living; therefore, a trial court properly concluded that divorcing parties' standard of living did not substantially increase when the husband became a partner in his accounting firm, resulting in a net increase in salary of approximately $240.00 a month, a change from $6,487.52 to $6,732.73. (Decided under former G.S. 50-16.5.) Kelly v. Kelly, 167 N.C. App. 437, 606 S.E.2d 364, 2004 N.C. App. LEXIS 2323 (2004).

Raised Standard of Living. — Because it was unclear what amount each child used for his or her own needs, and what amount was used to supplement plaintiff's needs, which also hinged on a determination of the change in standard of living, the matter was remanded for the court to determine if the dependent spouse had raised her standard of living, and whether the contributions by the adult children should be a means of supporting that increase. Dodson v. Dodson, 190 N.C. App. 412, 660 S.E.2d 93, 2008 N.C. App. LEXIS 899 (2008).

Alimony Award Upheld. — An alimony award to the plaintiff wife of $600 per month for 30 months was upheld where (1) the wife received an unequal distribution of the marital property in her favor; (2) she was able to re-allocate her resources to meet her reasonable needs without depleting her separate estate; (3) both of the parties had selected careers and been educated for their career plans prior to their marriage; (4) the parties lived beyond their means during the last four years of their marriage; (5) subsequent to the parties' separation, the husband provided support to the wife which enabled her to obtain a full-time position at a university and to complete her training in order to meet her reasonable economic needs; and (6) certain expenses would have to be cut and re-allocated by both parties in order to live within their means which was not the case during the last few years of their marriage. Friend-Novorska v. Novorska, 143 N.C. App. 387, 545 S.E.2d 788, 2001 N.C. App. LEXIS 302 (2001), aff'd, 354 N.C. 564, 556 S.E.2d 294 (2001).

The trial court did not abuse its discretion in awarding alimony in the amount of $1,800.00 per month to plaintiff based in part on its consideration of defendant's financial benefits, such as health insurance, vehicle and reimbursed expenses received through his company. Walker v. Walker, 143 N.C. App. 414, 546 S.E.2d 625, 2001 N.C. App. LEXIS 295 (2001).

Because a husband's estate was substantially larger than a wife's estate, it would have been unfair to require the wife to further deplete her estate while allowing the husband to maintain his; because a modified alimony award required both parties to deplete their estates to meet their living expenses, award was fair to both parties. Swain v. Swain, — N.C. App. —, 635 S.E.2d 504, 2006 N.C. App. LEXIS 2139 (2006).

Trial court was not required to find a change of circumstances in entering an alimony order in a divorce case because at the time of the hearing, the only order in effect was a postseparation support order, and the alimony award thus did not "modify" a prior alimony order, but rather terminated an existing temporary postseparation support; because the wife failed to assign error to any of the trial court's findings of fact, they were binding on appeal, and absent a showing that the trial court failed to make any finding as to a particular factor, the wife failed to demonstrate that the trial court's findings of fact were inadequate. Langdon v. Langdon, 183 N.C. App. 471, 644 S.E.2d 600, 2007 N.C. App. LEXIS 1106 (2007).

Failure to Consider Change in Circumstances. — While it made sufficient findings to support its determinations that the ex-wife was a dependent spouse, because the trial court abused its discretion by not considering alleged changes of circumstances occurring after the first hearing before entering a lump sum retroactive alimony award, the appellate court had to vacate the lump sum award. Rhew v. Felton, 178 N.C. App. 475, 631 S.E.2d 859, 2006 N.C. App. LEXIS 1560, appeal dismissed, review denied, 636 S.E.2d 810 (2006).

Where the trial court found that the ex-husband had a net monthly income of approximately $5,400 and reasonable monthly expenses in the amount of $4,200, yielding a surplus of $1,200, and the ex-wife's reasonable needs exceeded her income by $1,400, there was no abuse of discretion in finding the ex-wife was a dependent spouse and the ex-husband was a supporting spouse and awarding the ex-wife $1,200 per month in alimony. Rhew v. Felton, 178 N.C. App. 475, 631 S.E.2d 859, 2006 N.C. App. LEXIS 1560, appeal dismissed, review denied, 636 S.E.2d 810 (2006).

Modification. — Under former G.S. 50-16.5 (1987), in determining whether a change in circumstances had occurred for purposes of a motion to terminate alimony, a trial court was not allowed to reconsider a spouse's dependent spouse status, as that was adjudicated at initial alimony hearing; alimony could have been reduced to zero, but that did not result in loss of dependent spouse status. Honeycutt v. Honeycutt, 152 N.C. App. 673, 568 S.E.2d 260, 2002 N.C. App. LEXIS 966 (2002).

Trial court did not abuse its discretion by making reductions to husband's monthly expenses because it found that he could reasonably lower his monthly living expenses by almost $1,500 by reducing his $134 telephone bill to $100, canceling his $55 cable television subscription, reducing his $650 food expense to $400.00, reducing his $100 clothing expense to $50, stopping his $60 allowance to the children since he would be paying child support, reducing his $207 gift and special occasion expense to $104, reducing his vacation and recreation expense from $450 to $100, and reducing his $60 grooming and hygiene expense to $20; additionally, the trial court found that the husband's $150 furniture payment would soon end and his $400 credit card payments were a duplication of other expenses. Cunningham v. Cunningham, 171 N.C. App. 550, 615 S.E.2d 675, 2005 N.C. App. LEXIS 1371 (2005).

Failure to Consider Earning Capacity Not Erroneous. — Trial court properly declined to consider the husband's earning capacity when ruling on the wife's request for alimony because there was no evidence that the husband, a doctor, was intentionally depressing the husband's income or in any way acting in bad faith; the trial court found that the husband's reduction in income was attributable to the fact that the husband's patients were not happy with the husband's services and were choosing other doctors. Megremis v. Megremis, 179 N.C. App. 174, 633 S.E.2d 117, 2006 N.C. App. LEXIS 1828 (2006).

Applied in Vadala v. Vadala, 145 N.C. App. 478, 550 S.E.2d 536, 2001 N.C. App. LEXIS 662 (2001).

Cited in Williamson v. Williamson, 142 N.C. App. 702, 543 S.E.2d 897, 2001 N.C. App. LEXIS 181 (2001); Nunn v. Allen, 154 N.C. App. 523, 574 S.E.2d 35, 2002 N.C. App. LEXIS 1522 (2002); McCutchen v. McCutchen, 360 N.C. 280, 624 S.E.2d 620, 2006 N.C. LEXIS 2 (2006); Harris v. Harris, 188 N.C. App. 477, 656 S.E.2d 316, 2008 N.C. App. LEXIS 228 (2008); Helms v. Helms, 191 N.C. App. 19, 661 S.E.2d 906, 2008 N.C. App. LEXIS 1173 (2008).

§ 50-16.4. Counsel fees in actions for alimony, postseparation support.

At any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A, or postseparation support pursuant to G.S. 50-16.2A, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony. (1967, c. 1152, s. 2; 1995, c. 319, s. 3.)

Editor's Note. — Session Laws 1995, c. 319, which amended this section, in s. 12 provides that this act applies to civil actions filed on or after October 1, 1995, and shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995.

This section, prior to the amendment by Session Laws 1995, c. 319, read as follows: "**Counsel fees in actions for alimony.**

"At any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony."

Legal Periodicals. — For comment on contingent fees in domestic relations actions, see 62 N.C.L. Rev. 381 (1984).

For note, "The Contingent Fee Contract in Domestic Relations Cases," see 7 Campbell L. Rev. 427 (1985).

For note, "A Public Goods Approach to Calculating Reasonable Fees under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

CASE NOTES

I. In General.
II. Amount of Fees.
III. Findings.
IV. Review on Appeal.

I. IN GENERAL.

Editor's Note. — *Some of the cases cited below were decided under former G.S. 50-15 and 50-16 which dealt with alimony pendente lite in divorce actions and subsistence and counsel fees pending actions for alimony without divorce, respectively.*

Former Sections 50-16.1 Through 50-16.10 in Pari Materia. — The statutes codified as G.S. 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982).

Section 50-16.9 does not list factors to help in the modification decision, but the alimony statutes, G.S. 50-16.1 through 50-16.10, have been read in pari materia because they deal with the same subject matter. Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Right Derived from Common Law. — The right of a wife (dependent spouse) to subsistence pending trial and to attorneys' fees was derived from the common law. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Apart from statute, there is no duty upon husband (supporting spouse), before or after separation, to furnish wife (dependent spouse) with legal counsel, whether he or another be the adverse party to her controversy. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

Notice and Due Process Considerations. — Although this section and G.S. 50-13.6 provide for attorney's fees in both modification of child support actions and alimony actions, this authority does not override a party's basic constitutional rights to notice and due process considerations. Spencer v. Spencer, 133 N.C. App. 38, 514 S.E.2d 283 (1999).

Purpose. — The purpose of the allowance for attorneys' fees is to put the wife (dependent spouse) on substantially even terms with the husband (supporting spouse) in the litigation. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961); Harrell v. Harrell, 256 N.C. 96, 123 S.E.2d 220 (1961); Deal v. Deal, 259 N.C. 489, 131 S.E.2d 24 (1963); Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

The remedy of subsistence and counsel fees pendente lite is intended to enable the wife to maintain herself according to her station in life and to employ counsel to meet her husband at trial upon substantially equal terms. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

The purpose of the allowance of counsel fees pendente lite is to enable the wife (dependent spouse), as litigant, to meet the husband (supporting spouse), as litigant, on substantially even terms by making it possible for her to employ adequate counsel. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968); Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972); Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

No Fees Awarded For Pro Bono Counsel. — Where the wife received pro bono counsel during the alimony proceedings, she was not entitled to an award of counsel fees under G.S. 50-16.4, as counsel fees referred only to fees paid by the wife to counsel for services rendered, and no such payment was made; the purpose of the statute was to even the playing field for a dependent spouse seeking alimony, and since pro bono services were rendered there were no costs to shift. Patronelli v. Patronelli, 175 N.C. App. 320, 623 S.E.2d 322, 2006 N.C. App. LEXIS 56 (2006).

Appellate court did not err in affirming the trial court's ruling that denied the wife's request for an award of attorney fees in a divorce case where the wife was represented on a pro bono basis by her counsel through the Volunteer Lawyers Program; an award of attorney fees, under the plain language of the relevant statute, would have to benefit and such an award under the circumstances could not do so because she was not obligated to pay counsel fees. Patronelli v. Patronelli, 360 N.C. 628, 636 S.E.2d 559, 2006 N.C. LEXIS 1194 (2006).

Contingent Fee Agreements Are Not Enforceable. — A contract for the payment of a fee to an attorney contingent upon his procuring a divorce for his client or contingent in amount upon the amount of alimony and/or property awarded is void as against public policy. Such a contract is unenforceable exclusively by virtue of the fact that it violates the public policy of this state. Thompson v. Thompson, 70 N.C. App. 147, 319 S.E.2d 315 (1984), rev'd on other grounds, 313 N.C. 313, 328 S.E.2d 288 (1985).

Contingent-fee contract in which fee was contingent with respect to both divorce and equitable distribution actions was void as against public policy, even though the uncontested divorce involved relatively minimal time compared with the time the attorney spent on the equitable distribution claim; and the attorney could not recover either under the contract itself or in quantum meruit for services rendered pursuant to the contract. In re Cooper, 81 N.C. App. 27, 344 S.E.2d 27 (1986).

Contingent-Fee Contract in Equitable Distribution Must Be Separated from Fee Agreement for Divorce. — If an attorney represents a client in both a divorce proceeding and an equitable distribution proceeding, and the client wishes to have a contingent-fee contract in the equitable distribution proceeding, the parties must execute a separate agreement to provide for a fee in the divorce action that is not contingent upon the securing of the divorce. In re Cooper, 81 N.C. App. 27, 344 S.E.2d 27 (1986).

Award of "Expenses" Is Not Authorized. — This section provides only for the award of "reasonable counsel fees," making no mention of "expenses." Williams v. Williams, 42 N.C. App. 163, 256 S.E.2d 401 (1979), aff'd, 299 N.C. 174, 261 S.E.2d 849 (1980).

Counsel fees are not allowable in all alimony cases, only those that come within the ambit of this section and G.S. 50-16.3. Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978).

Section Is Not Restricted to Proceedings for Alimony Pendente Lite. — While the language of this section could be improved upon, its effect is not to restrict the award of counsel fees to alimony pendente lite proceedings and actions of the court pursuant thereto. Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978).

Spouse awarded alimony pendante lite does not lose her right to attorney's fees for services rendered in a pendente lite proceeding in the event the recipient's permanent alimony claim is denied. Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994).

Award of counsel fees is appropriate whenever it is shown that the spouse is, in fact, dependent, is entitled to the relief demanded, and is without sufficient means whereon to subsist during the prosecution and to defray the necessary expenses thereof. Fungaroli v. Fungaroli, 53 N.C. App. 270, 280 S.E.2d 787 (1981).

A trial court is authorized to award attorneys' fees to a party who has shown that she is entitled to the relief demanded, is a dependent spouse, and lacks sufficient means upon which to live during the prosecution of the suit and to defray her necessary legal expenses. Perkins v. Perkins, 85 N.C. App. 660, 355 S.E.2d 848, cert. denied, 320 N.C. 633, 360 S.E.2d 92 (1987).

To recover attorneys' fees pursuant to this section in an action for alimony, the spouse must be entitled to the relief demanded, must be a dependent spouse, and must have insufficient means to subsist during the prosecution of the suit and to defray the expenses thereof. Caldwell v. Caldwell, 82 N.C. App. 225, 356 S.E.2d 821, cert. denied, 320 N.C. 791, 361 S.E.2d 72 (1987).

The requirements which a spouse must meet before a request for attorneys' fees pendente lite can be granted are as follows: (1) the party requesting the award must be a "dependent spouse" as defined in former G.S. 50-16.1(3); (2) the party must be entitled to alimony pendente lite; and (3) the court must find that the dependent spouse is without sufficient means to subsist during the prosecution or defense of the suit and to defray the attendant expenses thereof. Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706, cert. denied, 322 N.C. 330, 368 S.E.2d 875 (1988).

"At anytime" includes times subsequent to determination of the issues in favor of the dependent spouse at the trial of her cause on its merits. Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978).

Anytime a dependent spouse can show grounds for alimony pendente lite under G.S. 50-16.3, the court can award attorneys' fees; "anytime" includes time subsequent to the determination of the issues in the dependent spouse's favor at the trial of his or her cause on the merits. Evans v. Evans, 111 N.C. App. 792, 434 S.E.2d 856, cert. denied, 335 N.C. 554, 439 S.E.2d 144 (1993).

Fees Allowable for Precursory Activity. — All litigation inevitably involves certain precursory activity. The term "litigant" is not intended to exclude legitimate work by counsel in such precursory activity from those services for which fees are allowable. Whedon v. Whedon, 58 N.C. App. 524, 294 S.E.2d 29, cert. denied, 306 N.C. 752, 295 S.E.2d 764 (1982).

Entitlement to Representation Is Not Limited to Trial Level. — There is nothing in our statutory or case law to suggest that a dependent spouse in this State is entitled to meet the supporting spouse on equal footing, in terms of adequate and suitable legal representation, at the trial level only. Fungaroli v. Fungaroli, 53 N.C. App. 270, 280 S.E.2d 787 (1981).

And an award of attorneys' fees for services performed on appeal should ordinarily be granted, provided the general statutory requirements for such an award are duly met, especially where the appeal is taken by the supporting spouse. Fungaroli v. Fungaroli, 53 N.C. App. 270, 280 S.E.2d 787 (1981); Whedon v. Whedon, 313 N.C. 200, 328 S.E.2d 437 (1985).

Recovery of Fees After Denial of Alimony Pendente Lite. — There was no merit to defendant's contention that, because plaintiff's claim for alimony pendente lite was denied, plaintiff was precluded from recovering attorneys' fees in the subsequent action for permanent alimony. Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243, cert. denied, 302 N.C. 634, 280 S.E.2d 449 (1981).

Recovery of Attorneys' Fees When Modification of Alimony Is Sought After Absolute Divorce. — This section is applicable any time a dependent spouse can show that she has grounds for alimony pendente lite, even though the proceeding was not brought for that purpose. That any time includes times subsequent to the determination of the issues in her favor at the trial of her cause on the merits. Thus, if she meets the three requirements of G.S. 50-16.3(a) for alimony pendente lite, she can recover her attorneys' fees even though she sought alimony modification subsequent to absolute divorce. Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Prerequisites to Award of Attorneys' Fees. — The clear and unambiguous language of this section and G.S. 50-16.3 provides as prerequisites for determination of an award of counsel fees that (1) The spouse must be entitled to the relief demanded; (2) The spouse must be a dependent spouse; and (3) The dependent spouse must not have sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972); Guy v. Guy, 27 N.C. App. 343, 219 S.E.2d 291 (1975); Taylor v. Taylor, 46 N.C. App. 438, 265 S.E.2d 626 (1980); Knott v. Knott, 52 N.C. App. 543, 279 S.E.2d 72 (1981); Roberts v. Roberts, 68 N.C. App. 163, 314 S.E.2d 781 (1984); Whedon v. Whedon, 313 N.C. 200, 328 S.E.2d 437 (1985); Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

Any time a dependent spouse can show that she has the grounds for alimony pendente lite, i.e., that (1) she is entitled to the relief demanded in her action or cross-action for divorce from bed and board or alimony without divorce, and (2) she does not have sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof, the court is authorized to award fees to her counsel. Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978).

As a prerequisite to an award of attorneys' fees, the party seeking the award must be a dependent spouse, must be entitled to the relief sought, and must have insufficient means to defray the necessary expense in prosecuting her claim. Beaman v. Beaman, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

Dependent Spouse Must Have Insufficient Means. — Before attorneys' fees may be awarded in an alimony case to the dependent spouse under this section and G.S. 50-16.3, that person must have insufficient means to defray the expense of the suit; that is, he or she must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Lacking sufficient means to defray the expenses of the suit means that the dependent spouse is not able as litigant to meet the supporting spouse as litigant on substantially even terms because the dependent spouse is financially unable to employ adequate counsel. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

And a Showing of Need Must Be Made. — In order for dependent spouse to be awarded counsel fees, she must show that she needs such counsel fees to enable her, as a litigant, to meet her husband on substantially even terms by making it possible for her to employ adequate counsel. Quick v. Quick, 53 N.C. App. 248, 280 S.E.2d 482 (1981), rev'd on other grounds, 305 N.C. 446, 290 S.E.2d 653 (1982).

Adultery Does Not Bar Allowance of Counsel Fees. — A plea of adultery, found by the court to be true, does not preclude the court from allowing the wife (dependent spouse) reasonable counsel fees for the prosecution or defense of an action for divorce. Bolin v. Bolin, 242 N.C. 642, 89 S.E.2d 303 (1955). See § 50-16.6.

Multiple awards of counsel fees in the same domestic action are, in the proper circumstances, within the court's discretion to allow. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

Award Upheld. — Uncontradicted evidence that in 1983 the defendant's net monthly income was $228 and that for the first six months of 1984 the defendant earned only $3,490 was sufficient evidence to support the court's finding that the defendant had insufficient means to sustain the financial burden of alimony. Beaman v. Beaman, 77 N.C. App. 717, 336 S.E.2d 129 (1985), upholding award of $400.00.

Award Held Improper. — Where the finding that plaintiff-wife was a dependent spouse amounted to a mere conclusion unsupported by a finding of fact, and where there were no findings upon which to conclude that she was entitled to the relief demanded under G.S. 50-16.3(a)(1), the trial court erred in ordering alimony pendente lite and counsel fees. Kornegay v. Kornegay, 15 N.C. App. 751, 190 S.E.2d 646 (1972).

Trial court erred in awarding attorneys' fees to wife, where the evidence showed that she had assets of over $490,000, debts of $37,876, and a total gross monthly income of $1477 (plus $1684 in alimony), with monthly expenses of $2500, and that husband had assets of $901,338.29, debts of $338,095.46, a gross monthly income of $8696.32, and monthly living expenses of $2861.11. Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

Award Properly Denied. — Court properly denied wife's motion for an interim award of alimony pendente lite and counsel fees in her suit for alimony without divorce, where there were findings that (1) the plaintiff and her husband had separated by mutual agreement, (2) the husband did not abandon the wife, and (3) the husband was guilty of no misconduct that would support an award of alimony. Harper v. Harper, 9 N.C. App. 341, 176 S.E.2d 48 (1970).

Wife who was not entitled to alimony was not entitled to alimony attorneys' fees for the prosecution of her claim for alimony pendente lite. Puett v. Puett, 75 N.C. App. 554, 331 S.E.2d 287 (1985).

Denial of Fees to Defend Against Husband's Divorce Action Not Error. — The court did not err in not granting the wife's attorneys' fees to defend against her husband's action for divorce from bed and board, as the judge may award such fees when statute allows, and there is no statute giving the judge authority to award fees in this circumstance. Puett v. Puett, 75 N.C. App. 554, 331 S.E.2d 287 (1985).

A child of divorced parents was not entitled to an allowance of counsel fees and suit money pendente lite in her action against her father to force him to provide for her support, as former G.S. 50-15 and 50-16 applied only to actions instituted by the wife, and such right did not exist at common law. Green v. Green, 210 N.C. 147, 185 S.E. 651 (1936).

Effect of Abandonment of Suit. — The fact that after the institution of an action for alimony without divorce the client abandons the suit instituted in this State and institutes a suit for divorce in another state, and that counsel employed here are permitted to withdraw, since no further services could be performed by them, does not affect such counsels' right to an order allowing them counsel fees out of the property of defendant for the services performed in this State in good faith. Stadiem v. Stadiem, 230 N.C. 318, 52 S.E.2d 899 (1949).

In an action for alimony and counsel fees pendente lite and for alimony without divorce, plaintiff, on the day set for hearing of the motion for alimony and counsel fees pendente lite, filed "certificate and affidavit" stating that there had been a reconciliation between plaintiff and defendant and that plaintiff "withdraws and renounces the complaint" and "takes a voluntary nonsuit . . . and prays the court to dismiss" the action as of nonsuit. Plaintiff's attorneys filed petition for counsel fees against defendant, and defendant's attorney filed plaintiff's "certificate and affidavit" as an affidavit in support of defendant's resistance to judgment allowing counsel fees against him. After the petition was filed and after the court had announced its intention of allowing same, judgment as of nonsuit was tendered and signed by the court. It was held that at the time the petition for counsel fees was filed, the complaint was still a part of the record and the action was still pending, and the petition amounted to a motion to have the court act upon the prayer as made by plaintiff in her complaint, and the action of the court in allowing counsel fees to plaintiff's attorneys against defendant was affirmed. McFetters v. McFetters, 219 N.C. 731, 14 S.E.2d 833 (1941).

Effect of Motion for Involuntary Dismissal at Mid-Trial. — The trial court is not required to make a ruling on the merits of a party's request for attorneys' fees when presented with a motion for an involuntary dismissal at mid-trial. Whedon v. Whedon, 313 N.C. 200, 328 S.E.2d 437 (1985).

Award of permanent alimony ordinarily terminates an order for subsistence pendente lite or counsel fees. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

Court May Enter Second Order Allowing Additional Counsel Fees. — The fact that an order allowing counsel fees has been entered in an action for alimony without divorce does not preclude the court from thereafter entering a second order allowing additional counsel fees for subsequent services. Stadiem v. Stadiem, 230 N.C. 318, 52 S.E.2d 899 (1949).

Under proper circumstances the court, in its sound discretion, may in an action for alimony without divorce enter a second order allowing additional counsel fees. Yow v. Yow, 243 N.C. 79, 89 S.E.2d 867 (1955).

Amount of Additional Counsel Fees Held Not Unreasonable. — On an appeal from an order allowing additional counsel fees in an action for alimony without divorce, the amount was held not so unreasonable as to constitute an abuse of discretion. Stadiem v. Stadiem, 230 N.C. 318, 52 S.E.2d 899 (1949).

For case upholding garnishment of income from alleged "Spendthrift trust" administered in this State, see Swink v. Swink, 6 N.C. App. 161, 169 S.E.2d 539 (1969).

Applied in Williams v. Williams, 12 N.C. App. 170, 182 S.E.2d 667 (1971); Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973); Little v. Little, 18 N.C. App. 311, 196 S.E.2d 562 (1973); Powell v. Powell, 25 N.C. App. 695, 214 S.E.2d 808 (1975); Taylor v. Taylor, 26 N.C. App. 592, 216 S.E.2d 737 (1975); Hill v. Hill, 27 N.C. App. 423, 219 S.E.2d 273 (1975); Hampton v. Hampton, 29 N.C. App. 342, 224 S.E.2d 197 (1976); Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640 (1979); Winborne v. Winborne, 298 N.C. 305, 259 S.E.2d 918 (1979); Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979); Cornelison v. Cornelison, 47 N.C. App. 91, 266 S.E.2d 707 (1980); Squires v. Squires, 178 N.C. App. 251, 631 S.E.2d 156, 2006 N.C. App. LEXIS 1410 (2006).

Cited in Blair v. Blair, 8 N.C. App. 61, 173 S.E.2d 513 (1970); Fonvielle v. Fonvielle, 8 N.C. App. 337, 174 S.E.2d 67 (1970); Simmons v. Simmons, 22 N.C. App. 68, 205 S.E.2d 582 (1974); Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975); Blair v. Blair, 44 N.C. App. 605, 261 S.E.2d 301 (1980); Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985); Taylor v. Taylor, 343 N.C. 50, 468 S.E.2d 33 (1996).

II. AMOUNT OF FEES.

Amount of Attorneys' Fees Is Within Discretion of Trial Court. — While the right to alimony involves a question of law, the amount of alimony and counsel fees is a matter of judicial discretion. Schonwald v. Schonwald, 62 N.C. 215 (1867); Barker v. Barker, 136 N.C. 316, 48 S.E. 733 (1904).

And Is Not Reviewable Absent Abuse or Error of Law. — Subsistence and counsel fees pendente lite are within the discretion of the court, and its decision is not reviewable except for abuse of discretion or for error of law. Griffith v. Griffith, 265 N.C. 521, 144 S.E.2d 589 (1965); Harper v. Harper, 9 N.C. App. 341, 176 S.E.2d 48 (1970); Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

If attorneys' fees may be properly awarded, the amount of the award rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980); Stickel v. Stickel, 58 N.C. App. 645, 294 S.E.2d 321 (1982).

But Facts Required by Statute Must Be Alleged and Proved. — There is some language in Supreme Court decisions which leaves the impression that the allowance of counsel fees and subsistence pendente lite lies solely within the discretion of the trial judge, and that such allowance is reviewable only upon a showing of an abuse of the judge's discretion. The correct rule is that the facts required by the statutes must be alleged and proved to support an order for subsistence pendente lite. Guy v. Guy, 27 N.C. App. 343, 219 S.E.2d 291 (1975).

Reasonableness Is Key Factor. — Reasonableness, not arbitrary classification of attorney activity, is the key factor under all the attorneys' fees statutes. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 70 N.C. App. 221, 319 S.E.2d 650, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Although the dependent spouse was not entitled to receive attorney's fees for the portions of the case relating to equitable distribution and divorce, the supporting spouse was required to pay $35,000 of her $64,830 in attorneys fees, which were reasonable fees for 244.8 hours of service based on $300 per hour. Cunningham v. Cunningham, 171 N.C. App. 550, 615 S.E.2d 675, 2005 N.C. App. LEXIS 1371 (2005).

And Amount Awarded Must Be Reasonable. — This section requires that the amount of counsel fees shall be reasonable, and the reasonable amount is to be determined by the trial judge in the exercise of his discretion. Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970).

Determination of what are reasonable counsel fees is within the discretion of the trial judge. Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970), overruled on other grounds, Stephenson v. Stephenson, 55 N.C. App. 250, 285 S.E.2d 281 (1981).

Court's Discretion Is Limited by Factual Conditions. — The amount of subsistence and counsel fees pendente lite is within the discretion of the court, but this discretion is limited by the factual conditions. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Elements to Be Considered. — In determining a pendente lite allowance of attorneys' fees, the nature and worth of the services, the magnitude of the task imposed, reasonable consideration for the defendant's condition and financial circumstances, and many other considerations are involved. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

When allowable, the amount of attorneys' fees in an action for alimony without divorce is within the sound discretion of the court below and is unappealable except for abuse of that discretion. The statute itself, however, contains some guides to the exercise of that discretion, and practice has developed others. Within the rule of reasonableness the court must consider, along with other things, the condition and circumstances of the defendant. Stadiem v. Stadiem, 230 N.C. 318, 52 S.E.2d 899 (1949).

In making its determination of the proper amount of counsel fees which are to be awarded a dependent spouse as litigant or appellant, the trial court is under an obligation to conduct a broad inquiry, considering as relevant factors the nature and worth of the services rendered, the magnitude of the task imposed upon counsel, and reasonable consideration for the parties' respective conditions and financial circumstances. Whedon v. Whedon, 313 N.C. 200, 328 S.E.2d 437 (1985).

Once attorneys' fees are authorized, a trial court must consider several factors in determining the amount of the award, including but not limited to each party's estate and ability to defray legal costs, the nature and scope of the legal services rendered the dependent spouse, and the skill, time, and labor expended during such representation. Perkins v. Perkins, 85 N.C. App. 660, 355 S.E.2d 848, cert. denied, 320 N.C. 633, 360 S.E.2d 92 (1987).

Award of attorneys' fees must not be in excess of defendant's net income. Davidson v. Davidson, 189 N.C. 625, 127 S.E. 682 (1925). See Wright v. Wright, 216 N.C. 693, 6 S.E.2d 555 (1940).

Merit Bonus. — While the quality of services rendered is properly considered in awarding fees, as well as the nature of the services required, and hence the scope and complexity of the case, there is no North Carolina authority for an award of a "merit bonus." Even assuming such bonuses are allowed, as under federal practice, that should occur only in the rare case where the applicant specifically shows superior quality representation and exceptional success. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 70 N.C. App. 221, 319 S.E.2d 650, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

III. FINDINGS.

The trial court must set out findings of fact upon which the award of attorneys' fees is made. Self v. Self, 37 N.C. App. 199, 245 S.E.2d 541, cert. denied, 295 N.C. 648, 248 S.E.2d 253 (1978); Skamarak v. Skamarak, 81 N.C. App. 125, 343 S.E.2d 559 (1986).

Upon Which Determination of Reasonableness Could Be Based. — This section and G.S. 50-13.6 permit the entering of a proper order for reasonable counsel fees for the benefit of a dependent spouse, but only where the record contains findings of fact, such as the nature and scope of the legal services rendered and the skill and time required, upon which a determination of the requisite reasonableness could be based. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

A proper order awarding counsel fees in a child support or alimony action must contain a finding or findings upon which a determination of the reasonableness of the award can be based, such as the nature and scope of the legal services rendered and the time and skill required. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

An order awarding counsel fees in a child support or alimony action must contain a finding or findings upon which a determination of the reasonableness of the award can be based, such as the nature and scope of the legal services rendered, the time and skill required, and the attorney's hourly rate in comparison to the customary charges of attorneys practicing in that general area. Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706, cert. denied, 321 N.C. 330, 368 S.E.2d 875 (1988).

Findings Must Meet Test of former § 50-16.3. — No order for reasonable counsel fees for the benefit of a dependent spouse may be entered on findings which fail to meet the test of former G.S. 50-16.3. Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973).

Whenever an order is deficient in findings to establish that a dependent spouse is entitled to alimony pendente lite pursuant to G.S. 50-16.3, an award of counsel fees under this section is also unsupported. Presson v. Presson, 13 N.C. App. 81, 185 S.E.2d 17 (1971).

Since because of the clear statutory mandate, a spouse who is not entitled to alimony pendente lite is not entitled to an award of counsel fees. Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

Findings Must Show Inability to Defray Expenses of Suit. — In order to recover counsel fees, this section requires a finding that plaintiff is unable to defray the expense of prosecuting the suit. Davis v. Davis, 62 N.C. App. 573, 302 S.E.2d 886 (1983).

And Must Show That Fees Are Allowable and Award Is Reasonable. — In order to award attorneys' fees in alimony cases, the trial court must make findings of fact showing that fees are allowable and that the amount awarded is reasonable. Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978).

In Combined Actions Findings Should Not Reflect Fees Attributable to Equitable Distribution. — In a combined action for alimony, child support, and equitable distribution, findings should reflect that the fees awarded are attributable to work only on the alimony and/or child support actions. Holder v. Holder, 87 N.C. App. 578, 361 S.E.2d 891 (1987).

Absence of Sufficient Findings Is Reversible Error. — The trial court errs in ordering defendant to pay fees to plaintiff's attorneys where the court does not make sufficient findings as to plaintiff being a dependent spouse and defendant being the supporting spouse. Smith v. Smith, 15 N.C. App. 180, 189

S.E.2d 525 (1972), aff'd, 17 N.C. App. 416, 194 S.E.2d 568 (1973).

The lack of any evidence as to reasonable attorneys' fees and the absence of any findings by the trial judge based upon such evidence as to the reasonable worth of attorneys' fees are grounds for reversal of a judgment awarding attorneys' fees. Austin v. Austin, 12 N.C. App. 390, 183 S.E.2d 428 (1971).

An award of attorneys' fees cannot be upheld where the court failed to make findings of fact upon which a determination of the reasonableness of the fees could be based, such as the nature and scope of the legal services rendered and the skill and time required. Brown v. Brown, 47 N.C. App. 323, 267 S.E.2d 345 (1980).

Awards Held Erroneous for Lack of Findings. — The court erred in awarding plaintiff counsel fees pendente lite where no findings were made that plaintiff was entitled to the relief demanded, was a dependent spouse and had insufficient means whereon to subsist during prosecution of the suit and to defray the necessary expenses thereof. Guy v. Guy, 27 N.C. App. 343, 219 S.E.2d 291 (1975).

The court erred in awarding counsel fees to the wife in a child support action where the court made no findings as to the wife's ability to pay or the reasonableness of the fees. Horner v. Horner, 47 N.C. App. 334, 267 S.E.2d 65, cert. denied, 301 N.C. 89, 273 S.E.2d 297 (1980).

Factual findings on award of attorneys' fees were deficient as to child support where there was no finding that the supporting spouse refused to provide adequate support under circumstances existing at the time the action was initiated, and as to both alimony and child support, where there were no factual findings upon which a determination of the reasonableness of the award could be based, other than the trial court's statement that the time expended was "reasonably necessary." Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

Because the trial court made no findings with regard to the wife's ability to subsist during prosecution of the suit or her ability to defray the necessary expenses of suit, its award of attorney fees in favor of the wife was improper. Swain v. Swain, — N.C. App. —, 635 S.E.2d 504, 2006 N.C. App. LEXIS 2139 (2006).

Remand for Findings. — Order awarding attorneys' fees which failed to satisfy requirement of findings as to the lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent was insufficient and case would be remanded for appropriate findings as to attorneys' fees. Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985).

The portion of an award denying attorney fees to the plaintiff wife was reversed and the matter was remanded where the trial court concluded that she was a dependent spouse, but did not make any findings regarding whether she was without sufficient means to subsist during the prosecution of the suit and to defray the necessary expenses. Friend-Novorska v. Novorska, 143 N.C. App. 387, 545 S.E.2d 788, 2001 N.C. App. LEXIS 302 (2001), aff'd, 354 N.C. 564, 556 S.E.2d 294 (2001).

Recital that appellee's attorney rendered valuable services not sufficient to support court's conclusion that appellee is entitled to recover $2,500.00 in attorneys' fees. Morris v. Morris, 90 N.C. App. 94, 367 S.E.2d 408 (1988).

Court's Findings Supported Denial of Attorney's Fees. — Trial court's findings that (1) a wife's income had increased from the date of separation until the date of the action, (2) the wife continued to live at the marital residence while the husband voluntarily paid at least half of the monthly mortgage payments, (3) the husband paid the wife monthly post-separation support, and (4) the husband had previously paid $2,000 towards the wife's attorney's fees supported its conclusion of law that the wife was able to subsist and defray the necessary expenses related to prosecuting the action and the denial of the wife's motion for attorney's fees. Friend-Novorska v. Novorska, 163 N.C. App. 776, 594 S.E.2d 409, 2004 N.C. App. LEXIS 593 (2004).

IV. REVIEW ON APPEAL.

Appeal as a Matter of Right. — An order requiring payment of alimony pendente lite and counsel fees affects a substantial right from which an appeal lies as a matter of right. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Scope of Review. — Proper exercise of the trial judge's authority in granting alimony, alimony pendente lite, or counsel fees is a question of law, reviewable on appeal. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

The facts required by this section and G.S. 50-16.3 must be alleged and proved to support an order for attorneys' fees. Whether these requirements have been met is a question of law that is reviewable on appeal. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

When an award of counsel fees is made, whether the statutory requirements have been met is a question of law, reviewable on appeal. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

When the statutory requirements have been met, the amount of an award of attorneys' fees is reviewable only for an abuse of discretion. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d

607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

Fees Upheld. — Since the trial court found that the ex-wife was without sufficient means whereon to subsist during the prosecution of the action and to defray the necessary expenses of the action, the unchallenged findings were sufficient to support the ex-wife's entitlement to attorney fees. Rhew v. Felton, 178 N.C. App. 475, 631 S.E.2d 859, 2006 N.C. App. LEXIS 1560, appeal dismissed, review denied, 636 S.E.2d 810 (2006).

Denial of Attorneys' Fees Held Interlocutory. — Denial of attorneys' fees under this section was not a final order of the trial court, where at the time appellant's motion was filed there had been no determination that his client, defendant, was entitled to alimony pendente lite under G.S. 50-16.3, so that appellant was not yet entitled to attorneys' fees under this section, and as appellant could appeal the denial of his motion after final judgment, or could bring a separate lawsuit to collect fees, no substantial right of appellant was affected by the Court of Appeals' failure to entertain an interlocutory appeal on this issue. Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

§ 50-16.5: Repealed by Session Laws 1995, c. 319, s. 1.

Cross References. — As to alimony generally, see G.S. 50-16.3A.

Editor's Note. — Session Laws 1995, c. 319, which repealed this section, in section 12 provides that the act applies to civil motions filed on or after that date, and shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995.

This section, prior to the repeal by Session Laws 1995, c. 319, read as follows: "**Determination of amount of alimony.**

"(a) Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case.

(b) Except as provided in G.S. 50-16.6 in case of adultery, the fact that the dependent spouse has committed an act or acts which would be grounds for alimony if such spouse were the supporting spouse shall be grounds for disallowance of alimony or reduction in the amount of alimony when pleaded in defense by the supporting spouse."

Legal Periodicals. — For article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

For survey of 1980 family law, see 59 N.C.L. Rev. 1194 (1981).

For note, "Alimony Modification and Cohabitation in North Carolina," see 63 N.C.L. Rev. 794 (1985).

For 1984 survey, "Equitable Distribution Without Consideration of Marital Fault," see 63 N.C.L. Rev. 1204 (1985).

For 1984 survey, "The Brief Death of Alienation of Affections and Criminal Conversation in North Carolina," see 63 N.C.L. Rev. 1317 (1985).

For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

CASE NOTES

I. In General.
II. Basis of Award.
III. Discretion of Trial Court.
IV. Acts Which Would Support Divorce.

I. IN GENERAL.

Editor's Note. — *Some of the cases cited below were decided under former G.S. 50-15, which dealt with alimony pendente lite in divorce actions, and former G.S. 50-16, which dealt with actions for alimony without divorce.*

Sections 50-16.1 Through 50-16.10 to Be Construed in Pari Materia. — The statutes codified as G.S. 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982).

Section 50-16.9 does not list factors to help in the modification decision, but the alimony statutes, G.S. 50-16.1 through 50-16.10, have been read in pari materia because they deal with the same subject matter. Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Construction With Other Provisions. — Whether a spouse is substantially in need of maintenance and support as defined by former G.S. 50-16.1(3) is determined by construing this statute in pari material with the terms of former G.S. 50-16.5 which prescribed factors for the trial court to consider in determining the amount of alimony. Fink v. Fink, 120 N.C. App. 412, 462 S.E.2d 844 (1995).

Change of Circumstances Required by § 50-16.9 Refers to This Section. — The change of circumstances required by G.S. 50-16.9 for modification of an alimony order refers to those circumstances listed in this section. Rowe v. Rowe, 52 N.C. App. 646, 280 S.E.2d 182 (1981), rev'd on other grounds, 305 N.C. 177, 287 S.E.2d 840 (1982).

The purpose of the award is to provide for the reasonable support of the wife, not to punish the husband or to divide his estate. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968); Taylor v. Taylor, 26 N.C. App. 592, 216 S.E.2d 737 (1975).

The remedy established for the subsistence of the wife pending final determination of the issues involved and for her counsel fees is intended to enable her to maintain herself according to her station in life and to have sufficient funds to employ adequate counsel to meet her husband at the trial upon substantially equal terms. Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972); Newsome v. Newsome, 22 N.C. App. 651, 207 S.E.2d 355 (1974).

For a discussion of legislative intent as to judicial determinations of dependency under G.S. 50-16.1(3) in light of this section, see Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

The issues of who is a dependent spouse and who is a supporting spouse present mixed questions of law and fact which can best be determined by the trial judge when he sets the amount of permanent alimony. Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980).

Determination of Dependency Under This Section and § 50-16.1. — Even where a spouse is not "actually substantially dependent," the spouse may be a dependent spouse under the second part of G.S. 50-16.1(3) if he or she is substantially in need of maintenance and support, the meaning of which is determined by constructing G.S. 50-16.1 in pari materia with this section. Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

Guidelines for determining whether a spouse is "dependent" or "supporting" must be based upon factual findings sufficiently specific to indicate that the trial judge properly considered the statutory factors and the rules which evolved from case law. Otherwise, an appellate court cannot review the amount of alimony awarded to determine whether the trial judge abused his discretion. Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982).

Right to Subsistence Dates from Wrongful Separation. — Plaintiff is entitled to subsistence in keeping with defendant-husband's means and ability and standard of living, not only from the time she instituted her action, but from the time her husband wrongfully separated himself from her. Stickel v. Stickel, 58 N.C. App. 645, 294 S.E.2d 321 (1982).

Lump Sum Award Permissible. — Alimony awarded as periodic payments for a specified period of time is defined as a lump sum alimony award and is permissible. Perkins v. Perkins, 85 N.C. App. 660, 355 S.E.2d 848, cert. denied, 320 N.C. 633, 360 S.E.2d 92 (1987).

"Gross income," as used in a separation agreement under which husband agreed that after three years he would pay alimony in an amount equivalent to 30% of his gross income, included the gain realized from the sale of property. Heater v. Heater, 62 N.C. App. 587, 302 S.E.2d 891 (1983).

Reduction of Alimony. — The amount of alimony to be awarded lies in the sound discretion of the trial judge. In the absence of abuse of that discretion, the award will not be disturbed. The same should be true for reduced alimony. Self v. Self, 37 N.C. App. 199, 245 S.E.2d 541, cert. denied, 295 N.C. 648, 248 S.E.2d 253 (1978); Gebb v. Gebb, 77 N.C. App. 309, 335 S.E.2d 221 (1985).

Where reduced alimony is appropriate the court need not set out the amount of the reduction in its judgment. Self v. Self, 37 N.C. App. 199, 245 S.E.2d 541, cert. denied, 295 N.C. 648, 248 S.E.2d 253 (1978).

An order directing husband to make specified payments for support of wife until birth of their child, which expired at the birth of the child without provision for any payments thereafter, although made within the discretion of the court, would be vacated and the cause would be remanded, since the court's discretion was not exercised with respect to the controlling factual conditions. Garner v. Garner, 270 N.C. 293, 154 S.E.2d 46 (1967).

Termination of Spousal Support Obligation. — Findings of fact supported by competent evidence of record fully supported the trial judge's conclusion that plaintiff was no longer a "dependent spouse", which conclusion supported his order terminating defendant's spousal support obligations, as only a "dependent spouse" is entitled to alimony. Marks v. Marks, 316 N.C. 447, 342 S.E.2d 859 (1986).

Applied in Blake v. Blake, 6 N.C. App. 410, 170 S.E.2d 87 (1969); Little v. Little, 18 N.C. App. 311, 196 S.E.2d 562 (1973); Yearwood v. Yearwood, 287 N.C. 254, 214 S.E.2d 95 (1975); Shoaf v. Shoaf, 25 N.C. App. 311, 212 S.E.2d 672 (1975); Robinson v. Robinson, 26 N.C. App. 178, 215 S.E.2d 179 (1975); Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979); Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243 (1981); Harris v. Harris, 58 N.C.

App. 314, 293 S.E.2d 602 (1982); Hinton v. Hinton, 70 N.C. App. 665, 321 S.E.2d 161 (1984); Gilbert v. Gilbert, 71 N.C. App. 160, 321 S.E.2d 455 (1984).

Cited in Hatcher v. Hatcher, 7 N.C. App. 562, 173 S.E.2d 33 (1970); Blair v. Blair, 44 N.C. App. 605, 261 S.E.2d 301 (1980); Spencer v. Spencer, 61 N.C. App. 535, 301 S.E.2d 411 (1983); Whedon v. Whedon, 68 N.C. App. 191, 314 S.E.2d 794 (1984); Roberts v. Roberts, 68 N.C. App. 163, 314 S.E.2d 781 (1984); Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809 (1986); Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986); Harris v. Maready, 84 N.C. App. 607, 353 S.E.2d 656 (1987); Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993); Cunningham v. Cunningham, 121 N.C. App. 771, 468 S.E.2d 466 (1996).

II. BASIS OF AWARD.

The question of the correct amount of alimony and child support is a question of fairness to all parties. Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

The appropriate amount is essentially a question of fairness and justice to all parties. Whedon v. Whedon, 58 N.C. App. 524, 294 S.E.2d 29, cert. denied, 306 N.C. 752, 295 S.E.2d 764 (1982).

To determine whether the dependent spouse was entitled to alimony and, if so, in what amount, the trial judge was required to weigh evidence of adultery by the supporting spouse as well as evidence of indignities offered by both the supporting and the dependent spouse. Baker v. Baker, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

Factors in This Section to Be Considered in Determining Dependency. — In determining whether one qualifies as a dependent spouse under G.S. 50-16.1(3) as well as in determining the amount of alimony to be awarded, the courts must consider the factors enumerated in this section for determining the amount of alimony. These factors include the estates, earnings, earning capacity, condition, and accustomed standard of living of the parties, and other facts of the particular case. Beaman v. Beaman, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

The term "accustomed standard of living of the parties" in subsection (a) of this section completes the contemplated legislative meaning of "maintenance and support" in G.S. 50-16.1(3). The latter phrase clearly means more than a level of mere economic survival. Plainly it contemplates the economic standard established by the marital partnership for the family unit during the years in which the marital contract was intact. It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed. Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

The term "estates" in subsection (a) refers to the financial worth of each spouse. Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988).

Findings of Fact. — In the case of both alimony and alimony pendente lite, the order concerning the amount must be supported by a conclusion of law that such amount is necessary under the circumstances. This conclusion of law, in turn, must be supported by specific findings of fact as to the estates, earnings, earning capacity, condition, and accustomed standard of living of the parties, as well as other relevant factors. Steele v. Steele, 36 N.C. App. 601, 244 S.E.2d 466 (1978).

The trial judge must at least make findings sufficiently specific to indicate proper consideration of each of the factors established by subsection (a) of this section for a determination of an alimony award. Spencer v. Spencer, 70 N.C. App. 159, 319 S.E.2d 636 (1984); Skamarak v. Skamarak, 81 N.C. App. 125, 343 S.E.2d 559 (1986).

In determining the amount of alimony to be awarded, the trial judge must comply with G.S. 1A-1, Rule 52, i.e., he must find facts specially, state separately the conclusions of law resulting from the facts so found, and direct entry of appropriate judgment; all the evidentiary facts need not be recited, but G.S. 1A-1, Rule 52 requires specific findings of ultimate facts established by the evidence which determine the issues involved and are essential to support the conclusions of law. Gebb v. Gebb, 77 N.C. App. 309, 335 S.E.2d 221 (1985).

To make a valid order for alimony, the trial court must make detailed findings concerning the following: (1) The estates of the parties; (2) the earnings of the parties; (3) the earning capacity of the parties; (4) the condition of the parties; and (5) the accustomed standard of living of the parties. Skamarak v. Skamarak, 81 N.C. App. 125, 343 S.E.2d 559 (1986).

The requirement for detailed findings is not a mere formality or an empty ritual; it must be done. Skamarak v. Skamarak, 81 N.C. App. 125, 343 S.E.2d 559 (1986).

Failure of the trial court to make any findings as to the parties' expenses, accustomed standard of living, or plaintiff's financial obligations in awarding alimony constituted reversible error. Perkins v. Perkins, 85 N.C. App. 660, 355 S.E.2d 848, cert. denied, 320 N.C. 633, 360 S.E.2d 92 (1987).

Conclusions of Law. — This section requires a conclusion of law that "circumstances render necessary" a designated amount of alimony, while case law requires conclusions of law that the supporting spouse is able to pay the designated amount and that the amount is fair and just to all parties. Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982); Davis v. Davis, 62 N.C. App. 573, 302 S.E.2d 886 (1983).

In determining the needs of a dependent spouse, all of the circumstances of the parties should be taken into consideration, including the property, earnings, earning capacity, condition and accustomed standard of living of the parties. Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972). See also, Cornelison v. Cornelison, 47 N.C. App. 91, 266 S.E.2d 707 (1980).

An order awarding alimony payments to a dependent spouse and support payments to a minor child must be founded upon proper consideration of the estates, earnings, earning capacity, conditions, accustomed standard of living of the parties or child, and other facts of the particular case. Williamson v. Williamson, 20 N.C. App. 669, 202 S.E.2d 489 (1974).

The trial court should take into consideration all the circumstances of the parties, including the property, earnings, earning capacity, financial needs and accustomed standard of living of the parties. Newsome v. Newsome, 22 N.C. App. 651, 207 S.E.2d 355 (1974).

An award of alimony should be based on the estate, earnings, income, obligations and expenses of the parties at the time the award is made. Eudy v. Eudy, 24 N.C. App. 516, 211 S.E.2d 536, aff'd, 288 N.C. 71, 215 S.E.2d 782 (1975).

Custodial Spouse's Caregiving Obligations. — While North Carolina's alimony statute does not contain express language which specifically allows consideration of the custodial spouse's caregiving obligations to the minor children, this consideration is nonetheless consistent with the "'overriding principle'" of "'fairness'" which guides the determination of alimony, as well as the statutory provision contemplating regard of "other facts of the particular case." Fink v. Fink, 120 N.C. App. 412, 462 S.E.2d 844 (1995).

The trial court may consider the custodial parent's attendant care giving and monetary obligations to a minor child in considering a request for alimony modification. Kowalick v. Kowalick, 129 N.C. App. 781, 501 S.E.2d 671 (1998).

Needs and Capacity Must Be Considered. — While the court must consider the needs of the spouse seeking alimony in the context of the family unit's accustomed standard of living, it also must determine that the supporting spouse has the financial capacity to provide the support needed therefor. Whedon v. Whedon, 58 N.C. App. 524, 294 S.E.2d 29, cert. denied, 306 N.C. 752, 295 S.E.2d 764 (1982).

Parties' Assertions Need Not Be Taken at Face Value. — Determination of what constitutes reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves. Whedon v. Whedon, 58 N.C. App. 524, 294 S.E.2d 29, cert. denied, 306 N.C. 752, 295 S.E.2d 764 (1982).

Ordinarily husband's (supporting spouse's) ability to pay is determined by his income at the time the award is made if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably. Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976).

If husband (supporting spouse) is honestly and in good faith engaged in a business to which he is properly adapted, and is making a good faith effort to earn a reasonable income, the award should be based on the amount which he is earning when the award is made. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

The award should be based on the amount which defendant is earning when alimony is sought and the award made, if the husband (supporting spouse) is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably. Conrad v. Conrad, 252 N.C. 412, 113 S.E.2d 912 (1960); Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Unless the court finds that a supporting spouse is deliberately depressing his income in disregard of his marital obligation to provide reasonable support, and applies the "capacity to earn"rule, a supporting spouse's ability to pay alimony is ordinarily determined by his income at the time the award is made. Whedon v. Whedon, 58 N.C. App. 524, 294 S.E.2d 29, cert. denied, 306 N.C. 752, 295 S.E.2d 764 (1982).

But the granting of an allowance and the amount thereof does not necessarily depend upon earnings of the husband (supporting spouse). Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961); Harrell v. Harrell, 256 N.C. 96, 123 S.E.2d 220 (1961).

And one who has no income, but is able-bodied and capable of earning, may be ordered to pay subsistence. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961); Harrell v. Harrell, 256 N.C. 96, 123 S.E.2d 220 (1961); Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968).

The granting of a support allowance and the amount thereof does not necessarily depend upon the earnings of the husband (supporting spouse), and one who is able-bodied and capable of earning may be ordered to pay subsistence. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

Capacity to earn may be the basis of an award if it is based upon a proper finding that the husband (supporting spouse) is deliberately depressing his income or indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support for wife (dependent spouse) and children. Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976); Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that husband (supporting spouse) is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for wife (dependent spouse) and children. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

While an award of alimony may be based upon the supporting spouse's ability to earn as distinguished from his actual income, the rule seems to be applied only when it appears from the record that there has been a deliberate attempt on the part of the supporting spouse to avoid financial family responsibilities by refusing to seek or to accept gainful employment; by willfully refusing to secure or take a job; by deliberately not applying himself to business; by intentionally depressing income to an artificial low; or by intentionally leaving employment to go into another business. Bowes v. Bowes, 287 N.C. 163, 214 S.E.2d 40 (1975).

Unless the supporting spouse is deliberately depressing his or her income or indulging in excessive spending because of a disregard of the marital obligation to provide support for the dependent spouse, the ability of the supporting spouse to pay is ordinarily determined by his or her income at the time the award is made. If the supporting spouse is deliberately depressing income or engaged in excessive spending, then capacity to earn, instead of actual income, may be the basis of the award. Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982).

The court must consider the estate and earnings of both husband and wife in arriving at the sum which is just and proper for the husband (supporting spouse) to pay the wife (dependent spouse), either as temporary or permanent alimony; it is a question of fairness and justice to both. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966); Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976); Roberts v. Roberts, 38 N.C. App. 295, 248 S.E.2d 85 (1978).

The primary purpose for considering the parties' estates is to assist the court in determining the parties' earnings and earning capacities. Ordinarily, the parties will not be required to deplete their estates to pay alimony or to meet personal expenses. Beaman v. Beaman, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

Standard of Living Determinations. — Although the court did not make any detailed findings as to the couple's accustomed standard of living, where the findings which it made allowed the court to determine the couple's accustomed standard of living, a specific finding regarding the standard of living was not necessary. Morris v. Morris, 90 N.C. App. 94, 367 S.E.2d 408 (1988).

Judge's findings as to husband's monthly gross income and his reasonable living expenses, coupled with the findings as to wife's monthly income and her expenses during the last year of the marriage, satisfied the requirement of this section for findings regarding the couple's accustomed standard of living. Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988).

Dependent Spouse Need Not Be Impoverished Before an Award Can Be Made. — The law does not require that a dependent spouse should be impoverished Before the court can make an award of alimony pendente lite. Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970), overruled on other grounds, Stephenson v. Stephenson, 55 N.C. App. 250, 285 S.E.2d 281 (1981); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

The financial ability of the husband (supporting spouse) to pay is a major factor in the determination of the amount of subsistence to be awarded. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968).

Duty of Support Does Not Depend on Dependent Spouse's Means or Ability to Support Herself. — The duty of support resting on the husband (supporting spouse) does not depend on the adequacy or inadequacy of the wife's (dependent spouse's) means or on the ability or inability of the wife to support herself by her own labor or out of her own separate property. The fact that the wife has property or means of her own does not relieve the husband of his duty to furnish her reasonable support according to his ability. Bowling v. Bowling, 252 N.C. 527, 114 S.E.2d 228 (1960); Mercer v. Mercer, 253 N.C. 164, 116 S.E.2d 443 (1960); Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

The fact that the wife has property of her own does not relieve the husband of the duty to support her following his unjustified abandonment of her. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968).

Alimony pendente lite is measured, among other things, by the needs of the dependent spouse and the ability of the supporting spouse. The mere fact that the wife has property or means of her own does not prohibit an award of alimony pendente lite. Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970), overruled on other grounds, Stephenson v. Stephenson, 55 N.C. App. 250, 285 S.E.2d 281 (1981); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

But the earnings and means of the wife (dependent spouse) are matters to be considered by the judge in determining the amount of alimony. Bowling v. Bowling, 252 N.C. 527, 114 S.E.2d 228 (1960); Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

Court may take into account that a dependent spouse has property, although its value may not be precisely known, in considering the estates of both parties. Quick v. Quick, 53 N.C. App. 248, 280 S.E.2d 482 (1981), rev'd on other grounds, 305 N.C. 446, 290 S.E.2d 653 (1982).

As Is Her Earning Capacity. — It is proper for the trial judge to consider plaintiff's "earning capacity" in determining whether she could continue to maintain the standard of living enjoyed by her during her marriage. Spillers v. Spillers, 25 N.C. App. 261, 212 S.E.2d 676 (1975).

But a Finding on Dependent Spouse's Earning Capacity Is Not Always Required. — This section specifies the earning capacity of the parties as one of the factors the court should consider in determining the amount of alimony, but the court is not required in all cases to make findings of fact on the question of the dependent spouse's earning capacity. Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978); Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Finding on Earning Capacities Not Required Where Evidence Is Insufficient. — Although the spouses' earning capacities is a factor for the court to consider under this section, there is no requirement that the court make a specific finding of fact where there is not sufficient evidence of the parties' earning capacities. Beaman v. Beaman, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

Where husband (supporting spouse) has substantial income as compared to the limited income of wife (dependent spouse), the court is required by subsection (a) of this section to award the wife such alimony as will allow her to live as the wife of a man of plaintiff's income is entitled to live. McLeod v. McLeod, 43 N.C. App. 66, 258 S.E.2d 75, cert. denied, 298 N.C. 807, 261 S.E.2d 920 (1979).

Finding on Income of Supporting Spouse. — Although a proper finding pertaining to the income of the supporting spouse must be based on present, as opposed to past, income, there is no rule that requires a specific finding as to the income of the supporting spouse on the precise date of the hearing. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

Determination of Gross Income Was Proper. — There was no error where judge determined husband's monthly gross income from February 1986 through January 1987 by subtracting the expenses of husband's business from its deposits and dividing the sum by 12; the figures pertaining to deposits and expenses were furnished by husband's own testimony and by his own exhibits, and the judge also made a finding as to husband's indebtedness in areas unrelated to his business. Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988).

Finding on Contributions to Marriage. — Where although the court did not make a specific finding of fact concerning what each party had contributed to the financial status of the marital unit, it was clear from its findings of fact that the court considered this evidence, the lack of a specific finding on this matter did not constitute reversible error. Beaman v. Beaman, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

Dependent Spouse of Wealthy Man Is Entitled to Live as Such. — When the evidence shows a substantial estate in the supporting spouse, and the dependent spouse is entitled to alimony, subsection (a) of this section requires the court to enter an order for alimony which will enable the dependent spouse to live as the wife of a man with such an estate is entitled to live. Quick v. Quick, 53 N.C. App. 248, 280 S.E.2d 482 (1981), rev'd on other grounds, 305 N.C. 446, 290 S.E.2d 653 (1982).

The wife of a wealthy man who has abandoned her without justification should be awarded an amount somewhat commensurate with the normal standard of living of the wife of a man of like financial resources. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968).

Trial court's finding in an alimony action that all of the items in a budget submitted by defendant wife were not "needed or necessary" items did not show that the court applied an improper standard in determining the amount of alimony for the wife of a wealthy man, since it was clear that the court considered what expenses were necessary to maintain the standard of living of a woman who was married to a man of substantial means rather than what was necessary to maintain bare subsistence. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980).

Income tax consequences are among factors properly considered in awarding alimony under subsection (a) of this section, and they should be given appropriate importance in determining the amount of alimony required to meet the reasonable needs of the dependent spouse. Whedon v. Whedon, 58 N.C. App. 524, 294 S.E.2d 29, cert. denied, 306 N.C. 752, 295 S.E.2d 764 (1982).

While it is true that the express language of subsection (a) of this section does not include the income tax consequences of an award of alimony as a factor to be weighed in the balance in determining the proper amount of the award, such would be a proper consideration in making that determination. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980).

Tax Consequences Cannot Be Disregarded. — Consideration of the tax consequences is not preeminent in determining an alimony award, since it is but one consideration among the many to be weighed by the trial court. However, to disregard the effect of taxation on such an award would be to flirt with an unrealistic, and potentially unjust, result. Perkins v. Perkins, 85 N.C. App. 660, 355 S.E.2d 848 (1987).

Supporting Spouse May Be Required to Provide for Furnishing of Residence. — The court has authority to require defendant husband (supporting spouse) to provide for the furnishing of the residence where plaintiff and two children reside, but the court should fix a definite dollar amount for defendant husband to expend for this purpose. Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969), overruled on other grounds, Stephenson v. Stephenson, 55 N.C. App. 250, 285 S.E.2d 281 (1981).

And He May Be Ordered to Pay Debts of Parties. — The trial court has authority to order that defendant husband (supporting spouse) pay all debts of the parties as of the date of the order, such payment being associated with defendant's duty to support his wife (dependent spouse). Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969), overruled on other grounds, 55 N.C. App. 250, 285 S.E.2d 281 (1981).

Contributions Only Increasing Wife's Estate for Next of Kin Not Contemplated. — The legislature did not contemplate that "reasonable subsistence," as used in former G.S. 50-16, should include contributions by a husband which tended only to increase an estate for his estranged wife to pass on to her next of kin. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

A spouse cannot be reduced to poverty in order to comply with an alimony decree. Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982).

Change in Financial Need or Dependency. — On a motion to modify or terminate an order of alimony, it is appropriate for the trial court to consider whether the dependent spouse's financial need or dependency has changed, as it relates to the factors listed in this section. Cunningham v. Cunningham, 345 N.C. 430, 480 S.E.2d 403 (1997).

Conclusion Not Supported by Findings. — The trial court's conclusion that plaintiff-wife was the dependent spouse entitled to support was not supported by the findings of fact where the court found that defendant husband's income "is very significantly lower than same has been in the past" and that "plaintiff is unable to continue to maintain her accustomed station in life"; there was no finding or evidence that defendant deliberately depressed his income in an effort to avoid his obligations; and it was apparent that the trial court disregarded defendant's own inability to maintain the station in life to which he was formerly accustomed in its determination of dependency. Taylor v. Taylor, 46 N.C. App. 438, 265 S.E.2d 626 (1980).

A conclusion of law that there has been a substantial change of circumstances based only on income is inadequate and in error. Self v. Self, 93 N.C. App. 323, 377 S.E.2d 800 (1989).

Findings Held Insufficient to Support Award. — Where the trial court made certain findings as to the estate, income and expenses of plaintiff, but failed to make sufficient findings as to the estate, earnings, income and expenses of defendant, the trial court did not find sufficient facts to support its award of alimony. Eudy v. Eudy, 24 N.C. App. 516, 211 S.E.2d 536, aff'd, 288 N.C. 71, 215 S.E.2d 782 (1975).

The trial court's failure to make any findings regarding plaintiff's reasonable current financial needs and expenses and the ratio of those needs and expenses to her income constituted error. Self v. Self, 93 N.C. App. 323, 377 S.E.2d 800 (1989).

Modifying Court May Make Independent and Additional Findings. — Modification of an alimony award requires consideration of this section's standards, but this mandate does not limit a modifying court to only those findings of fact made by the court which entered the original alimony order or that the modifying court cannot make additional and independent findings of fact under this section as to the parties' health and financial needs existing at the time of the original alimony order based on evidence presented at the modification hearing. Self v. Self, 93 N.C. App. 323, 377 S.E.2d 800 (1989).

Alimony Held Excessive. — Alimony payments of $230.00 every four weeks, which was slightly more than three times the cost of the wife's actual subsistence in a state mental hospital at a cost of $75.00 a month, even including the cost of guardianship, exceeded "reasonable subsistence." Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

Parties Cannot Consent to Improperly Based Order. — The parties, by their consent, cannot enable a trial judge to enter an order not based upon consideration of the several factors listed in G.S. 50-13.4(c) and subsection (a) of this section. Williamson v. Williamson, 20 N.C.

App. 669, 202 S.E.2d 489 (1974).

Lists of estimated expenses are admissible to illustrate a plaintiff's testimony as to the amount of her expenses. Stickel v. Stickel, 58 N.C. App. 645, 294 S.E.2d 321 (1982).

Evidence of Financial Status of Corporation Controlled by Supporting Spouse. — In an action seeking permanent alimony, evidence of the financial status of a corporation in which defendant supporting spouse owned more than 96% of the stock was relevant and competent in determining the size of his estate for the purpose of setting the amount of alimony to which plaintiff was entitled. Quick v. Quick, 53 N.C. App. 248, 280 S.E.2d 482 (1981), rev'd on other grounds, 305 N.C. 446, 290 S.E.2d 653 (1982).

Failure to Separate Out Business Expenses. — "Alimony" means payment for the support and maintenance of a spouse; it does not mean payment for the support and maintenance of a spouse's business ventures. Therefore, the court erred in failing to determine and to consider the extent to which defendant's business expenses as an artist duplicated her personal expenses. Beaman v. Beaman, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

Principal on equitable distribution note from husband to wife was properly included in calculating the assets owned by wife, rather than her monthly income. Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

Admission by Supporting Spouse. — Testimony of husband testified that he was an able-bodied man and had the ability to provide ample support set at rest his ability to support his wife at the same level that she had become accustomed to during the marriage, since proof is not required for that which has been judicially admitted. Ahern v. Ahern, 63 N.C. App. 728, 306 S.E.2d 140 (1983).

Pleading Held Insufficient. — Trial court did not err by finding wife's pleadings were insufficient on their face and dismissing her action for alimony and alimony pendente lite; plaintiff asserted in her complaint that she was a "dependent spouse," but the only support she offered for this conclusion was evidence of her husband's salary and she did not present any evidence that she needed assistance to subsist during the prosecution or defense of the suit. Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989), cert. denied, 326 N.C. 50, 389 S.E.2d 94 (1990).

III. DISCRETION OF TRIAL COURT.

Alimony and Alimony Pendente Lite to Be Determined in Same Manner. — The amount of alimony pendente lite is to be determined in the discretion of the trial judge in the same manner as the amount of alimony is determined. Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970).

The amount of the allowance is a matter for the trial judge. Deal v. Deal, 259 N.C. 489, 131 S.E.2d 24 (1963).

The amount allowed for the reasonable subsistence, cost and attorneys' fees to the wife in her proceedings against her husband under former G.S. 50-16 was within the sound discretion of the judge hearing the same and having jurisdiction thereof. Cram v. Cram, 116 N.C. 288, 21 S.E. 197 (1895); Anderson v. Anderson, 183 N.C. 139, 110 S.E. 863 (1922); Best v. Best, 228 N.C. 9, 44 S.E.2d 214 (1947); Barwick v. Barwick, 228 N.C. 109, 44 S.E.2d 597 (1947).

The amount of alimony allowable pendente lite is a matter of sound judicial discretion, having regard to the condition and circumstances of the parties and the current earnings of the husband. Martin v. Martin, 263 N.C. 86, 138 S.E.2d 801 (1964).

The amount of alimony to be awarded is a reasonable subsistence, which must be determined by the trial judge from the evidence before him. Gebb v. Gebb, 77 N.C. App. 309, 335 S.E.2d 221 (1985).

And Determination of the Amount Is Within His Discretion. — The trial judge must follow the requirements of the section in determining the amount of alimony to be awarded, but the determination of such amount lies within his sound discretion. Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975), overruled on other grounds, Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982); Clark v. Clark, 44 N.C. App. 649, 262 S.E.2d 659, aff'd in part and rev'd in part, 301 N.C. 123, 271 S.E.2d 58 (1980).

The trial judge's determination of the amount of alimony is not absolute and unreviewable, but it will not be disturbed absent a clear abuse of discretion. Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975), overruled on other grounds, Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982); Ingle v. Ingle, 42 N.C. App. 365, 256 S.E.2d 532 (1979); Watts v. Watts, 44 N.C. App. 46, 260 S.E.2d 170 (1979).

The amount of alimony to be awarded is in the discretion of the court, but this is not an absolute discretion and unreviewable. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968).

But Court's Discretion Will Not Be Disturbed Absent Abuse. — The amount to be awarded for alimony is within the discretion of the trial court and the court's discretion will not be disturbed in the absence of an abuse of such discretion. Jones v. Jones, 173 N.C. 279, 91 S.E. 960 (1917); Hennis v. Hennis, 180 N.C. 606, 105 S.E. 274 (1920); Harris v. Harris, 258 N.C. 121, 128 S.E.2d 123 (1962); Rock v. Rock, 260 N.C. 223, 132 S.E.2d 342 (1963); Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966); Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968);

Swink v. Swink, 6 N.C. App. 161, 169 S.E.2d 539 (1969); Dixon v. Dixon, 6 N.C. App. 623, 170 S.E.2d 561 (1969); Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970); Gibson v. Gibson, 24 N.C. App. 520, 211 S.E.2d 522 (1975); Spillers v. Spillers, 25 N.C. App. 261, 212 S.E.2d 676 (1975); Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976); Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978); Ingle v. Ingle, 42 N.C. App. 365, 256 S.E.2d 532 (1979); Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982); Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980); Whedon v. Whedon, 58 N.C. App. 524, 294 S.E.2d 29, cert. denied, 306 N.C. 752, 295 S.E.2d 764 (1982).

Statutory Requirements Must Be Followed. — In determining the amount of alimony and child support to be awarded, the trial judge must follow the requirements of this section. The amount is a reasonable subsistence, to be determined by the trial judge in the exercise of a judicial discretion from the evidence before him. Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976); Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982).

The amount to be awarded is a question of fairness to the parties, and, so long as the court has properly taken into consideration the factors enumerated by statute, the award will not be disturbed absent an abuse of discretion. Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867, cert. denied, 297 N.C. 299, 254 S.E.2d 917 (1979); Cornelison v. Cornelison, 47 N.C. App. 91, 266 S.E.2d 707 (1980).

While the factors which are delineated in this section must be considered by the judge in determining the amount of alimony to be awarded in a given case, his determination of the proper amount may not be disturbed on appeal absent a clear showing of abuse of discretion. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980); Payne v. Payne, 49 N.C. App. 132, 270 S.E.2d 546 (1980).

Proper Exercise of Discretion Is Question of Law. — Proper exercise of the trial judge's authority in granting alimony, alimony pendente lite, or counsel fees is a question of law, reviewable on appeal. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

When Discretion Properly Applied. — Discretion is properly applied in those instances where, upon deliberation and with firmness, a judge deems its use necessary to the proper execution of justice. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980).

Conclusion Not Disturbed on Appeal Where Supported, Despite Contradictions. — Although plaintiff's testimony on cross-examination tended to contradict her assertion that her illness was incapacitating, the trial court considered this evidence and concluded that the plaintiff's medical condition prevented her from undertaking any meaningful employment and that she was unable to work and earn income to defray her own expenses; this conclusion was supported by the testimony of the plaintiff, and despite contradictions, it would not be disturbed on appeal. Brandt v. Brandt, 92 N.C. App. 438, 374 S.E.2d 663 (1988), aff'd, 325 N.C. 429, 383 S.E.2d 656 (1989).

Failure to Make Adequate Findings. — Where trial court failed to make findings about the parties' estates and accustomed standard of living, the case was remanded for additional findings of fact regarding the award of alimony. Ellinwood v. Ellinwood, 94 N.C. App. 682, 381 S.E.2d 162 (1989).

IV. ACTS WHICH WOULD SUPPORT DIVORCE.

Effect of Dependent Spouse's Conduct on Right to Alimony. — The legislature has seen fit to leave the question of whether indignities committed by a wife (dependent spouse) prior to separation should absolutely bar her right to alimony arising out of her husband's (supporting spouse's) adultery, or merely reduce the amount, for resolution by the trial judge in the exercise of his discretion on a case-by-case basis. Self v. Self, 37 N.C. App. 199, 245 S.E.2d 541, cert. denied, 295 N.C. 648, 248 S.E.2d 253 (1978).

Subsection (b) of this section makes it clear that the trial court may, in its discretion, award some permanent alimony to a dependent spouse even when the jury finds that the dependent spouse has committed acts which would support the granting of a divorce from bed and board in favor of the supporting spouse. Cavendish v. Cavendish, 38 N.C. App. 577, 248 S.E.2d 340 (1978), cert. denied, 296 N.C. 583, 254 S.E.2d 33 (1979).

§ 50-16.6. When alimony, postseparation support, counsel fees not payable.

(a) Repealed by Session Laws 1995, c. 319, s. 4.

(b) Alimony, postseparation support, and counsel fees may be barred by an express provision of a valid separation agreement or premarital agreement so long as the agreement is performed. (1871-2, c. 193, s. 39; Code, s. 1292; Rev., s. 1567; 1919, c. 24; C.S., s. 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3; 1953, c. 925; 1955, cc. 814, 1189; 1967, c. 1152, s. 2; 1995, c. 319, s. 4; c. 509, s. 135.3(f).)

Editor's Note. — Session Laws 1995, c. 319, which amended this section, in s. 12 provides that this act applies to civil actions filed on or after October 1, 1995, and shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995.

This section, prior to the amendment by Session Laws 1995, c. 319, read as follows: "**When alimony not payable.**

"(a) Alimony or alimony pendente lite shall not be payable when adultery is pleaded in bar of demand for alimony or alimony pendente lite, made in an action or cross action, and the issue of adultery is found against the spouse seeking alimony, but this shall not be a bar to reasonable counsel fees.

(b) Alimony, alimony pendente lite, and counsel fees may be barred by an express provision of a valid separation agreement so long as the agreement is performed."

Legal Periodicals. — For article, "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

For article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the State in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

For survey of 1982 law relating to family law, see 61 N.C.L. Rev. 1155 (1983).

For 1984 survey, "The Brief Death of Alienation of Affections and Criminal Conversation in North Carolina," see 63 N.C.L. Rev. 1317 (1985).

For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

CASE NOTES

I. In General.
II. Adultery.
III. Separation Agreements.

I. IN GENERAL.

Editor's Note. — Some of the cases cited below were decided under former G.S. 50-14, which dealt with alimony in actions for divorce a mensa et thoro, former G.S. 50-15, which dealt with alimony pendente lite in divorce actions, and former G.S. 50-16, which dealt with actions for alimony without divorce.

Sections 50-16.1 Through 50-16.10 Construed in Pari Materia. — The statutes codified as G.S. 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982).

Section 50-16.9 does not list factors to help in the modification decision, but the alimony statutes, G.S. 50-16.1 through 50-16.10, have been read in pari materia because they deal with the same subject matter. Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Consent Judgment Awarding Medical Expenses. — Under consent judgment in which the court found as a fact that there were no claims for support or alimony pending between the parties and ordered plaintiff to pay all necessary and reasonable medical expenses incurred by defendant, the parties did not intend for medical expenses to constitute alimony payments; thus, the trial court erred in entering judgment ex meru motu declaring portions of consent judgment null and void and unenforceable ab initio and in striking them. Davis v. Davis, 78 N.C. App. 464, 337 S.E.2d 190 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 893 (1986).

Applied in Owens v. Owens, 28 N.C. App. 713, 222 S.E.2d 704 (1976); Levitch v. Levitch, 294 N.C. 437, 241 S.E.2d 506 (1978); Harris v. Harris, 58 N.C. App. 314, 293 S.E.2d 602 (1982); Coombs v. Coombs, 121 N.C. App. 746, 468 S.E.2d 807 (1996).

Cited in Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972); Sturgill v. Sturgill, 49 N.C. App. 580, 272 S.E.2d 423 (1980); Crutchley v. Crutchley, 53 N.C. App. 732, 281 S.E.2d 744 (1981); Wells v. Wells, 132 N.C. App. 401, 512 S.E.2d 468 (1999).

II. ADULTERY.

Subsection (a) is similar in language and import to prior law. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Court Must Make Findings If Adultery Is Pleaded. — When adultery is pleaded in bar of a demand for alimony or alimony pendente lite, an award or allowance of alimony pendente lite will not be sustained in the absence of a finding of fact on the issue of adultery in favor of the party seeking such an award. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

In a wife's action for alimony without divorce in which defendant's answer sets up the defense of adultery, it is error for the court to order temporary alimony to plaintiff without finding the facts with respect to the plea of adultery. Williams v. Williams, 230 N.C. 660, 55 S.E.2d 195 (1949).

Evidence of Adultery. — While authority for blood-grouping tests is limited to an issue of paternity, in a case in which the issue is raised the results of the tests, if they exclude defendant as the father of a child admittedly born during the subsistence of the marriage, would also be evidence of adultery. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Effect of Post-Divorce Sexual Activity. — This section is not an expression of legislative intent that post-divorce indiscriminate sexual activity by a former wife should bar her right to continue to receive alimony from her former husband. Stallings v. Stallings, 36 N.C. App. 643, 244 S.E.2d 494, cert. denied, 295 N.C. 648, 248 S.E.2d 249 (1978).

There is no statute that allows the court to modify an award of alimony solely because of post-marital fornication. Stallings v. Stallings, 36 N.C. App. 643, 244 S.E.2d 494, cert. denied, 295 N.C. 648, 248 S.E.2d 249 (1978).

III. SEPARATION AGREEMENTS.

What Constitutes "Separation Agreement". — To be a "separation agreement," there must be an agreement to separate or to live separately and apart. Robuck v. Robuck, 20 N.C. App. 374, 201 S.E.2d 557 (1974).

"Gross income," as used in a separation agreement under which the husband agreed that after three years he would pay alimony in an amount equivalent to 30% of his gross income, included the gain realized from the sale of property. Heater v. Heater, 62 N.C. App. 587, 302 S.E.2d 891 (1983).

The jurisdiction of the court is not barred by a prior separation agreement between the parties. Garner v. Garner, 270 N.C. 293, 154 S.E.2d 46 (1967), decided under former § 50-16.

But Unimpeached Deed of Separation May Bar Alimony. — A wife who, in a valid deed of separation, has released her husband from his support obligation is remitted to her rights under the agreement, and as long as the deed of separation stands unimpeached, the court is without power to award her alimony and counsel fees. Williams v. Williams, 261 N.C. 48, 134 S.E.2d 227 (1964).

Wife sought a divorce a mensa and alimony, notwithstanding the provisions of a valid separation agreement which the husband had "fully performed," could not, after her husband had performed his part of the contract, obtain an award of alimony. Wilson v. Wilson, 261 N.C. 40, 134 S.E.2d 240 (1964).

A deed of separation, approved by a consent judgment, could be pleaded as complete bar to the wife's application for alimony pendente lite and for reasonable counsel fees, as provided by former G.S. 50-15. Brown v. Brown, 205 N.C. 64, 169 S.E. 818 (1933).

However, resumption of marital relations rescinds deed of separation. Williams v. Williams, 261 N.C. 48, 134 S.E.2d 227 (1964).

Agreement Did Not Waive Alimony Rights. — Defendant's execution of a separation agreement which stated that it was executed with "the express understanding" and "in full satisfaction of all obligations" did not constitute an express waiver of her alimony rights within the meaning of G.S. 52-10.1 or this section where the preamble to the agreement referred to G.S. 50-20, an equitable distribution statute, thus excluding issues of spousal support. Napier v. Napier, 135 N.C. App. 364, 520 S.E.2d 312 (1999).

Discontinuance of Payments Under Separation Agreement. — Where, by an agreement for a separation between husband and wife, the former agreed to pay a certain monthly allowance, and the husband, after paying several installments, discontinued the payments, he could not set up the agreement in bar of her action for support under this section, even though he discontinued the payments because she demanded that the allowance be increased. Cram v. Cram, 116 N.C. 288, 21 S.E. 197 (1895).

Election to Seek Alimony Rather Than Damages for Breach of Contract to Support. — When a wife, in an action for alimony without divorce, elects to seek alimony rather than damages for the breach of the contract to support her, she is only entitled to such an award as would be proper if no contract had been signed. If there has been a partial performance, she must account for the net benefits, if any, which she may have received. Wilson v. Wilson, 261 N.C. 40, 134 S.E.2d 240 (1964).

Attempt to Set Aside Settlement. — The eminence, experience, and character of counsel who represented the plaintiff in procuring a property settlement would bear directly on plaintiff's subsequent attempt to set it aside as fraudulent. Van Every v. Van Every, 265 N.C.

506, 144 S.E.2d 603 (1965), decided under former § 50-16.

Suit Held Not Barred by Separation Agreement. — Jurisdiction of the court invoked under former G.S. 50-16 was not barred by separation agreement pleaded, where wife sued for alimony and support without divorce on grounds of specific acts of cruelty by husband and declared intention to sue for divorce in two years. Butler v. Butler, 226 N.C. 594, 39 S.E.2d 745 (1946).

Setting Out Separation Agreement in Record on Appeal. — Where defendant resisted his wife's application for alimony without divorce under former G.S. 50-16, upon the ground that there was still in effect a valid contract of separation which they had both executed, and appealed from an adverse decision of the trial judge hearing the matter, the record on appeal should have set out the written contract of separation so that the Supreme Court could determine whether it was reasonable, just and fair to the wife, and whether in taking her acknowledgment the officer had properly certified that it was not unreasonable or injurious to her, as the statutes then required. Moore v. Moore, 185 N.C. 332, 117 S.E. 12 (1923).

Post-Separation Failure to Provide Necessary Subsistence. — Absent a valid separation agreement waiving all alimony rights under subsection (b) of this section, post-separation failure to provide a dependent-spouse with necessary subsistence gives rise to an action for alimony. Brown v. Brown, 104 N.C. App. 547, 410 S.E.2d 223 (1991), cert. denied, 331 N.C. 383, 417 S.E.2d 789 (1992).

Summary judgment was appropriate where a premarital agreement signed by the parties irrefutably barred the wife's claims for postseparation support, alimony and equitable distribution;.the language in the subject agreement—drafted by the wife's attorney—was sufficiently "express" to constitute a valid and enforceable waiver of the wife's claims for postseparation support pursuant to G.S. 50-16.2A and alimony pursuant to G.S. 50-16.3A. Stewart v. Stewart, 141 N.C. App. 236, 541 S.E.2d 209, 2000 N.C. App. LEXIS 1439 (2000).

§ 50-16.7. How alimony and postseparation support paid; enforcement of decree.

(a) Alimony or postseparation support shall be paid by lump sum payment, periodic payments, income withholding, or by transfer of title or possession of personal property or any interest therein, or a security interest in or possession of real property, as the court may order. The court may order the transfer of title to real property solely owned by the obligor in payment of lump-sum payments of alimony or postseparation support or in payment of arrearages of alimony or postseparation support so long as the net value of the interest in the property being transferred does not exceed the amount of the arrearage being satisfied. In every case in which either alimony or postseparation support is allowed and provision is also made for support of minor children, the order shall separately state and identify each allowance.

(b) The court may require the supporting spouse to secure the payment of alimony or postseparation support so ordered by means of a bond, mortgage, or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the supporting spouse to execute an assignment of wages, salary, or other income due or to become due.

(c) If the court requires the transfer of real or personal property or an interest therein as a part of an order for alimony or postseparation support as provided in subsection (a) or for the securing thereof, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(d) The remedy of arrest and bail, as provided in Article 34 of Chapter 1 of the General Statutes, shall be available in actions for alimony or postseparation support as in other cases.

(e) The remedies of attachment and garnishment, as provided in Article 35 of Chapter 1 and Article 9 of Chapter 110 of the General Statutes, shall be available in actions for alimony or postseparation support as in other cases, and for such purposes the dependent spouse shall be deemed a creditor of the supporting spouse.

(f) The remedy of injunction, as provided in Article 37 of Chapter 1 of the General Statutes and G.S. 1A-1, Rule 65, shall be available in actions for alimony or postseparation support as in other cases.

(g) Receivers, as provided in Article 38 of Chapter 1 of the General Statutes, may be appointed in actions for alimony or postseparation support as in other cases.

(h) A dependent spouse for whose benefit an order for the payment of alimony or postseparation support has been entered shall be a creditor within the meaning of Article 3A of Chapter 39 of the General Statutes pertaining to fraudulent conveyances.

(i) A judgment for alimony or postseparation support obtained in an action therefor shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past-due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments.

(j) Any order for the payment of alimony or postseparation support is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A of the General Statutes.

Notwithstanding the provisions of G.S. 1-294 or G.S. 1-289, an order for the periodic payment of alimony that has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for alimony until the appeal is decided if justice requires.

(k) The remedies provided by Chapter 1 of the General Statutes Article 28, Execution; Article 29B, Execution Sales; and Article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for alimony and postseparation support as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in Article 16 of Chapter 1C of the General Statutes.

(*l*) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available.

(*l*1) The dependent spouse may apply to the court for an order of income withholding for current or delinquent payments of alimony or postseparation support or for any portion of the payments. If the court orders income withholding, a notice of obligation to withhold shall be served on the payor as required by G.S. 1A-1, Rule 4, Rules of Civil Procedure. Copies of the notice shall be filed with the clerk of court and served upon the supporting spouse by first-class mail. (1967, c. 1152, s. 2; 1969, c. 541, s. 5; c. 895, s. 18; 1977, c. 711, s. 26; 1985, c. 482, s. 1; c. 689, s. 18; 1995 c. 319, s. 5; 1998-176, ss. 2, 3; 1999-456, s. 14.)

Local Modification. — Person: 1967, c. 848, s. 2.

Cross References. — As for garnishment of government employee benefits, see 42 U.S.C. 659 and 10 U.S.C. 1408.

Editor's Note. — Session Laws 1995, c. 319, which amended this section, in s. 12 provides that this act applies to civil actions filed on or after October 1, 1995, and shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995.

This section, prior to the amendment by Session Laws 1995, c. 319, read as follows: "**How alimony and alimony pendente lite paid; enforcement of decree.**

"(a) Alimony or alimony pendente lite shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property or any interest therein, or a security interest in or possession of real property, as the court may order. In every case in which either alimony or alimony pendente lite is allowed and provision is also made for support of minor children, the order shall separately state and identify each allowance.

"(b) The court may require the supporting spouse to secure the payment of alimony or alimony pendente lite so ordered by means of a bond, mortgage, or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the supporting spouse to execute an assignment of wages, salary, or other income due or to become due.

"(c) If the court requires the transfer of real or personal property or an interest therein as a part of an order for alimony or alimony pendente lite as provided in subsection (a) or for the securing thereof, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

"(d) The remedy of arrest and bail, as provided in Article 34 of Chapter 1 of the General Statutes, shall be available in actions for alimony or alimony pendente lite as in other cases.

"(e) The remedies of attachment and garnishment, as provided in Article 35 of Chapter 1 of the General Statutes, shall be available in actions for alimony or alimony pendente lite as in other cases, and for such purposes the dependent spouse shall be deemed a creditor of the supporting spouse.

"(f) The remedy of injunction, as provided in Article 37 of Chapter 1 of the General Statutes and G.S. 1A-1, Rule 65, shall be available in actions for alimony or alimony pendente lite as in other cases.

"(g) Receivers, as provided in Article 38 of Chapter 1 of the General Statutes, may be appointed in actions for alimony or alimony pendente lite as in other cases.

"(h) A dependent spouse for whose benefit an order for the payment of alimony or alimony pendente lite has been entered shall be a creditor within the meaning of Article 3 of Chapter 39 of the General Statutes pertaining to fraudulent conveyances.

"(i) A judgment for alimony or alimony pendente lite obtained in an action therefor shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past-due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments.

"(j) Any order for the payment of alimony or alimony pendente lite is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A of the General Statutes.

"Notwithstanding the provisions of G.S. 1-294 or G.S. 1-289, an order for the periodic payment of alimony that has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for alimony until the appeal is decided if justice requires.

"(k) The remedies provided by Chapter 1 of the General Statutes Article 28, Execution; Article 29B, Execution Sales; and Article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for alimony and alimony pendente lite as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in Article 16 of Chapter 1C of the General Statutes.

"(*l*) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available."

Legal Periodicals. — For note on the remedy of garnishment in child support, see 56 N.C.L. Rev. 169 (1978).

For note on specific performance of separation agreements, see 58 N.C.L. Rev. 867 (1980).

For comment on tenancy by the entirety in North Carolina, see 59 N.C.L. Rev. 997 (1980).

For note on equitable distribution of property upon divorce, see 11 N.C. Cent. L.J. 156 (1980).

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the State in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

For note on consent judgments in family law in light of Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983), see 6 Campbell L. Rev. 125 (1984).

For survey, "Termination of Lump Sum Alimony upon the Remarriage of a Dependent Spouse: Potts v. Tutterow," see 73 N.C.L. Rev. 2432 (1995).

CASE NOTES

I. In General.
II. Contempt.

I. IN GENERAL.

Editor's Note. *— Some of the cases cited below were decided under former G.S. 50-15, which dealt with alimony pendente lite in divorce actions, and former G.S. 50-16, which dealt with alimony without divorce.*

Sections 50-16.1 Through 50-16.10 Construed in Pari Materia. — The statutes codified as G.S. 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982).

Section 50-16.9 does not list factors to help in the modification decision, but the alimony statutes, G.S. 50-16.1 through 50-16.10, have been read in pari materia because they deal with the same subject matter. Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Support May Be Compelled by Judicial Decree. — Wife (dependent spouse) may compel performance by judicial decree where husband (supporting spouse) separates himself from his wife and fails to support her, and husband cannot, by merely providing support for his wife until he gets beyond the jurisdiction of the court, deprive his wife of the right of compelling him by judicial decree to support her. Wilson v. Wilson, 261 N.C. 40, 134 S.E.2d 240 (1964).

The trial judge can award alimony in a lump payment or monthly payments. Austin v. Austin, 12 N.C. App. 390, 183 S.E.2d 428 (1971); Whitesell v. Whitesell, 59 N.C. App. 552, 297 S.E.2d 172 (1982), cert. denied, 307 N.C. 583, 299 S.E.2d 653 (1983).

Or May Combine Forms of Payment. — The fact that a trial judge used a combination of both a lump sum payment and a continuing monthly payment for alimony did not constitute an abuse of discretion. Austin v. Austin, 12 N.C. App. 390, 183 S.E.2d 428 (1971).

Limit of Court's Authority. — When a court awards alimony pendente lite, it has authority to cause the husband (supporting spouse) to secure so much of his estate as may be necessary to comply with its order. Such order as may be necessary for the protection of the wife (dependent spouse) is the limit of the court's authority. It cannot penalize defendant unless and until he refuses to comply with the court's direction. Harris v. Harris, 257 N.C. 416, 126 S.E.2d 83 (1962).

The court has no power to order a lump sum payment either to punish the supporting spouse or to divide his estate. Taylor v. Taylor, 46 N.C. App. 438, 265 S.E.2d 626 (1980).

The trial court had no power to order defendant husband to make a lump sum payment of $50,000.00 to plaintiff wife where it was apparent that the effect of the court's order would be to force defendant to liquidate, either by sale or mortgage, his only remaining assets having any substantial value, not for the purpose of paying for the maintenance and support of defendant, but in order to effect a division of his estate with her. Taylor v. Taylor, 46 N.C. App. 438, 265 S.E.2d 626 (1980).

Trial court's creation of a trust consisting of certain real and personal property owned by the parties in order to secure the payment of alimony and child support was a proper exercise of its discretion in applying the provisions of G.S. 50-13.4(e) and of subsections (a) and (c) of this section, and would be affirmed. Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706, cert. denied, 322 N.C. 330, 368 S.E.2d 875 (1988).

Corpus of Estate May Be Assigned to Secure Allowance. — The court is authorized to assign the corpus of the husband's (supporting spouse's) property to secure the allowance, and therefore it is immaterial to defendant whether the home place is taken and rents and profits therefrom used to provide a suitable residence for the wife (dependent spouse) and children or whether they are granted the right of occupancy of the home place, and it being found that such arrangement is most feasible and appropriate, the order will not be disturbed. Wright v. Wright, 216 N.C. 693, 6 S.E.2d 555 (1940).

The husband's "estate," from which the court may secure its order allowing a reasonable subsistence, etc., to the wife (dependent spouse) in her proceedings for alimony without divorce, includes within its meaning income from permanent property, tangible or intangible, or from the husband's (supporting spouse's) earnings. Crews v. Crews, 175 N.C. 168, 95 S.E. 149 (1918); Anderson v. Anderson, 183 N.C. 139, 110 S.E. 863 (1922).

Alimony Pendente Lite May Be Decreed a Lien. — Where alimony pendente lite has been regularly granted to the wife in her action for divorce against her nonresident husband, who has abandoned her, the court may decree it a lien upon his lands described in the complaint and situated here, and order the sale thereof for its payment; and it is not necessary that the defendant should have had notice of the wife's application therefor. Bailey v. Bailey, 127 N.C. 474, 37 S.E. 502 (1900); White v. White, 179 N.C. 592, 103 S.E. 216 (1920).

Nonresident Defendant May Be Required to Post Bond. — Under G.S. 50-13.4(f)(1) and subsection (b) of this section, the court properly required the supporting spouse to post a security bond to secure his compliance with a judgment requiring him to make monthly payments for support of his wife and children, where the court found that defendant no longer resided within the State and that he had no attorney of record in the case. Parker v. Parker, 13 N.C. App. 616, 186 S.E.2d 607 (1972).

The security interest to which this section refers is an interest in real estate which secures the payment of an obligation. Taylor v. Taylor, 26 N.C. App. 592, 216 S.E.2d 737 (1975).

Imposition of Trust Where Supporting Spouse Has Only Defeasible Fee in Part of Land. — Where the judge, in proceedings for an allowance of reasonable subsistence, has impressed a trust upon the husband's (supporting spouse's) land for the enforcement of the decree, the fact that in a part of the land he has only a defeasible fee cannot prejudice him, and his exception on that ground cannot be sustained. Anderson v. Anderson, 183 N.C. 139, 110 S.E. 863 (1922).

Receiver May Collect Income and Sell

Realty to Pay Alimony. — In a wife's (dependent spouse's) action for alimony without divorce, a receiver appointed therein to take possession of the husband's (supporting spouse's) property within the State may collect the income from the husband's realty for the purpose of paying alimony awarded the wife in the action and may sell the husband's real estate if necessary to pay the alimony decreed. Lambeth v. Lambeth, 249 N.C. 315, 106 S.E.2d 491 (1959).

Non-Income-Producing Realty May Be Sold and Proceeds Invested. — A judge has the power to order the sale of a husband's (supporting spouse's) non-income-producing real estate for the purpose of investing the proceeds derived from such sale in legal investments as provided in Article 6 of Chapter 53, so as to produce an income sufficient to enable the receiver appointed to enforce payment of alimony decreed to pay the expenses of the receivership and alimony awarded the plaintiff wife (dependent spouse). Lambeth v. Lambeth, 249 N.C. 315, 106 S.E.2d 491 (1959).

Rents and Profits in Estate by Entireties Are Chargeable. — Where husband and wife own land by entireties, the rents and profits of the husband (supporting spouse) therein may be charged with the support of the wife (dependent spouse) and the minor children of the marriage upon his abandonment of her, in an action for alimony without divorce, and for her counsel fees by Laws 1921, c. 123, in these proceedings; and to enforce an order allowing her alimony and attorneys' fees, according to the statutes, a writ of possession may issue, to apply thereto the rents and profits as they shall accrue and become personalty; and an order for the sale of land conveying the fee simple title for the purpose of paying the allowance is erroneous. Holton v. Holton, 186 N.C. 355, 119 S.E. 751 (1923); Porter v. Citizens Bank, 251 N.C. 573, 111 S.E.2d 904 (1960).

But Sale of Such Estate May Not Be Ordered. — The court does not have the power to order the sale of land held as tenants by the entireties to procure funds to pay alimony to the wife (dependent spouse) or to pay her counsel fees. Porter v. Citizens Bank, 251 N.C. 573, 111 S.E.2d 904 (1960).

Although the rents and profits therefrom and the actual possession thereof may be made available for the support of the wife (dependent spouse), the court does not have the power to order the sale of land owned by husband and wife as tenants by the entirety in order to procure funds to pay alimony to the wife or to pay her counsel fees. Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973).

The court may allow plaintiff possession of the home owned by the parties as tenants by the entireties in fixing alimony pendente lite under this section. Sellars v. Sellars, 240 N.C. 475, 82 S.E.2d 330 (1954).

Possession of Real or Personal Property as Alimony. — There is no requirement that alimony be denominated as such for it to be a valid award of alimony. Furthermore, possession of real or personal property, including the marital home, is one form of alimony provided by statute. Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

Transfer of Title or Possession of Real Property. — While the court has authority to order a transfer of title or possession of real property under subsection (a) of this section and G.S. 50-17, these sections do not require it to do so. Clark v. Clark, 44 N.C. App. 649, 262 S.E.2d 659, aff'd, 301 N.C. 123, 271 S.E.2d 58 (1980).

While a trial court has the authority to order payment of alimony by possession of real property under subsection (a) of this section, as well as the power to issue a writ of possession when necessary under G.S. 50-17, the pertinent statutory provisions do not require it to do so. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980).

This section in no way renders it mandatory or incumbent upon the trial court to order any transfer of property as part of alimony. Spillers v. Spillers, 25 N.C. App. 261, 212 S.E.2d 676 (1975).

This section does not authorize the court to direct that alimony be paid by the transfer of title to real estate. Taylor v. Taylor, 26 N.C. App. 592, 216 S.E.2d 737 (1975).

Subsections (b) and (c) of this section do not enlarge the authority given the trial judge in subsection (a). Rather, these subsections enable the court to order a transfer of title to real property to secure an award of alimony made under subsection (a). Thus, the trial judge may order the transfer of title to real property, but only if it is necessary to insure the payment of alimony. Gilbert v. Gilbert, 71 N.C. App. 160, 321 S.E.2d 455 (1984).

Power to Transfer Personalty Dependent on Alimony Power. — Although subsection (a) of this section clearly vests the court with power to order a transfer of personalty, that power does not exist independently of the court's power to order alimony for the dependent spouse. This section contemplates such transfers only in terms of satisfaction of the obligation to support. Where the court was not ordering a transfer of property as payment of alimony, the statute was, therefore, inapplicable. Clark v. Clark, 44 N.C. App. 649, 262 S.E.2d 659, aff'd, 301 N.C. 123, 271 S.E.2d 58 (1980).

Court order requiring defendant to secure payment of temporary alimony by means of deed of trust did not give to plaintiff fixed or permanent interest as cestui que trust, or any right to the entire proceeds of foreclosure sale under deed of trust; the order simply provided a means of securing payment of alimony, and the court was not required to find a change of circumstances as a basis for ordering the payment of a part of the proceeds of foreclosure sale to satisfy a judgment lien against defendant or to pay the fee of defendant's attorney. Johnson v. Johnson, 25 N.C. App. 448, 213 S.E.2d 427 (1975).

No Present Right to Disbursement of Eminent Domain Deposit for Land Owned by Entirety. — A wife separated from her husband and seeking alimony pendente lite had no present right to disbursement of money deposited by the State Highway Commission (now Board of Transportation) as a credit against just compensation for land owned by the wife and her husband as tenants by entirety. North Carolina State Hwy. Comm'n v. Myers, 270 N.C. 258, 154 S.E.2d 87 (1967), decided under former § 50-16.

Validity and Enforceability of Consent Judgment. — In an action for alimony without divorce, a judgment, entered by consent of the parties, which orders defendant to make alimony payments to his wife (dependent spouse), is valid and is enforceable against the husband (supporting spouse) by attachment for contempt, notwithstanding the absence of allegations or findings that the separation was caused by the misconduct of the husband. Whitesides v. Whitesides, 271 N.C. 560, 157 S.E.2d 82 (1967).

Where consent judgment ordered that plaintiff pay alimony in a certain amount per month and that if either party willfully failed to comply with and perform the terms and conditions of the separation agreement, the court could hold the breaching party in contempt of court, and the divorce decree ordered that the consent judgment should remain in effect according to the respective terms and conditions and applicable law, the judgment was actually an adjudication by the court which was enforceable by contempt and subject to modification upon a change of conditions, rather than a contract approved by the court which could not be modified absent a consent of the parties. Britt v. Britt, 36 N.C. App. 705, 245 S.E.2d 381 (1978).

Effect of Consent Judgment. — Where the parties to an action for alimony without divorce entered into a consent judgment, approved by the court, providing for the payment to the wife of a certain sum monthly and making such sums a lien upon the husband's real estate, and the husband failed to make payments in accordance with the judgment and the wife brought a separate action alleging abandonment, it was held that plaintiff's rights were remitted to the prior judgment. Turner v. Turner, 205 N.C. 198, 170 S.E. 646 (1933).

Trial judge's authority to incorporate a deed of separation into a judgment does not depend on the validity of deed of separation. Wells v. Wells, 92 N.C. App. 226, 373 S.E.2d 879 (1988), cert. denied, 324 N.C. 342, 378 S.E.2d 810 (1989).

Divorce Actions Awarding Alimony Remain Open for Enforcement. — Divorce actions in which alimony is awarded are not ended merely by the rendition of judgment. Such actions are always open for motions in the cause for the enforcement of the order for alimony. Miller v. Miller, 98 N.C. App. 221, 390 S.E.2d 352 (1990), cert. denied, 327 N.C. 637, 399 S.E.2d 124 (1990).

Alimony and Child Support Considered Together. — Although alimony and child support were normally subjects to be considered separately, there might be circumstances that would warrant considering them together. Such was true in the wife's case where she sought and the trial court granted an increase in alimony because the original award attributed only half of some reasonable expenses to the wife because some expenses were attributed to the minor child, and those reasonable expenses increased for the wife after the minor child turned 18-years-old and the child support award was terminated. Harris v. Harris, 188 N.C. App. 477, 656 S.E.2d 316, 2008 N.C. App. LEXIS 228 (2008).

Service of Notice of Motion for Enforcement on Defendant's Attorney. — Plaintiff seeking enforcement of an order for alimony need not serve defendant with a new summons. Simply serving him with notice of the motion for enforcement is sufficient. Unless otherwise ordered by the court, G.S. 1A-1, Rule 5(b) allows service of notice of written motions by service on defendant's attorney of record. Miller v. Miller, 98 N.C. App. 221, 390 S.E.2d 352, cert. denied, 327 N.C. 637, 399 S.E.2d 124 (1990).

Service of defendant's attorney of record in divorce case in 1976 with copies of motion for assignment of wages and show cause order of 1988 was proper, despite defendant's contention that attorney was hired only to protect defendant's interest in the dissolution of his marriage in 1976. Miller v. Miller, 98 N.C. App. 221, 390 S.E.2d 352, cert. denied, 327 N.C. 637, 399 S.E.2d 124 (1990).

Divorce Decree Does Not Affect Prior Order for Alimony. — A decree of absolute divorce on the ground of separation as provided in G.S. 50-6 would not affect a prior order for alimony without divorce rendered under former G.S. 50-16. Howell v. Howell, 206 N.C. 672, 174 S.E. 921 (1934).

A judgment for absolute divorce does not invalidate a judgment for alimony without divorce entered before the action for absolute divorce was instituted. Blankenship v. Blankenship, 256 N.C. 638, 124 S.E.2d 857 (1962).

A decree of absolute divorce will neither impair husband's (supporting spouse's) liability for alimony under a former judgment for permanent alimony under former G.S. 50-16, nor affect the power of the court to enforce it by contempt proceedings or otherwise. Wilson v. Wilson, 260 N.C. 347, 132 S.E.2d 695 (1963).

A judgment for subsistence survives a judgment of absolute divorce obtained by defendant. Simmons v. Simmons, 223 N.C. 841, 28 S.E.2d 489 (1944).

But where a pendente lite order was effective only "pending the trial of this action," it was superseded by rendition of the final judgment. Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980).

Amount Due Under Prior Orders May Be Determined upon Motion. — The wife (dependent spouse) may have the amount of alimony due under prior orders determined by the court upon motion in the cause. Barber v. Barber, 217 N.C. 422, 8 S.E.2d 204 (1940).

An action is not ended by the rendition of a judgment, but is still pending until the judgment is satisfied for the purpose of motions affecting the judgment but not the merits of the original controversy, especially judgments allowing alimony with or without divorce, and where the defendant makes a general appearance in the original action for subsistence without divorce in which judgment is duly rendered for plaintiff, the court acquires jurisdiction over defendant by the proper service of notice of plaintiff's subsequent petition to recover past due installments, and defendant may not challenge the court's jurisdiction to hear plaintiff's motion and petition for such recovery by special appearance. Barber v. Barber, 216 N.C. 232, 4 S.E.2d 447 (1939).

Where the obligor under a judgment awarding alimony and child support is in arrears in the periodic payment of the alimony and child support, the court may, upon motion in the cause, judicially determine the amount then properly due and enter its final judgment for the total then properly due, and execution may issue thereon. Lindsey v. Lindsey, 34 N.C. App. 201, 237 S.E.2d 561 (1977).

Attachment Will Lie. — An attachment against the husband's (supporting spouse's) land will lie in favor of the wife (dependent spouse) abandoned by him, for a reasonable subsistence or allowance adjudged by the court, under the implied contract that he support and maintain her, under the statute declaring and enforcing it and under the order of court; and attachment of the husband's land is a basis for the publication of summons. Walton v. Walton, 178 N.C. 73, 100 S.E. 176 (1919).

A proper order for reasonable subsistence and counsel fees pendente lite may be enforced against a nonresident or absconding husband (supporting spouse) by attachment against his property without notice, and in such case the court may also appoint a receiver to collect the income from the husband's property. Perkins v. Perkins, 232 N.C. 91, 59 S.E.2d 356 (1950).

Writ of Possession. — To enforce an order allowing alimony and counsel fees pursuant to the provisions of this section, the court may issue a writ of possession pursuant to the provisions of G.S. 50-17, giving the wife (dependent spouse) possession of property held by her and her husband (supporting spouse) as tenants by the entireties, in order that she may apply the rents and profits therefrom, as they shall accrue and become personalty, to the payment of alimony and counsel fees as fixed by the court. Porter v. Citizens Bank, 251 N.C. 573, 111 S.E.2d 904 (1960).

Priority of Claim. — The wife's (dependent spouse's) inchoate right to alimony makes her a creditor of her husband (supporting spouse) and is enforceable by attachment, in case of her abandonment, which puts everyone on notice of her claim and her priority over other creditors of her husband. Walton v. Walton, 178 N.C. 73, 100 S.E. 176 (1919).

Where the wife (dependent spouse) has obtained an order for support from her husband (supporting spouse), which has been declared a lien on his property under this section, in order for her to intervene in an action in another jurisdiction and claim priority over an attachment therein issued, it is necessary that she should show some valid service of process or waiver by her husband in an appropriate civil action against him. In this case it was questioned whether the lien of the wife would in any event prevail as against the lien of a valid attachment first levied in another court of equal concurrent jurisdiction. Mitchell v. Talley, 182 N.C. 683, 109 S.E. 882 (1921).

An order was entered in a divorce cause to the effect that if a deed of trust on property held by the husband and wife by the entireties was foreclosed, the husband's share of the surplus should be secured for the payment of the alimony awarded. The deed of trust was foreclosed and the trustee voluntarily paid in the office of the clerk the surplus realized in the sale. In an action on account instituted by a creditor of the husband prior to the sale, a warrant of attachment was issued and the husband's share in the surplus attached on the date it was put in the hands of the clerk. It was held that there having been no attachment of the funds in the divorce action, nor the surplus placed in custodia legis in that action, and the orders issued therein not constituting a lien in futuro upon such funds, the lien of the attaching creditor was superior to the rights of the wife therein. Porter v. Citizens Bank, 251 N.C. 573, 111 S.E.2d 904 (1960).

Unless Decree Constitutes Lien, Arrears Must Be Reduced to Judgment Before Execution. — A decree for periodic payments of alimony and support, in the absence of a provision in the decree itself which constitutes it a specific lien upon the property of the obligor, is not enforceable by execution until the arrears are reduced to judgment by a judicial determination of the amount then due. This is so because the decree for alimony and support may be modified as circumstances may justify. Lindsey v. Lindsey, 34 N.C. App. 201, 237 S.E.2d 561 (1977).

Income from Trust Administered in State Is Subject to Execution. — In a wife's (dependent spouse's) action for divorce from bed and board and for permanent alimony, the husband's (supporting spouse's) income from a trust created in another jurisdiction and administered by a trustee bank in this State is subject to execution to satisfy the judgment of the wife against the husband for alimony, child support and counsel fees. Swink v. Swink, 6 N.C. App. 161, 169 S.E.2d 539 (1969).

Homestead and Personal Property Exemptions. — The allowance made under this section is not such a "debt" as will give the husband the right to claim his homestead or personal property exemptions. Anderson v. Anderson, 183 N.C. 139, 110 S.E. 863 (1922). See also, Wright v. Wright, 216 N.C. 693, 6 S.E.2d 555 (1940).

Garnishment of Wages. — Garnishment of defendant's wages for payment of alimony was not improper since defendant's future earnings were not garnished and since defendant was not entitled to a 60-day exemption because he could not show that his earnings were necessary for the use of a family supported wholly or partly by his labor. Sturgill v. Sturgill, 49 N.C. App. 580, 272 S.E.2d 423 (1980).

Military Retirement Pay May Not Be Assigned to Enforce Payment. — An assignment of defendant's military retirement pay pursuant to court-ordered specific performance of a separation agreement conflicts with the federal law and would threaten grave harm to clear and substantial federal interests. Harris v. Harris, 58 N.C. App. 175, 292 S.E.2d 775, rev'd on other grounds, 307 N.C. 684, 300 S.E.2d 369 (1983).

Estoppel to Challenge Divorce Judgment. — Where husband filed for divorce and performed some of his obligations under separation agreement for several years, remarried in reliance on the divorce judgment, and did not object to the validity of the divorce decree or the agreement until he sought to defend his failure to comply with the judgment on grounds that it was void, he was estopped from questioning its validity and effect. Amick v. Amick, 80 N.C. App. 291, 341 S.E.2d 613 (1986).

Vested or Accrued Payments. — If under subsection (a), the court has ordered alimony in a single lump sum payment and this lump sum has not been paid, such alimony has vested or accrued and similarly, if under subsection (a), the court has ordered alimony in periodic payments and payments have come due but have not been paid, these payments have also vested or accrued; in either case, the dependent spouse's remarriage would not terminate the ordered amounts that had vested or accrued by virtue of being "due and payable." Potts v. Tutterow, 340 N.C. 97, 455 S.E.2d 156, rehearing denied, 340 N.C. 364, 458 S.E.2d 189 (1995).

Effect of Remarriage on Periodic Payment Plan. — Where trial court delineated alimony payable by husband to wife as a "lump sum" or as a "fixed amount," and the payment methodology was not in a single payment but instead was in periodic payments, wife's remarriage terminated the monthly alimony obligations not yet due and payable, as they had not vested prior to remarriage. Potts v. Tutterow, 340 N.C. 97, 455 S.E.2d 156, rehearing denied, 340 N.C. 364, 458 S.E.2d 189 (1995).

Applied in Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969); Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970); Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Yearwood v. Yearwood, 287 N.C. 254, 214 S.E.2d 95 (1975); Amaker v. Amaker, 28 N.C. App. 558, 221 S.E.2d 917 (1976); Love v. Love, 41 N.C. App. 308, 254 S.E.2d 642 (1979); Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980); Wade v. Wade, 63 N.C. App. 189, 303 S.E.2d 634 (1983).

Cited in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971); Hinton v. Hinton, 17 N.C. App. 715, 195 S.E.2d 319 (1973); Bridges v. Bridges, 29 N.C. App. 209, 223 S.E.2d 845 (1976); Conrad v. Conrad, 35 N.C. App. 114, 239 S.E.2d 862 (1978); Harper v. Harper, 50 N.C. App. 394, 273 S.E.2d 731 (1981); Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982); Summerlin v. Summerlin, 26 Bankr. 875 (Bankr. E.D.N.C. 1983); Phillips v. Phillips, 83 N.C. App. 228, 349 S.E.2d 397 (1986).

II. CONTEMPT.

Duty to provide support is not a debt in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided by this section for its willful neglect or abandonment. Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945).

And a judgment ordering payment of alimony may be enforced by contempt. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

An order to pay alimony may be enforced by imprisonment for contempt. Pain v. Pain, 80 N.C. 322 (1879); Zimmerman v. Zimmerman, 113 N.C. 432, 18 S.E. 334 (1893).

A district court judge may hold a party to a proceeding before him in civil contempt for failure to comply with court orders issued pursuant to a confession of judgment regarding payment of alimony which was entered in the superior court prior to the establishment of a district court for the district in which the order was entered. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

With Willful Failure Punishable by Imprisonment. — A willful failure of husband (supporting spouse) to comply with court's order to pay to the wife (dependent spouse) the amount fixed by order of the court, having due regard to the situation of the parties, the ability of the husband to pay, and the needs of the wife is a contempt, and can be punished as such by imprisonment, and is not within the constitutional inhibition against imprisonment for debt. Wilson v. Wilson, 261 N.C. 40, 134 S.E.2d 240 (1964).

Trial Court Has Jurisdiction to Enforce Alimony Order During Appeal. — Trial court did not lack authority to enter contempt order and initial show cause order against defendant where defendant had appealed original order for periodic alimony payments; appeal did not remove jurisdiction of trial court under G.S. 1-294 since this section dictates that trial court has jurisdiction to enforce alimony order during appeal. Cox v. Cox, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

Agreement of Parties Incorporated in Judgment Is Enforceable by Contempt Proceedings. — Where, in wife's action for alimony and child support, the parties agreed to the terms of a judgment providing that husband would make specified monthly support payments, and the judgment entered by the court ordered the husband to make the payments which he had agreed to make, the husband's obligation to make the support payments could be enforced by contempt proceedings. Parker v. Parker, 13 N.C. App. 616, 186 S.E.2d 607 (1972).

Property settlement provisions of a separation agreement incorporated by reference in a divorce decree are enforceable by contempt proceedings. Cobb v. Cobb, 54 N.C. App. 230, 282 S.E.2d 591 (1981), cert. denied and appeal dismissed, 304 N.C. 724, 288 S.E.2d 809 (1982).

Contempt in Failure to Comply with Consent Judgment. — Under a consent judgment entered in an action by a husband against his wife where no pleadings were filed, providing for certain money payments in lieu of alimony by the husband to the wife and that it should be more than a simple judgment for debt and as binding upon plaintiff as if rendered under this section, and also providing that, upon proper cause shown, it would subject husband to such penalties as the court might require in case of contempt of its orders, the court could commit the plaintiff upon his failure to make the payments required. Edmundson v. Edmundson, 222 N.C. 181, 22 S.E.2d 576 (1942).

Although a judgment may be entered by consent, based on a written agreement, if such judgment orders and decrees that the husband shall pay certain sums as alimony for the support of his wife, a willful refusal to make the payments as directed therein will subject the husband in a proper proceeding to attachment for contempt. Stancil v. Stancil, 255 N.C. 507, 121 S.E.2d 882 (1961).

Punishment by Contempt Requires "Willful" Disobedience. — Failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is willful. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

And "willful" imports knowledge and a stubborn resistance. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

One does not act "willfully" in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

The trial court must find as a fact that the defendant possessed the means to comply with orders of the court during the period when he was in default. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Where the court enters judgment as for civil contempt, the court must find not only failure to comply with the order but that the defendant presently possesses the means to comply. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Where the lower court had not found as a fact that defendant possessed the means to comply with the orders for payment of subsistence pendente lite at any time during the period when he was in default in such payments, the finding that defendant's failure to make the payments of subsistence was deliberate and willful was not supported by the record, and the decree committing him to imprisonment for contempt would be set aside. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

An order for a defendant's arrest for willful contempt of an earlier court order requiring him to make alimony payments would be remanded where there was no evidence to support a finding that defendant presently possessed the means to comply with the alimony order. Earnhardt v. Earnhardt, 9 N.C. App. 213, 175 S.E.2d 744 (1970).

Evidence of Willful Noncompliance with Order. — The mere fact that a defendant ordered to pay a certain sum monthly for the necessary subsistence of his wife and child has a right to move at any time for modification of the order does not support the conclusion that defendant's failure to comply with the order is willful. Smithwick v. Smithwick, 218 N.C. 503, 11 S.E.2d 455 (1940).

Findings Required to Support Judgment for Contempt. — In contempt proceedings for willful failure to comply with an order of court, it is required that the court find facts supporting the conclusion of willfulness, and findings of fact that defendant had been ordered to pay a certain sum monthly for the necessary subsistence of his wife and child, and that defendant had failed to comply with the order, without findings as to the property possessed by defendant or his earning capacity, will not support a judgment attaching defendant for contempt. Smithwick v. Smithwick, 218 N.C. 503, 11 S.E.2d 455 (1940).

Facts Found in Contempt Proceedings Not Reviewable Except upon Their Sufficiency. — In proceedings for contempt, the facts found by the judge are not reviewable except for the purpose of passing upon their sufficiency to warrant the judgment. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Husband Held in Contempt. — For case in which defendant was held in contempt for disobedience of the court's order for him to pay certain weekly sums to his wife under former G.S. 50-16, see Little v. Little, 203 N.C. 694, 166 S.E. 809 (1932).

Imprisonment Erroneous. — Where the trial judge found that the party was a healthy and able-bodied man for his age, and further found that he could pay at least a portion of the alimony, it was error to imprison him until he should pay the whole amount. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

As to habeas corpus after commitment for contempt, see In re Adams, 218 N.C. 379, 11 S.E.2d 163 (1940).

§ 50-16.8. Procedure in actions for postseparation support.

When an application is made for postseparation support, the court may base its award on a verified pleading, affidavit, or other competent evidence. The court shall set forth the reasons for its award or denial of postseparation support, and if making an award, the reasons for its amount, duration, and manner of payment. (1871-2, c. 193, ss. 37, 38, 39; 1883, c. 67; Code, ss. 1290, 1291, 1292; Rev., ss. 1565, 1566, 1567; 1919, c. 24; C.S., ss. 1665, 1666, 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3; 1953, c. 925; 1955, cc. 814, 1189; 1961, c. 80; 1967, c. 1152, s. 2; 1971, c. 1185, s. 25; 1979, c. 709, s. 4; 1995, c. 319, s. 6.)

Cross References. — As to court having jurisdiction over alimony proceedings, see G.S. 7A-244.

Editor's Note. — Session Laws 1995, c. 319, which amended this section, in s. 12 provides that this act applies to civil actions filed on or after October 1, 1995, and shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995.

This section, prior to the amendment by Session Laws 1995, c. 319, read as follows: "**Procedure in actions for alimony and alimony pendente lite.**

"(a) The procedure in actions for alimony and actions for alimony pendente lite shall be as in other civil actions except as provided in this section and in G.S. 50-19.

"(b) Payment of alimony may be ordered:

(1) Upon application of the dependent spouse in an action by such spouse for divorce, either absolute or from bed and board; or

(2) Upon application of the dependent spouse in a separate action instituted for the purpose of securing an order for alimony without divorce; or

(3) Upon application of the dependent spouse as a cross action in a suit for divorce, whether absolute or from bed and board, or a proceeding for alimony without divorce, instituted by the other spouse.

"(c) A cross action for divorce, either absolute or from bed and board, shall be allowable in an action for alimony without divorce.

"(d) Payment of alimony pendente lite may be ordered:

(1) Upon application of the dependent spouse in an action by such spouse for absolute divorce, divorce from bed and board, annulment, or for alimony without divorce; or

(2) Upon application of the dependent spouse as a cross action in a suit for divorce, whether absolute or from bed and board, annulment, or for alimony without divorce, instituted by the other spouse.

"(e) No order for alimony pendente lite shall be made unless the supporting spouse shall have had five days' notice thereof; but if the supporting spouse shall have abandoned the dependent spouse and left the State, or shall be in parts unknown, or is about to remove or dispose of his or her property for the purpose of defeating the claim of the dependent spouse, no notice is necessary.

"(f) When an application is made for alimony pendente lite, the parties shall be heard orally, upon affidavit, verified pleading, or other proof, and the judge shall find the facts from the evidence so presented.

"(g) When a district court having jurisdiction of the matter shall have been established, application for alimony pendente lite shall be made to such district court, and may be heard without a jury by a judge of said court at any time.

"(h) In any case where a claim is made for alimony without divorce, when there is a minor child, the pleading shall set forth the name and age of each such child; and if there be no minor child, the pleading shall so state."

Legal Periodicals. — For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the State in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

For note discussing arbitration of domestic cases, see 4 Campbell L. Rev. 203 (1981).

CASE NOTES

I. In General.
II. Alimony Without Divorce.
III. Alimony Pendente Lite.

I. IN GENERAL.

Editor's Note. — *Some of the cases cited below were decided under former G.S. 50-15, which dealt with alimony pendente lite and counsel fees in actions for divorce, and former G.S. 50-16, which dealt with actions for alimony without divorce.*

Sections 50-16.1 Through 50-16.10 Construed in Pari Materia. — The statutes codified as G.S. 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982).

Section 50-16.9 does not list factors to help in the modification decision, but the alimony statutes, G.S. 50-16.1 through 50-16.10, have been read in pari materia because they deal with the same subject matter. Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Enforcement of Duty of Support. — The law imposes a continuing legal duty upon a husband (supporting spouse) to support his wife (dependent spouse). Such duty is enforceable in a variety of ways: through criminal sanctions imposed for willful abandonment coupled with nonsupport, and through civil decrees granting alimony, alimony pendente lite, or alimony without divorce on the basis of misconduct or failure to support. Gray v. Snyder, 704 F.2d 709 (4th Cir. 1983).

Contractual Limitation on Duty of Support. — Duty of support is considered to be so fraught with a public interest that any contractual undertaking between a husband and wife living together and not contemplating imminent separation which purports to quantify or limit the duty is, under North Carolina law, void as against public policy. Gray v. Snyder, 704 F.2d 709 (4th Cir. 1983).

Jurisdiction over Alimony Proceedings. — The district court has jurisdiction over alimony proceedings and, indeed, the legislature has decreed that it is the only "proper" division for such a proceeding. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970). See § 7A-244.

Alimony Without Divorce and Alimony Pendente Lite Are Separate Remedies. — Former G.S. 50-16 provided two remedies, one for alimony without divorce, and another for subsistence and counsel fees pending trial and final disposition of the issues involved. Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966); Myers v. Myers, 270 N.C. 263, 154 S.E.2d 84 (1967).

A party suing for divorce from bed and board may, but is not required to, apply for alimony. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

A party may seek permanent alimony upon filing for a divorce from bed and board. Coombs v. Coombs, 121 N.C. App. 746, 468 S.E.2d 807 (1996).

Procedure Where Grounds for Alimony Are Asserted Simultaneously as Grounds for Divorce. — While it is true that the determination of dependency properly rests with the trial judge, and not with the jury, where the grounds asserted for alimony are asserted simultaneously as grounds for divorce, the right to alimony depends on the legal entitlement to divorce, regardless of financial dependency. The ordinary and correct procedure in such cases, therefore, is to allow the jury to render its verdict on the "fault" issues of divorce, and then and only then to move to a bench hearing on dependency and the proper amount, if any, of alimony. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

The term "application," as used in this section, means a motion in the cause, the procedure for which is governed by the North Carolina Rules of Civil Procedure, G.S. 1A-1. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

The legislature intended the word "application," as used in subsections (b) and (d) of this section and in G.S. 1A-1, Rule 7(b)(1), to have reference to the same kind of procedure. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Application for Alimony or Alimony Pendente Lite in Divorce Action Need Not Be Contained in Pleadings. — Nothing in this section indicates that an application for either alimony or alimony pendente lite must be contained in the pleadings or an amendment thereto in an action for absolute divorce. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Burden on Applicant for Alimony. — This section looks first to the ability of the spouses to maintain the standard of living to which they have become accustomed during the last years of the marriage. The burden on the applicant for alimony is to show the accustomed standard of living and lack of means to maintain that standard. Only then does the ability of the other spouse to pay become significant. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Application Properly Served on Defendant's Attorney. — Where motion for alimony did not specify a date for a hearing, but was served, by depositing it in the mail, properly addressed to defendant's attorney, at least five days before an already scheduled hearing, plaintiff properly proceeded to apply for alimony. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Counterclaims. — The statutes dealing specifically with divorce actions do not prescribe a procedure for counterclaims different from that prescribed in G.S. 1A-1, Rule 13(a). Gardner v. Gardner, 294 N.C. 172, 240 S.E.2d 399 (1978).

There is no conflict between the statutes dealing with procedure in divorce actions and G.S. 1A-1, Rule 13(a). Rather G.S. 1A-1, Rule 13(a) superimposes an additional characteristic on certain kinds of counterclaims. Gardner v. Gardner, 294 N.C. 172, 240 S.E.2d 399 (1978).

Improper venue, in an action for alimony pendente lite and alimony without divorce, is subject to attack under G.S. 1A-1, Rule 12(b)(3). Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Court Lacked Authority to Rule While Change of Venue Motion Was Pending. — When supporting spouse in apt time made a proper motion for change of venue under G.S. 1A-1, Rule 12(b)(3), it became a matter of right, and the district court was without authority to proceed further in the cause until the motion to remove had been determined. Since the court lacked authority to make any ruling on the merits while the motion to change venue was pending, it was error to enter an order granting alimony pendente lite and counsel fees. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

"Supporting Spouse" Defined. — A "supporting spouse" is a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support. A spouse meets the definition if he or she qualifies under either test, which essentially is the same as that applied for "dependent spouse." The primary issue is not the supporting spouse's ability to pay, but whether the spouse seeking alimony is a dependent spouse. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Determination of what constitutes a "dependent spouse" and what constitutes a "supporting spouse" requires an application of principles of statutory law to facts and therefore involves mixed questions of law and fact. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971). See § 50-16.1.

Accustomed Standard of Living Determinative. — It is not necessary that a spouse be reduced to penury to be considered dependent; the accustomed standard of living is the proper measure. Long v. Long, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

Vacation of Consent Judgments Without Making Specific Findings Held Error. — While a consent order for alimony or alimony pendente lite may be modified or vacated at any time upon motion and a showing of changed circumstances, where defendant husband offered some evidence of changed circumstances but the trial court failed to comply with the statutory mandate as to the making of specific findings, and erroneously ruled that consent judgments were invalid for failure of the court to make a finding of dependency, the cause would be remanded for a de novo hearing. Cox v. Cox, 36 N.C. App. 573, 245 S.E.2d 94 (1978).

Judgment as Judicial Separation for Purpose of § 50-6. — A judgment in an action instituted under former G.S. 50-16 decreeing that the husband had willfully abandoned the wife and awarding her support and maintenance constituted a judicial separation which, two years (now one year) thereafter, would permit the husband to obtain an absolute divorce. Rouse v. Rouse, 258 N.C. 520, 128 S.E.2d 865 (1963).

Action for Divorce Not Defeated by Order for Support. — An order for support, either pendente lite or for alimony without divorce, without more, would not perforce defeat an action for divorce under G.S. 50-6. Byers v. Byers, 223 N.C. 85, 25 S.E.2d 466 (1943).

Binding Arbitration Available. — Since the parties may settle spousal support by agreement, there exists no prohibition to their entering into binding arbitration under former G.S. 1-567.1 through 1-567.20 to settle the issue of spousal support. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

But Not by Court Order. — Binding arbitration is not available in this State by court order in a civil action for alimony, custody and child support. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Court May Not Delegate Duties to Arbitration. — While, in the absence of court proceedings, parties may settle their disputes by arbitration, once the issues are brought into court, the court may not delegate its duty to resolve those issues to arbitration. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Advantages of Binding Arbitration for Dependent Spouse. — In light of the fact that the right of a dependent spouse to support and maintenance is a property right which can be released by contract, the advantages to binding and nonmodifiable arbitration outweigh its disadvantages. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Effect of § 14-322. — Section 14-322, requiring the State to show the husband's willful abandonment of his wife, etc., beyond a reasonable doubt, does not deprive the wife of her civil remedies. State v. Falkner, 182 N.C. 793, 108 S.E. 756 (1921).

Determining Proper Amount of Counsel Fees. — The trial court is under an obligation to conduct a broad inquiry in making its determination of the proper amount of counsel fees which are to be awarded a dependent spouse as litigant, considering as relevant factors the nature and worth of the services rendered, the magnitude of the task imposed upon counsel, and reasonable consideration for the parties' respective conditions and financial circumstances. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980).

It would be contrary to what the court perceives to be the intent of the legislature to require a dependent spouse to meet the expenses of litigation through the unreasonable depletion of her separate estate where her separate estate is considerably smaller than that of the supporting spouse. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980).

Appellate Review. — The granting or denial of a motion for temporary alimony (pendente lite) is within the discretion of the trial judge and as such is normally not reviewable on appeal. However, the same may not be said about a dismissal of an action for alimony without divorce. Holcomb v. Holcomb, 7 N.C. App. 329, 172 S.E.2d 212 (1970).

Applied in Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969); Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970); Boone v. Boone, 8 N.C. App. 524, 174 S.E.2d 833 (1970); Briggs v. Briggs, 21 N.C. App. 674, 205 S.E.2d 547 (1974); Simmons v. Simmons, 22 N.C. App. 68, 205 S.E.2d 582 (1974); Yearwood v. Yearwood, 287 N.C. 254, 214 S.E.2d 95 (1975); Guy v. Guy, 27 N.C. App. 343, 219 S.E.2d 291 (1975); Hill v. Hill, 27 N.C. App. 423, 219 S.E.2d 273 (1975); Brondum v. Cox, 30 N.C. App. 35, 226 S.E.2d 193 (1976); Harris v. Harris, 58 N.C. App. 314, 293 S.E.2d 602 (1982); Whedon v. Whedon, 313 N.C. 200, 328 S.E.2d 437 (1985).

Cited in Harper v. Harper, 9 N.C. App. 341, 176 S.E.2d 48 (1970); Mitchell v. Mitchell, 12 N.C. App. 54, 182 S.E.2d 627 (1971); Howell v. Howell, 19 N.C. App. 260, 198 S.E.2d 462 (1973); Therrell v. Therrell, 19 N.C. App. 321, 198 S.E.2d 776 (1973); Hogue v. Hogue, 20 N.C. App. 583, 202 S.E.2d 327 (1974); Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976); Blake v. Blake, 34 N.C. App. 160, 237 S.E.2d 310 (1977); Davis v. Davis, 35 N.C. App. 111, 240 S.E.2d 488 (1978); Steele v. Steele, 36 N.C. App. 601, 244 S.E.2d 466 (1978); Hamilton v. Hamilton, 36 N.C. App. 755, 245 S.E.2d 399 (1978); Benson v. Benson, 39 N.C. App. 254, 249 S.E.2d 877 (1978); Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982); Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994); Squires v. Squires, 178 N.C. App. 251, 631 S.E.2d 156, 2006 N.C. App. LEXIS 1410 (2006).

II. ALIMONY WITHOUT DIVORCE.

Suits for alimony without divorce are within the analogy of divorce laws. Blankenship v. Blankenship, 256 N.C. 638, 124 S.E.2d 857 (1962).

Procedure in Actions for Alimony Without Divorce. — This section changes the procedure to be followed in actions for alimony without divorce from the divorce procedure set forth in G.S. 50-10 to the procedure applicable to other civil actions. Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Whitaker v. Whitaker, 16 N.C. App. 432, 192 S.E.2d 80 (1972).

Upon application for a postseparation support award, the trial court might grant or deny awards based upon paper filings at abbreviated hearings conducted early in the litigation process and prior to significant discovery. Wells v. Wells, 132 N.C. App. 401, 512 S.E.2d 468 (1999).

Inapplicability of Residency Requirement. — The residency requirement of G.S. 50-8 is not applicable in an action for alimony without divorce. Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975), overruled on other grounds, Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982).

Residence is a condition to the maintenance of an action for divorce, but this was not true of an action brought under former G.S. 50-16. Harris v. Harris, 257 N.C. 416, 126 S.E.2d 83 (1962).

Venue of Suit for Alimony Without Divorce — County of Wife's Residence. — Suits for alimony without divorce are within the analogy of divorce laws, and where a wife was forced by her husband's conduct to leave his residence, she could bring an action for alimony without divorce in the county where she resided, notwithstanding the provision of former G.S. 50-16 that "the wife may institute an action in the superior court of the county in which the cause of action arose." Rector v. Rector, 186 N.C. 618, 120 S.E. 195 (1923).

A wife who was forced by her husband to leave his home and take refuge elsewhere could acquire a separate domicile, and could sue him for alimony without divorce in the county of her residence, and the husband was not entitled to removal to the county of his residence as a matter of right under the provisions of former G.S. 50-16 and G.S. 1-82 and 50-3. Miller v. Miller, 205 N.C. 753, 172 S.E. 493 (1934).

Same — County Where Parties Were Living at Time of Abandonment. — The wife may institute action for alimony without divorce in the county in which the parties were living at the time of the husband's alleged abandonment. Robbins v. Robbins, 262 N.C. 749, 138 S.E.2d 632 (1964).

Plaintiff, though she and defendant were both domiciled in South Carolina, was allowed to maintain an action under former G.S. 50-16 in a county in North Carolina where defendant had large properties, including a farm and house in which the parties were living when defendant abandoned plaintiff. Harris v. Harris, 257 N.C. 416, 126 S.E.2d 83 (1962).

Same — Action by Nonresident. — Intent of plaintiff, a nonresident, to establish a residence in the future in Madison County did not authorize a trial of the suit in that county, but the proper place for trial was in Haywood County, where defendant was a resident. Burrell v. Burrell, 243 N.C. 24, 89 S.E.2d 732 (1955).

Action for Alimony Not Abated by Prior Action of Husband for Absolute Divorce. — The prior institution of an action by the husband for an absolute divorce does not abate the wife's subsequent action for alimony without divorce, nor deprive the court of power to award her alimony and counsel fees pendente lite therein. Reece v. Reece, 231 N.C. 321, 56 S.E.2d 641 (1949).

The pendency of the husband's action for absolute divorce under G.S. 50-6 is not ground for abatement of the wife's subsequent action for alimony without divorce. Beeson v. Beeson, 246 N.C. 330, 98 S.E.2d 17 (1957), commented on in 36 N.C.L. Rev. 203 (1958).

If an action for absolute divorce is instituted and the wife is the defendant therein, she is not estopped from bringing an action for alimony without divorce during the pendency of such action. Blankenship v. Blankenship, 256 N.C. 638, 124 S.E.2d 857 (1962).

Action for Alimony Barred by Verdict in Divorce Action. — The doctrine of res judicata applies to divorce actions as well as other civil cases, and hence the fact that the wife has the alternate remedy of independent action or a cross-action to secure alimony without divorce does not authorize her to bring an independent action based upon abandonment when the issue of abandonment has theretofore been determined adversely to her by verdict of the jury in the husband's action for divorce on the grounds of separation. Garner v. Garner, 268 N.C. 664, 151 S.E.2d 553 (1966).

Effect of Prior Divorce in Another State. — No action will lie for alimony without divorce where it appears that the court of a state having jurisdiction over the parties has declared them not husband and wife. Bidwell v. Bidwell, 139 N.C. 402, 52 S.E. 55 (1905).

Complaint Praying for Subsistence and Other Relief as Action for Alimony Without Divorce. — Where a complaint alleges certain acts of misconduct constituting bases for divorce, both absolute and from bed and board, with prayer for relief demanding subsistence for the plaintiff and the minor child of the marriage and for such other relief as may be just and proper, without prayer for divorce, the cause is an action for alimony without divorce. Brooks v. Brooks, 226 N.C. 280, 37 S.E.2d 909 (1946).

Cross-Action for Alimony Without Divorce. — A wife may assert a cause of action for alimony without divorce as a cross-action in the husband's suit for divorce. Scott v. Scott, 259 N.C. 642, 131 S.E.2d 478 (1963).

The 1955 amendment to former G.S. 50-16 gave a wife the right to set up a cross-action for alimony without divorce in the husband's suit for divorce, either absolute or from bed and board, without disturbing the right of the wife to bring an independent action under the statute for alimony without divorce, the alternative procedure being permissive but not mandatory. Beeson v. Beeson, 246 N.C. 330, 98 S.E.2d 17 (1957).

Former G.S. 50-16, as it stood before the 1955 amendment, could not be used by the wife as the basis of a cross-action in a suit for divorce instituted by the husband. Silver v. Silver, 220 N.C. 191, 16 S.E.2d 834 (1941); Shore v. Shore, 220 N.C. 802, 18 S.E.2d 353 (1942). See also, Ericson v. Ericson, 226 N.C. 474, 38 S.E.2d 517 (1946).

Notice of Intended Cross-Action Does Not Preclude Taking of Voluntary Nonsuit. — Plaintiff, in an action for absolute divorce, is entitled as a matter of right to take a voluntary nonsuit upon paying costs and alimony pendente lite to the date of motion, notwithstanding he has had notice of defendant's intention to file a cross-action for alimony without divorce, and where the nonsuit has been taken, no action is pending in which defendant may amend her answer to assert such cross-action. Scott v. Scott, 259 N.C. 642, 131 S.E.2d 478 (1963).

Requirements of Complaint. — The complaint in an action for alimony without divorce must allege facts sufficient to constitute a good cause of action under the provision of the statute for the court to allow wife (dependent spouse) from the estate or earnings of her husband (supporting spouse) a reasonable support and counsel fees, and when the wife alleges only that she has left her husband because he failed to fulfill his promise to supply certain conveniences, this is insufficient. McManus v. McManus, 191 N.C. 740, 133 S.E. 9 (1926).

The plaintiff, in an action for alimony without divorce on the ground of abandonment, is not required to allege the acts and conduct relied upon as the basis of the action with that degree of particularity as is required when the cause of action is based on such indignities to the person of plaintiff as to render her condition intolerable and life burdensome. Sguros v. Sguros, 252 N.C. 408, 114 S.E.2d 79 (1960).

In an action for alimony without divorce, allegations that the husband had been abusive and violent toward plaintiff and that she had been made to fear for her safety were insufficient, it being necessary that plaintiff allege specific acts of misconduct on the part of the husband so that the court could determine whether his conduct was in fact such as constituted cause for divorce from bed and board, and that plaintiff also specify what, if anything, she did or said at the time, in order that the court could determine whether she provoked the difficulty. Ollis v. Ollis, 241 N.C. 709, 86 S.E.2d 420 (1955).

The essential elements required to be alleged in an action for alimony without divorce are (1) separation of the husband (supporting spouse) from the wife (dependent spouse), and (2) his failure to provide her with necessary subsistence according to his means and condition in life. Trull v. Trull, 229 N.C. 196, 49 S.E.2d 225 (1948); Bowling v. Bowling, 252 N.C. 527, 114 S.E.2d 228 (1960).

In an action for alimony without divorce, it suffices for wife (dependent spouse) to allege and prove (1) the existence of a valid marriage between the parties, and (2) that the husband (supporting spouse) has separated himself from the wife and failed to provide her (and the children of the marriage) with necessary subsistence according to his means, or, instead of the latter, that the husband is a drunkard or spendthrift. Caddell v. Caddell, 236 N.C. 686, 73 S.E.2d 923 (1953).

A wife's complaint states a cause of action for alimony without divorce under the statute if it alleges separation without providing subsistence, or alleges that the husband (supporting spouse) is a drunkard or spendthrift or is guilty of any misconduct or acts that would be or constitute cause for divorce either absolute or from bed and board. Thurston v. Thurston, 256 N.C. 663, 124 S.E.2d 852 (1962).

To state a cause of action for alimony without divorce it is necessary to allege: (1) the marriage, (2) the separation of the husband (supporting spouse) from the wife (dependent spouse) and his failure to provide the wife and children of the marriage reasonable subsistence, i.e., abandonment, or some conduct on the part of the husband constituting cause for divorce, either absolute or from bed and board, and (3) want of provocation on the part of the wife. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

Allegation That Acts of Husband Were Without Provocation — In General. — An allegation in an action for alimony without divorce that the separation of defendant from plaintiff wife was without fault or misconduct on her part was a sufficient allegation that husband's acts were without provocation on her part. Trull v. Trull, 229 N.C. 196, 49 S.E.2d 225 (1948).

In an action for alimony without divorce, as in an action for divorce a mensa et thoro by the wife (dependent spouse), she must not only set out with some particularity the acts of cruelty upon the part of the husband (supporting spouse), but she must also aver, and consequently offer proof, that such acts were without adequate provocation on her part. The omission of such allegations is fatal. Howell v. Howell, 223 N.C. 62, 25 S.E.2d 169 (1943); Best v. Best, 228 N.C. 9, 44 S.E.2d 214 (1947); Ollis v. Ollis, 241 N.C. 709, 86 S.E.2d 420 (1955).

In an action by the wife (dependent spouse) for alimony without divorce on the ground of mistreatment constituting constructive abandonment, the absence of an allegation that defendant's misconduct was without adequate provocation is fatal. Barker v. Barker, 232 N.C. 495, 61 S.E.2d 360 (1950).

Same — Where Adultery Is Charged. — Where a complaint alleges adultery and also sets forth acts of misconduct constituting a basis for divorce from bed and board, the failure of the complaint to allege that the misconduct was without adequate provocation is not fatal, since such allegation is not necessary in an action for absolute divorce on the ground of adultery, and this ground, independently, is sufficient to sustain the action for alimony without divorce. Brooks v. Brooks, 226 N.C. 280, 37 S.E.2d 909 (1946).

Allegations Held Sufficient. — Allegations in an action for alimony without divorce to the effect that defendant constantly mistreated plaintiff and offered such indignities to her person as to endanger her health and safety and forced her to separate herself from defendant, that defendant drank excessively and failed to provide for her support, and that plaintiff had at all times been a dutiful wife, were sufficient to state a cause of action for alimony without divorce, and defendant's demurrer thereto was properly overruled. Bateman v. Bateman, 232 N.C. 659, 61 S.E.2d 909 (1950).

Allegation that defendant had become an habitual drunkard constituted a ground for divorce from bed and board, and hence was sufficient to support an action for alimony without divorce even though other insufficient allegations also appeared in the complaint. Allen v. Allen, 244 N.C. 446, 94 S.E.2d 325 (1956).

For case in which allegations were held sufficient, see also Ollis v. Ollis, 241 N.C. 709, 86 S.E.2d 420 (1955).

Allegations Deemed Denied. — Section 50-10 applies to actions for alimony without divorce, and all allegations of the complaint are deemed denied whether actually denied by pleadings or not. Schlagel v. Schlagel, 253 N.C. 787, 117 S.E.2d 790 (1961).

Where plaintiff did not reply and expressly deny defendant's allegations of adultery, but these allegations did not relate to a counterclaim, they were taken as controverted. Creech v. Creech, 256 N.C. 356, 123 S.E.2d 793 (1962).

Indefinite Allegations in Answer. — Vague and indefinite allegations of infidelity on the part of a wife made by a husband in his answer to her complaint in a proceeding for support and maintenance would not be allowed to affect the question of the husband's liability in such proceedings. Cram v. Cram, 116 N.C. 288, 21 S.E. 197 (1895).

Parties May Waive Jury Trial. — Issues of fact in an action for alimony without divorce may be determined by the judge if a jury trial is waived by failure to make timely demand pursuant to G.S. 1A-1, Rule 38(b), since this section changes the procedure to be followed in actions for alimony without divorce from the divorce procedure set forth in G.S. 50-10 to the procedure applicable to other civil actions. Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Whitaker v. Whitaker, 16 N.C. App. 432, 192 S.E.2d 80 (1972); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

Judge May Not Determine Facts upon Evidence Introduced at Another Trial. — The trial judge may not pass upon the issuable facts in proceedings for alimony without divorce upon evidence introduced before him theretofore upon a trial of the husband for criminal abandonment, etc., of which he was acquitted, when the witnesses are present and ready to testify. Crews v. Crews, 175 N.C. 168, 95 S.E. 149 (1918), distinguishing Cooper v. Southern R.R., 170 N.C. 490, 87 S.E. 322 (1915).

The only material facts at issue in the action for alimony without divorce are the questions of the existence of the marriage relation and whether the husband abandoned the wife. Skittletharpe v. Skittletharpe, 130 N.C. 72, 40 S.E. 851 (1902); Hooper v. Hooper, 164 N.C. 1, 80 S.E. 64 (1913).

Finding of Facts by Judge. — In a wife's application for alimony without divorce, it was not required by former G.S. 50-16 that the judge hearing the matter should find the facts as a basis for his judgment, as was required in proceedings for alimony pendente lite under former G.S. 50-15, although it was necessary that wife allege sufficient facts to constitute a good cause of action thereunder. Price v. Price, 188 N.C. 640, 125 S.E. 264 (1924); Vincent v. Vincent, 193 N.C. 492, 137 S.E. 426 (1927).

Attack on Consent Judgment by Infant's Guardians. — Where the court in proceedings for alimony without divorce approves a consent judgment providing for the support and subsistence of the defendant's wife and child, the validity of such consent judgment may be later attacked by the child's authorized guardians on the ground of irregularity and that it is not binding on the minor. In re Reynolds, 206 N.C. 276, 173 S.E. 789 (1934).

III. ALIMONY PENDENTE LITE.

An application for alimony pendente lite may be made by motion in the cause. Reeves v. Reeves, 82 N.C. 348 (1880), overruled on other grounds, Medlin v. Medlin, 175 N.C. 529, 95 S.E. 857 (1918).

The resident judge of the district has the jurisdiction to hear and determine the motion for reasonable subsistence and counsel fees pendente lite in an action for alimony without divorce. Herndon v. Herndon, 248 N.C. 248, 102 S.E.2d 862 (1958).

Where Motion May Be Heard. — Insofar as alimony pendente lite and counsel fees for plaintiff are concerned, a hearing could be held on proper notice anywhere in the judicial district. Joyner v. Joyner, 256 N.C. 588, 124 S.E.2d 724 (1962).

A motion for alimony pendente lite may be heard anywhere in the judicial district. Moore v. Moore, 130 N.C. 333, 41 S.E. 943 (1902).

As may a motion to reduce alimony. Moore v. Moore, 131 N.C. 371, 42 S.E. 822 (1902).

But a resident judge holding court in another district cannot hear a motion to reduce alimony pendente lite in a suit pending in the district in which he resides. Moore v. Moore, 131 N.C. 371, 42 S.E. 822 (1902).

Motion May Be Heard Out of Term. — In an action for alimony without divorce, a motion for alimony pendente lite may be heard out of term, after five days' notice to the husband. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Alimony pendente lite may be allowed before the return term if the complaint has been filed. Moore v. Moore, 130 N.C. 333, 41 S.E. 943 (1902).

Effect of Suit for Divorce Instituted After Suit for Alimony. — Where, after the wife instituted a suit for alimony without divorce, in which action the question of the custody of the minor child of the marriage was not raised, the husband instituted suit for absolute divorce, it was held that the 1953 amendment to former G.S. 50-16 did not affect the jurisdictional power of the court to award subsistence for the mother and child pendente lite in her action. Barnwell v. Barnwell, 241 N.C. 565, 85 S.E.2d 916 (1955).

Necessity for Notice to Defendant. — An order entered in action for alimony without divorce requiring defendant to pay subsistence and counsel fees pendente lite is void when the order is entered without notice to defendant. Barnwell v. Barnwell, 241 N.C. 565, 85 S.E.2d 916 (1955).

An order allowing alimony pendente lite without notice is void. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

The provision in former G.S. 50-15 requiring five days' notice applied only when the motion was heard out of term; and parties were fixed with notice of all motions or orders made during the term of the court. Coor v. Smith, 107 N.C. 430, 11 S.E. 1089 (1890); Zimmerman v. Zimmerman, 113 N.C. 432, 18 S.E. 334 (1893); Jones v. Jones, 173 N.C. 279, 91 S.E. 960 (1917).

An order of court continuing the motion for alimony to a future term of court made in the presence of counsel for both parties was sufficient notice, under former G.S. 50-15, of such motion. Lea v. Lea, 104 N.C. 603, 10 S.E. 488 (1889).

When Notice Dispensed with. — An affidavit of the wife that husband had left the State the day after the filing of the complaint and that she had good reason to believe that he had left to defeat her claim for alimony, having been selling his property for several months with that purpose in view, dispensed with the necessity of notice. Barker v. Barker, 136 N.C. 316, 48 S.E. 733 (1904).

Where the supporting spouse abandons the dependent spouse and leaves the State, notice of hearing on motion for alimony pendente lite is not required, nor is service on the supporting spouse's counsel of record required. Fungaroli v. Fungaroli, 40 N.C. App. 397, 252 S.E.2d 849 (1979), cert. denied and appeal dismissed, 446 U.S. 930, 100 S. Ct. 2144, 64 L. Ed. 2d 783 (1980).

Specification of Time of Hearing. — The fact that a notice of a motion for alimony pendente lite, duly served upon the defendant, did not specify the time of hearing, did not invalidate the order allowing the same, it having been heard at a time of court at which the cause stood regularly for trial. Zimmerman v. Zimmerman, 113 N.C. 432, 18 S.E. 334 (1893).

Whether the wife is entitled to alimony pendente lite is a question of law, upon the facts found, and is reviewable on appeal by either party. Morris v. Morris, 89 N.C. 109 (1883); Moore v. Moore, 130 N.C. 333, 41 S.E. 943 (1902); Barker v. Barker, 136 N.C. 316, 48 S.E. 733 (1904).

Jury Trial Not Required. — In respect of allowances for alimony and counsel fees pendente lite, the allowances pendente lite form no part of the ultimate relief sought and do not affect the final rights of the parties, and the power of the judge to make them is constitutionally exercised without the intervention of the jury. Davis v. Davis, 269 N.C. 120, 152 S.E.2d 306 (1967).

Pursuant to subsection (g) of this section, a supporting spouse is not entitled to a jury trial on the matter of alimony pendente lite. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Power of Court to Require Disclosure of Information. — The court has jurisdiction of the parties and has plenary power and authority to require the disclosure of any information which is within their knowledge or is available to them bearing upon a temporary allowance. It is not necessary that the parties agree as to what the husband's income is. The findings of the court will not be disturbed if based on competent evidence. Harrell v. Harrell, 256 N.C. 96, 123 S.E.2d 220 (1961).

Right of Defendant to Offer Evidence. — Where it affirmatively appeared that defendant was not permitted to offer evidence which was pertinent to the allegations of the complaint, exception thereto would be sustained. Parker v. Parker, 261 N.C. 176, 134 S.E.2d 174 (1964).

Discretion of Judge as to Form of Evidence. — The words "may be heard in or out of term, orally or upon affidavit, or either or both" in former G.S. 50-16 gave the judge hearing the motion for alimony pendente lite the discretion to decide in what form he should receive the evidence in his efforts to ascertain the truth. Miller v. Miller, 270 N.C. 140, 153 S.E.2d 854 (1967).

Judge Must Pass on Truth or Falsity of Evidence. — When the issue has been raised as to whether the husband has separated himself from the wife, it is not sufficient that the judge merely examine the evidence or testimony to see whether there is any evidence to support plaintiff's charges or allegations which would operate as a prima facie showing. He must, by application of his sound judgment, pass upon its truth or falsity and find according to his conviction. Deal v. Deal, 259 N.C. 489, 131 S.E.2d 24 (1963).

And Must Make Findings of Fact. — The provision of G.S. 1A-1, Rule 52(a)(2) that the trial judge is not required to make findings of fact unless requested to do so by a party does not abrogate the specific requirement of subsection (f) of this section that the trial judge shall make findings of fact upon an application for alimony pendente lite, since the Rules of Civil Procedure are of general application and do not abrogate the requirements of a statute of more specificity. Hatcher v. Hatcher, 7 N.C. App. 562, 173 S.E.2d 33 (1970).

Section 1A-1, Rule 52 does not apply in awarding alimony pendente lite. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

While the precise factual findings which must be made under subsection (f) of this section will vary depending upon the pleadings, evidence and circumstances of each case, the trial judge must make sufficient findings of the controverted material facts at issue to show that the award of alimony pendente lite is justified and appropriate. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971); Presson v. Presson, 13 N.C. App. 81, 185 S.E.2d 17 (1971).

But Detailed Findings Are Not Required. — In making findings of fact under subsection (f) of this section, it is not necessary that the trial judge make detailed findings as to each allegation and evidentiary fact presented. It is only necessary that he find the ultimate facts sufficient to establish that the dependent spouse is entitled to an award of alimony pendente lite under the provisions of G.S. 50-16.3(a). Blake v. Blake, 6 N.C. App. 410, 170 S.E.2d 87 (1969).

In making findings of fact, it is not necessary that the trial judge make detailed findings as to each allegation and evidentiary fact presented. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Findings Must Show That Award Is Justified. — The Court of Appeals does not interpret subsection (f) of this section to require the trial judge to make findings as to each allegation and evidentiary fact presented. However, it is necessary for the trial judge to make findings from which it can be determined, upon appellate review, that an award of alimony pendente lite is justified and appropriate in the case. Hatcher v. Hatcher, 7 N.C. App. 562, 173 S.E.2d 33 (1970); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972); Newsome v. Newsome, 22 N.C. App. 651, 207 S.E.2d 355 (1974).

It is necessary for the trial judge to make findings from which it can be determined, upon appellate review, that an award of alimony pendente lite is justified and appropriate in the case. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

And the judge must find ultimate facts sufficient to establish that the dependent spouse is entitled to an award of alimony pendente lite under the provisions of G.S. 50-16.3(a). Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

As Well as Specific Factual Findings as to Ultimate Facts. — Specific factual findings as to each ultimate fact at issue upon which the rights of the litigants are predicated must be found. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

As to what are evidentiary facts and what are ultimate facts, see Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Finding of Fact as Narrative Statement of Ultimate Fact. — A finding of fact in an alimony pendente lite matter is a narrative statement by the trial judge of the ultimate fact at issue and need not include the evidentiary or subsidiary facts required to prove the ultimate facts. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

Findings that the defendant left the home on July 21, 1970, had abandoned the plaintiff, and had failed to provide adequate support for her were a narrative statement of some of the ultimate facts at issue, and were not conclusions. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

The ultimate facts at issue in proceedings often differ, and thus a necessary finding of facts in one case may not be necessary in another case. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

The findings of fact in any given case should be "tailor-made" to settle the matters at issue between the parties. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Present Requirement for Findings of Fact Is Departure from Previous Practice. — The present statutory requirement for findings of fact by the trial judge in pendente lite awards of alimony is a departure from the practice as it existed prior to October 1, 1967. Hatcher v. Hatcher, 7 N.C. App. 562, 173 S.E.2d 33 (1970); Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

The requirement of subsection (f) of this section that facts be found to support an award of alimony is a new one imposed by Session Laws 1967, c. 1153, s. 2. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

The statutory requirement for findings of fact changes the prior rule that no findings of fact were necessary in alimony pendente lite matters unless adultery was charged against the wife. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972).

The distinction between the "finding of facts" and the "stating of conclusions" by the trial judge after he has heard the evidence in an alimony pendente lite matter is somewhat analogous to the distinction between a witness testifying as to a "fact" and stating his "opinion." Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Facts are the basis for conclusions, and to call a "conclusion" a "finding of fact" does not make it one. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Facts found in an alimony pendente lite case must be determinative of all questions at issue. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

A failure to make a proper finding of fact in a matter at issue will result in prejudicial error, especially where the evidence is conflicting. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972).

Award of permanent alimony ordinarily terminates an order for subsistence pendente lite or counsel fees. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972); Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980).

Where a pendente lite order by its express language was effective only "pending the trial of this action," it was in all respects superseded by the rendition of the final judgment. Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980).

Stay of Execution Pending Appeal. — Where alimony pendente lite is allowed, and the husband (supporting spouse) appeals from such order, an injunction should be granted to stay execution against the property of the husband pending the appeal. Barker v. Barker, 136 N.C. 316, 48 S.E. 733 (1904).

§ 50-16.9. Modification of order.

(a) An order of a court of this State for alimony or postseparation support, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. This section shall not apply to orders entered by consent before October 1, 1967.

Any motion to modify or terminate alimony or postseparation support based on a resumption of marital relations between parties who remain married to each other shall be determined pursuant to G.S. 52-10.2.

(b) If a dependent spouse who is receiving postseparation support or alimony from a supporting spouse under a judgment or order of a court of this State remarries or engages in cohabitation, the postseparation support or alimony shall terminate. Postseparation support or alimony shall terminate upon the death of either the supporting or the dependent spouse.

As used in this subsection, cohabitation means the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage, or a private homosexual relationship. Cohabitation is evidenced by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations. Nothing in this section shall be construed to make lawful conduct which is made unlawful by other statutes.

(c) When an order for alimony has been entered by a court of another jurisdiction, a court of this State may, upon gaining jurisdiction over the person of both parties in a civil action instituted for that purpose, and upon a showing of changed circumstances, enter a new order for alimony which modifies or supersedes such order for alimony to the extent that it could have been so modified in the jurisdiction where granted. (1871-2, c. 193, ss. 38, 39; 1883, c. 67; Code, ss. 1291, 1292; Rev., ss. 1566, 1567; 1919, c. 24; C.S., ss. 1666, 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3; 1953, c. 925; 1955, cc. 814, 1189; 1961, c. 80; 1967, c. 1152, s. 2; 1987, c. 664, s. 3; 1995, c. 319, s. 7.)

Cross References. — As to distribution by court of marital property upon divorce, see G.S. 50-20.

Editor's Note. — Session Laws 1995, c. 319, which amended this section, in s. 12 provides that this act applies to civil actions filed on or after October 1, 1995, and shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995.

This section, prior to the amendment by Session Laws 1995, c. 319 read as follows: "**Modification of order.**

"(a) An order of a court of this State for alimony or alimony pendente lite, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. This section shall not apply to orders entered by consent before October 1, 1967.

"Any motion to modify or terminate alimony or alimony pendente lite based on a resumption of marital relations between parties who remain married to each other shall be determined pursuant to G.S. 52-10.2.

"(b) If a dependent spouse who is receiving alimony under a judgment or order of a court of this State shall remarry, said alimony shall terminate.

"(c) When an order for alimony has been entered by a court of another jurisdiction, a court of this State may, upon gaining jurisdiction over the person of both parties in a civil action instituted for that purpose, and upon a showing of changed circumstances, enter a new order for alimony which modifies or supersedes such order for alimony to the extent that it could have been so modified in the jurisdiction where granted."

Legal Periodicals. — For a survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

For note on reinstatement of alimony under a prior divorce decree after annulment of remarriage, see 14 Wake Forest L. Rev. 273 (1978).

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For note on specific performance of separation agreements, see 58 N.C.L. Rev. 867 (1980).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For note on separability of support and property provisions in ambiguous separation agreements, see 16 Wake Forest L. Rev. 152 (1980).

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the State in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

For note on consent judgments in family law in light of Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983), see 6 Campbell L. Rev. 125 (1984).

For note, "Discarding the Dual Consent Judgment Approach in Family Law in Light of Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983)," see 20 Wake Forest L. Rev. 297 (1984).

For note, "Alimony Modification and Cohabitation in North Carolina," see 63 N.C.L. Rev. (1985).

For survey, "Termination of Lump Sum Alimony upon the Remarriage of a Dependent Spouse: Potts v. Tutterow," see 73 N.C.L. Rev. 2432 (1995).

CASE NOTES

I. In General.
II. Change of Circumstances.
III. Separation Agreements, Consent Judgments, etc.
IV. Remarriage of Dependent Spouse.
V. Modification of Foreign Judgments and Modification By Foreign Courts.

I. IN GENERAL.

Editor's Note. — *Some of the cases cited below were decided under former G.S. 50-14, which dealt with alimony in actions for divorce a mensa et thoro, former G.S. 50-15, which dealt with alimony pendente lite in divorce actions, and former G.S. 50-16, which dealt with actions for alimony without divorce.*

Former Sections 50-16.1 Through 50-16.10 Construed in Pari Materia. — The statutes codified as G.S. 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982).

Section 50-16.9 does not list factors to help in the modification decision, but the alimony statutes, G.S. 50-16.1 through 50-16.10, have been read in pari materia because they deal with the same subject matter. Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Jurisdiction Under Long-Arm Statute. — This section provides only that an alimony order entered by a court of another jurisdiction may be modified by a court of this State "upon gaining jurisdiction over the person of both parties"; therefore, statutory jurisdiction arises, if at all, under G.S. 1-75.4, the North Carolina "long-arm" statute. Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Money payments are "things of value" within the meaning of G.S. 1-75.4(5)d, the long-arm statute; thus, in an action brought by resident husband against nonresident wife to have alimony obligation reduced or terminated, statutory jurisdiction existed. However, under the circumstances, defendant did not have sufficient minimum contacts with North Carolina and her motion to dismiss for lack of personal jurisdiction was improperly denied. Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Alimony Award Held Fair to Both Wife and Husband. — Because a husband's estate was substantially larger than a wife's estate, it would have been unfair to require the wife to further deplete her estate while allowing the husband to maintain his; because a modified alimony award required both parties to deplete their estates to meet their living expenses, award was fair to both parties. Swain v. Swain, — N.C. App. —, 635 S.E.2d 504, 2006 N.C. App. LEXIS 2139 (2006).

An order for payment of alimony is not a final judgment, since it may be modified upon application of either party; thus, an action for alimony would continue to be "pending" in the court of proper jurisdiction, which is now the district court. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

A final judgment could not be entered under former G.S. 50-16, as the necessity of such provisions for the wife and children would cease if the parties resumed the marriage relation, and could not properly be continued if the husband procured a divorce for the fault of the wife. Skittletharpe v. Skittletharpe, 130 N.C. 72, 40 S.E. 851 (1902); Hooper v. Hooper, 164 N.C. 1, 80 S.E. 64 (1913); Crews v. Crews, 175 N.C. 168, 95 S.E. 149 (1918).

An order entered under former G.S. 50-16 was not a final determination and did not affect the final rights of the parties. Deal v. Deal, 259 N.C. 489, 131 S.E.2d 24 (1963).

And the allowance is subject to modification from time to time. Harrell v. Harrell, 256 N.C. 96, 123 S.E.2d 220 (1961).

The court may reopen and amend prior orders awarding subsistence to wife and children. Wright v. Wright, 216 N.C. 693, 6 S.E.2d 555 (1940).

Where, within the exercise of his sound discretion, the judge having jurisdiction has allowed the wife a reasonable subsistence, attorneys' fees, etc., in her proceedings for alimony without divorce, the order of allowance may be thereafter modified or vacated as the statute provides upon application to the proper jurisdiction for the circumstances to be inquired into and the merits of the case determined. Anderson v. Anderson, 183 N.C. 139, 110 S.E. 863 (1922).

Modification of Alimony Improper Where Motion Only Sought Modification of Child Support. — Where, the only motion before the trial court was one for modification of child support, not alimony, and at no point in the proceedings did either party move for modification of the alimony payments, order modifying alimony agreement would be reversed. Van Nynatten v. Van Nynatten, 113 N.C. App. 142, 438 S.E.2d 417 (1993).

Upon a Showing of Changed Conditions. — An order for support is not final, and may be modified or set aside on a showing of changed conditions. Byers v. Byers, 223 N.C. 85, 25 S.E.2d 466 (1943).

An order for the payment of alimony is res judicata between the parties, but is not a final judgment, since the court has the power, upon application of either party, to modify the order for changed conditions of the parties. Barber v. Barber, 217 N.C. 422, 8 S.E.2d 204 (1940).

An award of subsistence for defendant and the children born of the marriage, decreed by a court in conjunction with a divorce a mensa et thoro, before the commencement of a proceeding by the wife for a divorce a vincula under the provisions of G.S. 50-6, which she obtained, can be increased in amount by the court in its discretion, on her motion in the action when and where subsistence was awarded, when changed circumstances of the parties reasonably require it. Rayfield v. Rayfield, 242 N.C. 691, 89 S.E.2d 399 (1955).

A court may vacate or modify its prior award of either permanent or temporary alimony upon a showing of changed circumstances. Roberts v. Roberts, 38 N.C. App. 295, 248 S.E.2d 85 (1978).

Although there is no requirement that the alimony be modified, upon a showing of changed circumstance, the trial court should consider, in its discretion, whether to modify the original decree of alimony. Cunningham v. Cunningham, 121 N.C. App. 771, 468 S.E.2d 466 (1996), rev'd on other grounds, 345 N.C. 430, 480 S.E.2d 403 (1997).

Changed Circumstances Relating to Factors in Original Determination of Alimony. — Only those changed circumstances that relate to the factors used in the original determination of the amount of alimony awarded are relevant to a request for modification. Kowalick v. Kowalick, 129 N.C. App. 781, 501 S.E.2d 671 (1998).

Modification Referable to Date Petition Filed. — Orders which modify alimony or support payments effective as of the date of the petition, or subsequent thereto, but prior to the date of the order of modification, are not subject to the criticism that they have retroactive effect which destroys vested rights. This is true because the modification and the whole proceeding in which it is made are referable to the date of the filing of the petition and any change effective as of that date cannot be said to be retroactive. Hill v. Hill, 335 N.C. 140, 435 S.E.2d 766 (1993).

Improper Finding That Wife Had Cohabited. — Trial court erred in finding that a husband did not breach a separation agreement; trial court improperly found that the wife had cohabited pursuant to the terms of G.S. 50-16.9(b), because the trial court failed to make adequate findings of fact as required by G.S. 1A-1, Rule 52(a)(1); therefore, the trial court erred in finding that the husband was no longer obligated to pay alimony. Long v. Long, 160 N.C. App. 664, 588 S.E.2d 1, 2003 N.C. App. LEXIS 1925 (2003).

Support Payments Not Part of Integrated Agreement. — The opinion in Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983) did not change the law in North Carolina that property settlement provisions of a separation agreement included in a consent decree are beyond the power of the judge to modify without the consent of both parties, nor did it change the law in North Carolina which prohibits the modification of support provisions of an integrated property settlement agreement; however, since support payments not part of an integrated agreement are modifiable by law, Walters would allow such support provisions to be modified if included in a court-ordered decree at the request of the parties. Hayes v. Hayes, 100 N.C. App. 138, 394 S.E.2d 675 (1990).

But a New Order for Alimony After Final Divorce Is Not Authorized. — Although an order granting alimony may be modified, when a party has secured an absolute divorce, it is beyond the power of the court thereafter to enter a new order for alimony. Baugh v. Baugh, 44 N.C. App. 50, 260 S.E.2d 161 (1979).

Order for subsistence pendente lite may be modified at any time before the trial on application of either party. Rock v. Rock, 260 N.C. 223, 132 S.E.2d 342 (1963).

Material Change Not Required for Modification of Order for Alimony Pendente Lite. — An order for subsistence pendente lite may be modified at any time before trial on application of either party without a finding of a material change of condition. Snuggs v. Snuggs, 260 N.C. 533, 133 S.E.2d 174 (1963).

Either Party May Apply for Modification of Award of Alimony Pendente Lite. — The amounts allowed for reasonable subsistence and counsel fees upon application for alimony pendente lite are determined by the trial court in its discretion and are not reviewable, although either party may apply for a modification before trial. Tiedemann v. Tiedemann, 204 N.C. 682, 169 S.E. 422 (1933).

Alimony regularly ordered to be paid a wife pendente lite may be increased or reduced in amount by the court from time to time, but that which she has already received in the course and practice of the courts may not be ordered to be given up by her. White v. White, 179 N.C. 592, 103 S.E. 216 (1920).

Power to Modify Includes Power to Terminate Award. — The power to modify includes, in a proper case, power to terminate the award absolutely. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966); Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

This power to modify includes the power to terminate alimony altogether. Self v. Self, 93 N.C. App. 323, 377 S.E.2d 800 (1989).

Survival of Lump Sum Award. — A lump sum alimony award that has vested prior to the dependent spouse's remarriage survives the remarriage. Potts v. Tutterow, 114 N.C. App. 360, 442 S.E.2d 90 (1994), aff'd, 340 N.C. 97, 455 S.E.2d 156, reh'g denied, 340 N.C. 364, 458 S.E.2d 189 (1995).

Lump Sum's Failure to Vest. — Lump sum award did not vest prior to the defendant's remarriage where defendant was only entitled to semi-monthly payments and if plaintiff failed to make one of the payments, defendant could only execute on that amount. Potts v. Tutterow, 114 N.C. App. 360, 442 S.E.2d 90 (1994), aff'd, 340 N.C. 97, 455 S.E.2d 156, reh'g denied, 340 N.C. 364, 458 S.E.2d 189 (1995).

Change of Dependent Spouse Status Not Contemplated. — Although dependent spouse status is not properly reconsidered on a motion for modification and a change in circumstances could result in a reduction of alimony to zero, such modification does not result in the loss of dependent spouse status. Kowalick v. Kowalick, 129 N.C. App. 781, 501 S.E.2d 671 (1998).

This section does not contemplate that the jury should pass on requests for reductions in alimony because of changed circumstances; the motion is addressed to the trial judge. Shankle v. Shankle, 26 N.C. App. 565, 216 S.E.2d 915, cert. denied, 288 N.C. 394, 218 S.E.2d 467 (1975).

Judgment Presumed Correct. — The presumption is in favor of the correctness of the judgment of the lower court and the burden is upon appellant to show error. Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972).

When the evidence is not in the record, it will be presumed that there was sufficient evidence to support the findings of fact necessary to support the judgment. Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972).

As to basing of award on capacity to earn in certain circumstances, see Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971); Wachacha v. Wachacha, 38 N.C. App. 504, 248 S.E.2d 375 (1978).

Contempt Hearing May Not Be Transformed to Modification Hearing Without Notice. — The court, on its own motion and without notice to plaintiff, cannot transform a hearing for defendant to show cause why he should not be held in contempt for willful failure to comply with a court order to pay alimony and support into a hearing for modification of such order. Conrad v. Conrad, 35 N.C. App. 114, 239 S.E.2d 862 (1978).

Trial court's suspension of support payments without proper motion by defendant and without notice in a hearing for defendant to show cause why he should not be held in contempt for failure to pay support deprived plaintiff of her property rights without due process as required by the U.S. Const., Amend. XIV and N.C. Const., Art. I, § 19. Conrad v. Conrad, 35 N.C. App. 114, 239 S.E.2d 862 (1978).

Court order requiring defendant to secure payment of temporary alimony by means of a deed of trust did not give plaintiff fixed or permanent interest as cestui que trust, or any right to the entire proceeds of foreclosure sale under deed of trust; the order simply provided a means of securing payment of alimony, and the court was not required to find a change of circumstances as a basis for ordering the payment of a part of the proceeds of foreclosure sale to satisfy a judgment lien against defendant or to pay the fee of defendant's attorney. Johnson v. Johnson, 25 N.C. App. 448, 213 S.E.2d 427 (1975).

Section Does Not Expressly Authorize Award of Counsel Fees. — This section contains no express statutory authorization for an order directing payment of counsel fees for services rendered subsequent to an absolute divorce of the parties. Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972).

But Such Fees May Be Awarded Subsequent to Absolute Divorce. — Unless the case falls within one of the two exceptions made by G.S. 50-11(c), counsel fees may be awarded for services rendered to a dependent spouse subsequent to an absolute divorce in seeking to obtain or in resisting a motion for a revision of alimony or other rights provided under any judgment or decree of a court rendered before or at the time of the rendering of the judgment for absolute divorce. Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972).

And Such Award Is Discretionary. — Whether any award of counsel fees for services subsequent to an absolute divorce should be made in a particular case, and the amount of such an award, must remain within the sound discretion of the trial court. Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972).

Showing Necessary to Obtain Attorneys' Fees. — To be entitled to attorney fees it must be shown that they were necessary to enable the dependent spouse to litigate on substantially even terms by making it possible for her to employ counsel. The dependent spouse must be unable to defray the necessary expenses of the litigation. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982).

In order to obtain an award of counsel fees in a proceeding seeking a modification of alimony subsequent to divorce, the party seeking the fees must show: (1) That he or she is a dependent spouse; (2) that he or she is entitled to the relief demanded based upon all the evidence; and (3) that he or she has insufficient means to defray the expenses of the proceeding. Cecil v. Cecil, 74 N.C. App. 455, 328 S.E.2d 899 (1985).

Award of Counsel Fees Held Proper. — The former husband, by his own action in seeking to terminate his obligation to make further payments to plaintiff, forced the plaintiff to incur expenses for attorneys' fees simply to preserve rights which were already hers as result of a decree originally entered prior to the divorce. The trial court had authority, in its sound discretion, to order defendant to pay plaintiff's reasonable counsel fees. Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972).

Award of Attorneys' Fees Held Improper. — Attorneys' fees can properly be awarded in custody and child support cases upon adequate findings that the moving party acted in good faith and has insufficient means to defray the expense of the suit; thus, in an action for child support, custody and alimony, where the court found that plaintiff did not have sufficient income and assets with which to pay her attorney, but made no finding as to plaintiff's good faith in bringing the action, the award of attorneys' fees could not stand. Voshell v. Voshell, 68 N.C. App. 733, 315 S.E.2d 763 (1984).

New Motion After Failure of Original. — Where a motion to reduce alimony pendente lite has been disallowed, another motion for the same purpose should not be heard unless a different state of facts is shown and a receipt exhibited for a reasonable proportion of the allowance made at the former hearing. Moore v. Moore, 131 N.C. 371, 42 S.E. 822 (1902).

Appeal of order terminating dependent spouse's right to receive temporary alimony was not premature, as the question of plaintiff's continued entitlement to the previously ordered alimony pendente lite until such time as her prayer for permanent alimony could be heard affected a "substantial right" of the dependent spouse. Brown v. Brown, 85 N.C. App. 602, 355 S.E.2d 525, cert. denied, 320 N.C. 511, 358 S.E.2d 516 (1987).

The trial court's failure to make any findings regarding plaintiff's reasonable current financial needs and expenses and the ratio of those needs and expenses to her income constituted error. Self v. Self, 93 N.C. App. 323, 377 S.E.2d 800 (1989).

Evidentiary Hearing Required. — Where a separation agreement did not contain explicit, unequivocal provisions on integration or nonintegration, an evidentiary hearing was required to determine the intent of the parties regarding whether the agreement was separable or integrated. Hayes v. Hayes, 100 N.C. App. 138, 394 S.E.2d 675 (1990).

For a case discussing modification of separation agreements prior to the decision in Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983), which was expressly made prospective only and applies to judgments entered on or after 11 January 1983, see Rogers v. Rogers, 111 N.C. App. 606, 432 S.E.2d 907 (1993).

Applied in Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971); Downey v. Downey, 29 N.C. App. 375, 224 S.E.2d 255 (1976); Lindsey v. Lindsey, 34 N.C. App. 201, 237 S.E.2d 561 (1977); Rowe v. Rowe, 74 N.C. App. 54, 327 S.E.2d 624 (1985); Barham v. Barham, 127 N.C. App. 20, 487 S.E.2d 774 (1997); Dodson v. Dodson, 190 N.C. App. 412, 660 S.E.2d 93, 2008 N.C. App. LEXIS 899 (2008).

Cited in Dunn v. Dunn, 1 N.C. App. 532, 162 S.E.2d 73 (1968); Smith v. Smith, 17 N.C. App. 416, 194 S.E.2d 568 (1973); Bowen v. Bowen, 19 N.C. App. 710, 200 S.E.2d 214 (1973); Bailey v. Bailey, 26 N.C. App. 444, 216 S.E.2d 394 (1975); Bugher v. Bugher, 34 N.C. App. 601, 239 S.E.2d 303 (1977); Russ v. Russ, 43 N.C. App. 74, 257 S.E.2d 676 (1979); Markham v. Markham, 53 N.C. App. 18, 279 S.E.2d 905 (1981); Whedon v. Whedon, 58 N.C. App. 524, 294 S.E.2d 29 (1982); Ratton v. Ratton, 73 N.C. App. 642, 327 S.E.2d 1 (1985); Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985); Graham v. Graham, 77 N.C. App. 422, 335 S.E.2d 210 (1985); Rice v. Rice, 81 N.C. App. 247, 344 S.E.2d 41 (1986); Hayes v. Hayes, 100 N.C. App. 138, 394 S.E.2d 675 (1990); Rhew v. Rhew, 138 N.C. App. 467, 531 S.E.2d 471, 2000 N.C. App. LEXIS 634 (2000).

II. CHANGE OF CIRCUMSTANCES.

A change in circumstances must be shown in order to modify an order relating to custody, support or alimony. Elmore v. Elmore, 4 N.C. App. 192, 166 S.E.2d 506 (1969); McDowell v. McDowell, 13 N.C. App. 643, 186 S.E.2d 621 (1972).

A court is not warranted in modifying or changing a prior valid order absent a showing of a change in conditions. Vandooren v. Vandooren, 27 N.C. App. 279, 218 S.E.2d 715 (1975).

A change of condition and circumstances must be established before an order for the support of children and permanent alimony can be modified. Rock v. Rock, 260 N.C. 223, 132 S.E.2d 342 (1963).

Termination of Consent Order for Alimony Justified. — Defendant husband was entitled to have his alimony payments terminated pursuant to G.S. 50-16.9(b), as trial court order directing that he continue to pay alimony was a consent order rather than an order of specific performance of his and plaintiff wife's separation agreement, and thus, allowed for termination because parties agreed that statutory grounds for termination of alimony, that plaintiff was cohabiting with another man, existed, regardless of the separation agreement provisions. Jones v. Jones, 144 N.C. App. 595, 548 S.E.2d 565, 2001 N.C. App. LEXIS 541 (2001).

Party moving for modification of an award of alimony has the burden of showing a change of circumstances. Gill v. Gill, 29 N.C. App. 20, 222 S.E.2d 754 (1976).

The burden of proving, by a preponderance of the evidence, that a material change in the circumstances has occurred is upon the party requesting the modification. Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972).

Upon a motion for modification of an award of alimony and support pendente lite, the movant had the burden of going forward with the evidence to show a change of circumstances. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971); McDowell v. McDowell, 13 N.C. App. 643, 186 S.E.2d 621 (1972).

A finding of a change of circumstances does not necessarily require or justify modification of the previous order. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

Relevant Circumstances Listed in § 50-16.5. — The change of circumstances required by this section for modification of an alimony order involve those circumstances listed in G.S. 50-16.5. Rowe v. Rowe, 52 N.C. App. 646, 280 S.E.2d 182 (1981), rev'd on other grounds, 305 N.C. 177, 287 S.E.2d 840 (1982).

To determine whether a change of circumstances under this section has occurred, it is necessary to refer to the circumstances or factors used in the original determination of the amount of alimony awarded under G.S. 50-16.5. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982).

Change Must Relate to Financial Needs or Ability to Pay. — As a general rule, the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982).

Trial court properly modified an alimony judgment pursuant to G.S. 50-16.9(a) because the court made findings of fact demonstrating that there had been a substantial change of circumstances warranting a modification of alimony based upon: (1) the former husband's financial situation having improved so that he was then able to pay the former wife's entire monthly financial shortfall; and (2) the wife's overall financial situation had, in fact, worsened. Pierce v. Pierce, 188 N.C. App. 488, 655 S.E.2d 863, 2008 N.C. App. LEXIS 229 (2008).

Post-Marital Conduct Is Not a Changed Circumstance. — The "changed circumstances" under this section must bear upon the financial needs of the dependent spouse or the ability of the supporting spouse to pay. The term has no relevance to the post-marital conduct of either party. Stallings v. Stallings, 36 N.C. App. 643, 244 S.E.2d 494, cert. denied, 295 N.C. 648, 248 S.E.2d 249 (1978); Britt v. Britt, 49 N.C. App. 463, 271 S.E.2d 921 (1980).

There is no statute that allows the court to modify an award of alimony solely because of post-marital fornication. Stallings v. Stallings, 36 N.C. App. 643, 244 S.E.2d 494, cert. denied, 295 N.C. 648, 248 S.E.2d 249 (1978).

Any Considerable Change in Health or Financial Condition Warrants Change of Decree. — Any considerable change in the health or financial condition of the parties will warrant an application for change or modification of an alimony decree. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966); Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

But payment of alimony may not be avoided merely because it has become burdensome, or because the husband has remarried and voluntarily assumed additional obligations. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966); Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

Reduction in Husband's Salary or Income. — The fact that the husband's salary or income has been reduced substantially does not automatically entitle him to a reduction in alimony or maintenance. If the husband is able to make the payments as originally ordered, notwithstanding the reduction in his income, and the other facts of the case make it proper to continue the payments, the court may refuse to modify the decree. Medlin v. Medlin, 64 N.C. App. 600, 307 S.E.2d 591 (1983).

Increase in Wife's Needs or Decrease in Estate. — An increase in the wife's needs, or a decrease in her separate estate, may warrant an increase in alimony. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

On a motion to modify or terminate an order of alimony, it is appropriate for the trial court to consider whether the dependent spouse's financial need, that is, dependency, as it relates to the factors in G.S. 50-16.5, has changed. Cunningham v. Cunningham, 345 N.C. 430, 480 S.E.2d 403 (1997).

Trial court could determine that the wife's circumstances had changed substantially when the wife and husband's minor child turned 18-years-old, and grant the wife's motion for an increase in alimony, because the original alimony award attributed some expenses to the minor child, and the wife was forced to take on those expenses when the minor child turned 18-years-old. At the same time, the trial court could determine that the husband was not entitled to decrease the husband's alimony payment, as the husband was still able to make the original alimony payments ordered despite a decrease in income. Harris v. Harris, 188 N.C. App. 477, 656 S.E.2d 316, 2008 N.C. App. LEXIS 228 (2008).

Decrease in Wife's Needs. — A decrease in the wife's needs is a change in condition which may be properly considered in passing upon a husband's motion to reduce her allowance. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

Acquisition of Property or Increase in Its Value. — The fact that the wife has acquired a substantial amount of property, or that her property has increased in value, after entry of a decree for alimony or maintenance, is an important consideration in determining whether and to what extent the decree should be modified. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

An increase in the dependent spouse's income would entitle the supporting spouse to petition for modification of the alimony order under this section. Rowe v. Rowe, 52 N.C. App. 646, 280 S.E.2d 182 (1981), rev'd on other grounds, 305 N.C. 177, 287 S.E.2d 840 (1982).

As to wife's income, see also Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Effect of Change in Income. — A modification should be founded upon a change in the overall circumstances of the parties. A change in income alone says nothing about the total circumstances of a party. The significant inquiry is how that change in income affects a supporting spouse's ability to pay or a dependent spouse's need for support. Rowe v. Rowe, 52 N.C. App. 646, 280 S.E.2d 182 (1981), rev'd on other grounds, 305 N.C. 177, 287 S.E.2d 840 (1982).

A conclusion as a matter of law that changed circumstances exist, based only on the parties' incomes, is erroneous and must be reversed. Britt v. Britt, 49 N.C. App. 463, 271 S.E.2d 921 (1980).

Increase in wife's income alone did not warrant the modification of the original alimony order that reduced the husband's monthly alimony payments to $0. Pursuant to G.S. 50-16.9(a), the trial court was obligated to make findings of fact showing changes in circumstances regarding the wife's reasonable current needs and the husband's ability to pay. Frey v. Best, 189 N.C. App. 622, 659 S.E.2d 60, 2008 N.C. App. LEXIS 715 (2008).

Failure to Exercise Capacity to Earn. — A court may refuse to modify a support and/or alimony award on the grounds that the husband has failed to exercise his reasonable capacity to earn because of a disregard of his marital and parental obligations to provide reasonable support for his wife and minor child.

Wachacha v. Wachacha, 38 N.C. App. 504, 248 S.E.2d 375 (1978).

The determination that a husband's change in circumstances has been voluntarily effected by him in disregard of his marital and parental obligations justifying imposition of the earnings capacity rule is a conclusion of law based on the factual findings in the particular case. Wachacha v. Wachacha, 38 N.C. App. 504, 248 S.E.2d 375 (1978).

Father was not entitled to reduction in child and post-separation support payments under G.S. 50-13.7 and G.S. 50-16.9 despite being fired from job; evidence indicated that the father's unemployment was voluntary and that the father disregarded marital and parental obligations, as the father was fired for engaging in several incidents of intentional misconduct. Wolf v. Wolf, 151 N.C. App. 523, 566 S.E.2d 516, 2002 N.C. App. LEXIS 781 (2002).

Change Must Be Substantial. — Not any change of circumstances will be sufficient to order modification of an alimony award; rather, the phrase is used as a term of art to mean a substantial change in conditions, upon which the moving party bears the burden of proving that the present award is either inadequate or unduly burdensome. Britt v. Britt, 49 N.C. App. 463, 271 S.E.2d 921 (1980).

The change in circumstances must be substantial, with a final decision based on a comparison of the facts existing at the time of the original order and the time when the modification is sought. Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Determining Whether Substantial Change Occurred. — The present overall circumstances of the parties must be compared with the circumstances existing at the time of the original award in order to determine if there has been a substantial change. Britt v. Britt, 49 N.C. App. 463, 271 S.E.2d 921 (1980).

Changed circumstances do not have to be pled with specificity. White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979).

Sufficiency of Allegations. — Allegations in a motion for modification to the effect that the then-current alimony payments were inadequate were sufficient to withstand defendant's motion to dismiss. Specific allegations as to the basis of such inadequacy were not required. White v. White, 37 N.C. App. 471, 246 S.E.2d 591 (1978), aff'd, 296 N.C. 661, 252 S.E.2d 698 (1979).

Plaintiff's allegation in a motion for increased support that the payments she was receiving were totally inadequate under current circumstances was sufficient to withstand a motion to dismiss under G.S. 1A-1, Rule 12(b)(6). White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979).

Fact Issues Remained as to Cohabitation. — There were fact issues as to whether a wife had cohabitated under G.S. 50-16.9(b) as the wife's alleged paramour admitted that he spent the night at wife's house several times, that he and the wife had driven each other's vehicles, and that he had moved furniture into the wife's house; a private investigator observed that the paramour had spent at least 11 consecutive nights with the wife, that the paramour had walked the wife's dog, parked in the wife's garage, carried groceries into the wife's house, and let workmen into and out of the wife's house, and that the paramour's house appeared uninhabited. Bird v. Bird, — N.C. App. —, 668 S.E.2d 39, 2008 N.C. App. LEXIS 1754 (2008).

Trial court could not automatically terminate alimony upon cohabitation where action was filed before the provisions of this section were applicable. Bookholt v. Bookholt, 136 N.C. App. 247, 523 S.E.2d 729, 1999 N.C. App. LEXIS 1376 (1999).

Mere discovery of dependent spouse's adultery held not sufficient for a finding of "changed circumstances" necessary for a modification of an order of alimony pendente lite under subsection (a) of this section, where the adultery occurred before the parties' separation and before plaintiff filed her complaint for divorce, and where the pleadings revealed that defendant suspected his wife's adultery and alleged adultery as a bar to plaintiff's claim for permanent alimony under G.S. 50-16.6(a) and entered into a consent judgment agreeing to pay her alimony pendente lite. Brown v. Brown, 85 N.C. App. 602, 355 S.E.2d 525, cert. denied, 320 N.C. 511, 358 S.E.2d 516 (1987).

Fulfillment of Assumptions in Original Order. — Where in the original order, the court clearly calculated the amount of alimony on the assumption that plaintiff would be able to secure a job paying at least minimum wage, the fact that plaintiff subsequently did so did not substantially alter the relative positions of the parties. Hightower v. Hightower, 85 N.C. App. 333, 354 S.E.2d 743, cert. denied, 320 N.C. 792, 361 S.E.2d 76 (1987).

Where neither party moving for a modification of an award of alimony presented evidence as to the circumstances of the parties on which the original award of alimony was based, and no finding was made as to such circumstances, it could not be determined if there was a change of circumstances, and defendant's motion to reduce the amount of the award would be denied. Gill v. Gill, 29 N.C. App. 20, 222 S.E.2d 754 (1976).

Refusal to Reduce Alimony Upheld. — Where although plaintiff ex-wife, at time of hearing, made $22,788.00 per year, she had a debt of $20,000.00, much of which was attributable to defendant's failure to make past alimony payments, the trial court did not err in failing to reduce defendant ex-husband's alimony payments to her. Patton v. Patton, 88 N.C. App. 715, 364 S.E.2d 700 (1988).

Change of Circumstances Not Shown. — Findings of fact found by the trial court held supported by the evidence and clearly and more than amply supported the court's conclusion that defendant had failed to show a substantial change of circumstances that would warrant a modification of consent judgment providing for alimony and child support. Outlaw v. Outlaw, 89 N.C. App. 538, 366 S.E.2d 247 (1988).

Dependent Spouse Status. — In determining whether a change in circumstances had occurred for purposes of a motion to terminate alimony, a trial court was not allowed to reconsider a spouse's dependent spouse status, as that was adjudicated at initial alimony hearing; alimony could have been reduced to zero, but that did not result in loss of dependent spouse status. Honeycutt v. Honeycutt, 152 N.C. App. 673, 568 S.E.2d 260, 2002 N.C. App. LEXIS 966 (2002).

Remand from Appellate Court. — If, on remand from the appeal of an alimony award, the ex-husband were not afforded the chance to present new evidence of changed circumstances, the ex-husband would be deprived of the statutory right to move for a modification of alimony based upon a change of circumstances for the five-year period from the initial order until the hearing on the prior remand. Rhew v. Felton, 178 N.C. App. 475, 631 S.E.2d 859, 2006 N.C. App. LEXIS 1560, appeal dismissed, review denied, 636 S.E.2d 810 (2006).

III. SEPARATION AGREEMENTS, CONSENT JUDGMENTS, ETC.

Editor's Note. — *Many of the cases cited below were decided prior to rendition of the opinion in Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983), cited below.*

Legislative Intent. — The legislative intent, as expressed in this section, is that the public policy of North Carolina shall be in favor of modification of alimony provisions contained in consent judgments and the analogous area of incorporated separation agreements. Acosta v. Clark, 70 N.C. App. 111, 318 S.E.2d 551 (1984).

Separation agreements that have not been incorporated into a court order cannot be modified by the court except with the consent of the parties. Voshell v. Voshell, 68 N.C. App. 733, 315 S.E.2d 763 (1984).

Two Types of Consent Judgments No Longer Distinguished. — Two separate forms of consent judgments within domestic relations law, i.e., court approved contracts and court ordered consent judgments resulting from adoption of separation agreements, will no longer be recognized. Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983).

All Separation Agreements Approved by Court Are Modifiable. — Whenever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case. Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983).

But This Rule Applies Only to Judgments After January 11, 1983. — Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983), which announced the new rule that every court approved separation agreement is to be considered as part of a court ordered judgment and is thus modifiable and enforceable by the contempt powers of the court, applies only to judgments that were entered after January 11, 1983. Doub v. Doub, 68 N.C. App. 718, 315 S.E.2d 732 (1984), modified on other grounds, 313 N.C. 169, 326 S.E.2d 259 (1985); Cecil v. Cecil, 74 N.C. App. 455, 328 S.E.2d 899 (1985).

The parties can avoid the burdens of a court judgment by not submitting their agreement to the court. By not coming to court, the parties preserve their agreement as a contract, to be enforced and modified under traditional contract principles. Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983).

Options of Parties. — Consenting parties may still elect any of the options available to them prior to this opinion. For example, the parties may keep the property settlement provision aspects of their separation agreement out of court and in contract, while presenting their provision for alimony to the court for approval. The result of such action would be that the alimony provision is enforceable and modifiable as a court order while the property settlement provisions would be enforceable and modifiable under traditional contract methods. Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983).

The power of the court to enforce its judgment is no less and no greater for a court-adopted consent judgment than for a judgment resulting from a jury verdict in a hotly contested adversary proceeding. Henderson v. Henderson, 307 N.C. 401, 298 S.E.2d 345 (1983).

Once a separation agreement is incorporated into a court order, it loses its character as a contract and becomes a court order, which must then be enforced through the contempt powers of the court. Pitts v. Broyhill, 88 N.C. App. 651, 364 S.E.2d 738 (1988).

Nature of Award Is Determinative. — Whether a decree or award made pursuant to an agreement or arrangement between the parties is subject to modification may depend upon whether it is in effect an award of alimony or support or an adjustment and settlement of property rights. White v. White, 37 N.C. App. 471, 246 S.E.2d 591 (1978), aff'd, 296 N.C. 661, 252 S.E.2d 698 (1979).

Agreement as to Alimony Is Binding. — Parties to a divorce may enter into a valid agreement settling the question of alimony, and unless the court then orders alimony to be paid, the terms of the agreement are binding and can only be modified by the consent of both parties. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Provisions of a valid arbitration award concerning alimony may by agreement be made binding on the parties and nonmodifiable by the courts, although provisions of the award concerning custody and child support continue to be within the court's jurisdiction and are modifiable pursuant to G.S. 50-13.7. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Award Binding Heirs Violated Statute. — Order making post separation award binding on husband's heirs violated G.S. 50-16.9(b). Squires v. Squires, 178 N.C. App. 251, 631 S.E.2d 156, 2006 N.C. App. LEXIS 1410 (2006).

And Consent Judgment Settling All Rights of Parties May Not Be Modified. — A judgment which purports to be a complete settlement of all property and marital rights between the parties and which does not award alimony within the accepted definition of that term is not subject to modification even though it adjudges that the wife recover a specific money judgment. This is a consent judgment in its technical sense. Britt v. Britt, 36 N.C. App. 705, 245 S.E.2d 381 (1978).

If the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties. Britt v. Britt, 36 N.C. App. 705, 245 S.E.2d 381 (1978).

If a divorce decree or a consent judgment merely approves and sanctions the support payments which the parties have agreed in a separation agreement will be paid to a spouse, then the separation agreement is simply a contract approved by the court. It cannot be modified by order of the court. Cecil v. Cecil, 59 N.C. App. 208, 296 S.E.2d 329 (1982), cert. denied, 307 N.C. 468, 299 S.E.2d 220 (1983).

But Consent Order for Alimony May Be Modified. — Under subsection (a) of this section, the spouse may obtain a modification of the order for permanent alimony upon a showing of changed circumstances, even though the order was by consent. Seaborn v. Seaborn, 32 N.C. App. 556, 233 S.E.2d 67 (1977); Bowes v. Bowes, 43 N.C. App. 586, 259 S.E.2d 389 (1979).

Where Court Adopts Parties' Agreement as Its Own. — Where a court adopts the agreement of the parties as its own determination of the rights of the parties and orders the husband to pay alimony, the consent judgment is a decree of the court and is modifiable and enforceable by contempt. Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979).

A court-adopted consent judgment in a domestic setting has been variously characterized as a species of contract which has been superseded by the court's adoption of the agreement between the parties as its own determination of their respective rights and obligations. Once the court adopts the agreement of the parties and sets it forth as a judgment of the court with appropriate ordering language and the signature of the court, the contractual character of the agreement is subsumed into the court-ordered judgment. At that point the court and the parties are no longer dealing with a mere contract between the parties. That is not to say that such a contract may not eventually result in a judgment of the court which would be enforceable by contempt. Henderson v. Henderson, 307 N.C. 401, 298 S.E.2d 345 (1983).

For a court to have power to modify a consent judgment, the first requirement of this section, as with case law, is that the judgment consented to be an order of a court. The second essential requirement is that the order be one to pay alimony. White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979).

Where the court incorporates by reference a separation agreement into a consent judgment, making the agreement a part of the judgment and ordering compliance with its terms, the agreement merges into the consent judgment and is superseded by the court's decree, any language to the contrary notwithstanding. Marks v. Marks, 316 N.C. 447, 342 S.E.2d 859 (1986), decided under the law as it existed prior to Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338, reh'g denied, 307 N.C. 703, 301 S.E.2d 397 (1983).

Unless Reciprocity Would Thereby Be Destroyed. — If the court adopts the separation agreement as its own determination of the rights and obligations of the parties and orders the support payments to be made, the separation agreement becomes a decree of the court. The support payments may then be modified upon a showing of a change in circumstances, unless the support provision and the other provisions of the separation agreement constitute reciprocal consideration for each other so that the agreement would be destroyed by a modification of the support provision. Cecil v. Cecil, 59 N.C. App. 208, 296 S.E.2d 329 (1982), cert. denied, 307 N.C. 468, 299 S.E.2d 220 (1983).

Even though denominated as such, provisions in a consent order for periodic support payments to a dependent spouse may not be alimony within the meaning of this section and thus modifiable if they and other provisions for a property division between the parties constitute reciprocal consideration for each other. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982); Doub v. Doub, 68 N.C. App. 718, 315 S.E.2d 732 (1984), modified on other grounds, 313 N.C. 169, 326 S.E.2d 259 (1985).

Even though denominated as such, support payment provisions may not be alimony, and thus modifiable, if those provisions and other provisions for a property division between the parties constitute a complete settlement of all property and marital rights between the parties. Furthermore, where those provisions constitute a reciprocal consideration, so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties. Walters v. Walters, 54 N.C. App. 545, 284 S.E.2d 151 (1981), rev'd on other grounds, 307 N.C. 381, 298 S.E.2d 338 (1983); Barr v. Barr, 55 N.C. App. 217, 284 S.E.2d 762 (1981).

Where provisions for alimony payments were included in one subsection of an eleven-part section of a separation agreement, in which section the parties detailed a "division and settlement of marital rights and remaining properties," the provisions for alimony payments to plaintiff wife and the other property distributions as provided by the separation agreement were clearly reciprocal and therefore not separable or modifiable. Doub v. Doub, 68 N.C. App. 718, 315 S.E.2d 732 (1984), modified on other grounds, 313 N.C. 169, 326 S.E.2d 259 (1985).

Support Provisions Merged into Consent Order so as to Preclude Modification. — Evidence held to support court's findings and conclusion that the support provisions in a separation agreement merged into a consent order and made a decree of the court were not separable but were reciprocal with the property settlement provisions, so as to preclude modification. Cecil v. Cecil, 74 N.C. App. 455, 328 S.E.2d 899 (1985), decided under the law obtaining prior to the decision in Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983).

Separable Provisions in Consent Judgment. — An agreement for the division of property rights and an order for the payment of alimony may be included as separable provisions in a consent judgment. In such event the division of property would be beyond the power of the court to change, but the order for future installments of alimony would be subject to modification in a proper case. However, if the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties. Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979).

An agreement for the division of property rights and an order for the payment of alimony may be included as separable provisions in a consent judgment. In such event the division of property would be beyond the power of the court to change, but the order for future installments of alimony would be subject to modification in a proper case. Britt v. Britt, 36 N.C. App. 705, 245 S.E.2d 381 (1978).

In North Carolina (1) an agreement for division of property rights, and (2) an order for the payment of alimony, within the accepted definition of that term, may be included as separable provisions in a consent judgment. In such a case, the alimony provision is subject to modification where it has been ordered by the district court. However, if the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties. White v. White, 37 N.C. App. 471, 246 S.E.2d 591 (1978), aff'd, 296 N.C. 661, 252 S.E.2d 698 (1979).

Where plaintiff failed to present any evidence to the district court which would tend to rebut the presumption of separability of provisions, the deed of separation incorporated into a 1974 consent judgment between the parties would not be deemed an integrated property settlement which could not be modified by the trial court. Marks v. Marks, 316 N.C. 447, 342 S.E.2d 859 (1986), decided under the law as it existed prior to Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338, rehearing denied, 307 N.C. 703, 301 S.E.2d 397 (1983).

How Separability Determined. — While an agreement for the division of property rights and an order for the payment of alimony may be included as separate provisions in a consent judgment, the fact that both provisions are included in the judgment is, standing alone, inconclusive of the issue of separability. White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979).

Recitals in a consent judgment and the judgment of divorce to the effect that all matters in controversy arising from the pleadings had been agreed upon were not determinable upon the question as to whether the support provision of the consent decree was separable, and therefore modifiable, or instead constituted consideration for a property settlement. White v. White, 37 N.C. App. 471, 246 S.E.2d 591 (1978), aff'd, 296 N.C. 661, 252 S.E.2d 698 (1979).

In determining whether a provision in a consent judgment is for alimony alone and thus severable from the remaining provisions and terminable upon the wife's remarriage, or whether the provision for alimony and the provisions for division of property constitute reciprocal consideration so that they are not separable and may not be changed without the consent of both parties, a consent judgment must be construed in the same manner as a contract to ascertain the intent of the parties. Allison v. Allison, 51 N.C. App. 622, 277 S.E.2d 551, appeal dismissed and cert. denied, 303 N.C. 543, 281 S.E.2d 660 (1981).

Where a consent judgment is ambiguous, the intentions of the parties must be determined from evidence of the facts and circumstances surrounding its entry, just as the intentions of the parties to an ambiguous written contract must be determined from the surrounding circumstances. Barr v. Barr, 55 N.C. App. 217, 284 S.E.2d 762 (1981).

Where the intention of the parties regarding the reciprocity of agreements in a consent order is not evident from a reading thereof, evidence of the negotiations and contemporaneous property settlement agreements of the parties is admissible to clarify the uncertainty created when the nonmodification provision of the order appears to be void as a matter of law under this section. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982).

Burden of Proof on Separability. — In cases in which the question of whether provisions in a consent judgment or separation agreement are separable is not adequately addressed in the document itself, there is a presumption that provisions in a separation agreement or consent judgment made a part of the court's order are separable and that provisions for support payments therein are subject to modification upon an appropriate showing of changed circumstances. The effect of this presumption is to place the burden of proof on the issue of separability on the party opposing modification. The policies underlying the presumption require that this burden be discharged only by a preponderance of the evidence. White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979).

For purposes of determining whether a consent judgment may be modified under this section, there is a presumption that the provisions for property division and support payments are separable. The burden of proof rests on the party opposing modification to show that the provisions are not separable. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982).

Consent Order Purporting to Waive Applicability of Section. — In accord with this section, a consent order containing a proviso purporting to waive the applicability of this section may be modified unless defendant can show that it was an integral part of the property settlement. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982).

By enacting this section, the legislature has clearly expressed that it is the public policy of this state that consent orders to pay alimony are modifiable. In the usual case a proviso in an order purporting to waive applicability of this section would be contrary to this policy and, therefore, without force and effect. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982).

In a consent judgment, the word "alimony" and the provision that plaintiff's support payments to defendant would continue "until the defendant remarries or dies," is evidence, albeit inconclusive, of the parties' intention to treat the support provisions as alimony. Barr v. Barr, 55 N.C. App. 217, 284 S.E.2d 762 (1981).

Language in a consent judgment finding plaintiff a "dependent" spouse and defendant a "supporting" spouse are indicative of the payment and receipt of alimony and the absence of this language supports an interpretation that the payment provisions are not alimony. Walters v. Walters, 54 N.C. App. 545, 284 S.E.2d 151 (1981), rev'd on other grounds, 307 N.C. 381, 298 S.E.2d 338 (1983); Barr v. Barr, 55 N.C. App. 217, 284 S.E.2d 762 (1981).

Language in the preamble to a consent judgment that "the parties had settled their differences" is subject to the interpretation that the agreement was considered a complete settlement by the parties. Barr v. Barr, 55 N.C. App. 217, 284 S.E.2d 762 (1981).

Lump Sum Payment Pursuant to Negotiated Settlement. — The trial court did not have authority to reduce an executed lump sum payment and order a refund of a portion thereof, where the lump sum payment represented not only child support, but also constituted a negotiated settlement of all matters of dispute between the parties, including the effect of foreseeable changes in those matters, and there were no compelling equitable circumstances justifying a refund. Reavis v. Reavis, 82 N.C. App. 77, 345 S.E.2d 460 (1986).

Periodic Support Payments as Consideration for Property Division. — Even though denominated as such, periodic support payments to a dependent spouse may not be alimony within the meaning of this section and thus modifiable if they and other provisions for a property division between the parties constitute reciprocal consideration for each other. White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979); Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979).

Right to Present Evidence on Issue of Separability. — On wife's motion for increase in alimony payments, where consent order entered into between husband and wife contained support provisions and property settlement provisions, an evidentiary hearing was required to determine the intent of the parties regarding whether the provisions of the agreement were separable or integrated, and it was error for the trial court to refuse to allow husband to present evidence on this issue. Lemons v. Lemons, 103 N.C. App. 492, 406 S.E.2d 8 (1991), decided under law in effect in 1978 at time of consent decree.

Summary Judgment Inappropriate in Light of Conflicting Evidence as to Wife's Cohabitation. — In a former wife's suit against her former husband for breach of a separation agreement in which the husband raised cohabitation as an affirmative defense, it was error to grant the wife summary judgment in light of the conflicting evidence as to her cohabitation with a male friend. This conflicting evidence, which included evidence of how often the friend stayed overnight at the wife's residence, whether he permanently kept his clothes there, and to what extent he used the wife's residence as his base of operations for his business, required evaluation of subjective intent, which was inappropriate for summary judgment. Craddock v. Craddock, 188 N.C. App. 806, 656 S.E.2d 716, 2008 N.C. App. LEXIS 273 (2008).

Vacation of Consent Judgments Without Making Specific Findings Held Error. — While a consent order for alimony or alimony pendente lite may be modified or vacated at any time upon motion and a showing of changed circumstances, where defendant husband offered some evidence of changed circumstances but the trial court failed to comply with the statutory mandate as to the making of specific findings, and erroneously ruled that consent judgments were invalid for failure of the court to make a finding of dependency, the cause would be remanded for a de novo hearing. Cox v. Cox, 36 N.C. App. 573, 245 S.E.2d 94 (1978).

The eminence, experience and character of counsel who represented the plaintiff in procuring a property settlement would bear directly on her subsequent attempt to set it aside as fraudulent. Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965).

Surrender of Right to Enforce Agreement as Consideration for New Agreement. — Contractual surrender of plaintiff's right to bring an action to enforce portion of separation agreement which was incorporated in divorce decree was sufficient legal detriment to constitute consideration under a new agreement. Pitts v. Broyhill, 88 N.C. App. 651, 364 S.E.2d 738 (1988).

Husband's motion under G.S. 1A-1, N.C. R. Civ. P. 60(b)(6) was improper where he sought to vacate the alimony provision of his separation agreement with his wife, which had been incorporated into the parties' divorce decree; the motion should have been filed under G.S. 50-16.9. Oakley v. Oakley, 165 N.C. App. 859, 599 S.E.2d 925, 2004 N.C. App. LEXIS 1511 (2004).

Motion to Modify Due to Cohabitation Properly Denied. — Husband's motion seeking to vacate the alimony provision in his separation agreement with his wife, which had been incorporated into the parties' divorce decree, was properly denied as the wife was not cohabitating; she and her boyfriend had sexual relations and went on trips and dates, but there was no evidence that they had assumed the marital rights, duties, and obligations that were usually manifested by married people. Oakley v. Oakley, 165 N.C. App. 859, 599 S.E.2d 925, 2004 N.C. App. LEXIS 1511 (2004).

IV. REMARRIAGE OF DEPENDENT SPOUSE.

Construction With Other Sections. — Cases applying G.S. 52-10.1 and G.S. 52-10.2 are instructive in determining what constitutes marital rights, duties, and obligations under G.S. 50-16.9. Oakley v. Oakley, 165 N.C. App. 859, 599 S.E.2d 925, 2004 N.C. App. LEXIS 1511 (2004).

Vested Periodic Payments. — Where trial court delineated alimony payable by husband to wife as a "lump sum" or as a "fixed amount," and the payment methodology was not in a single payment but instead was in periodic payments, wife's remarriage terminated the monthly alimony obligations not yet due and payable, as they had not vested prior to remarriage. Potts v. Tutterow, 340 N.C. 97, 455 S.E.2d 156, rehearing denied, 340 N.C. 364, 458 S.E.2d 189 (1995).

Obligation Ceases upon Remarriage of Dependent Spouse. — Defendant's obligation to make payments pursuant to a consent judgment with plaintiff which designated such payments as alimony ceased as a matter of law pursuant to this section when the plaintiff remarried. Martin v. Martin, 26 N.C. App. 506, 26 S.E.2d 456 (1975).

Whether the alimony award is in the form of a "lump sum" or "periodic payments" is irrelevant since subsection (b) clearly provides that the supporting spouse's obligation to pay any alimony is terminated by the dependant spouse's remarriage and does not distinguish between the method of payment. Potts v. Tutterow, 114 N.C. App. 360, 442 S.E.2d 90 (1994), aff'd, 340 N.C. 97, 455 S.E.2d 156, reh'g denied, 340 N.C. 364, 458 S.E.2d 189 (1995).

Obligation Held to Terminate. — Where in consent judgment incorporating parties' deed of separation and property settlement, $400.00 per month payment was twice denominated "alimony," while there was no reference whatsoever to the distribution of stock, vehicles, and other property, the $400.00 payment was alimony, and defendant's obligation to make such payments terminated upon plaintiff's remarriage in accordance with the mandate of subsection (b) of this section. Garner v. Garner, 88 N.C. App. 472, 363 S.E.2d 670 (1988).

Terminating Alimony on the Basis of Cohabitation. — This section affirmatively states that cohabitation automatically terminates any alimony obligation, but the supporting spouse must first file a motion with the trial court, notify the dependant spouse, and obtain a court order authorizing termination of payments as of a date certain. Williamson v. Williamson, 142 N.C. App. 702, 543 S.E.2d 897, 2001 N.C. App. LEXIS 181 (2001).

V. MODIFICATION OF FOREIGN JUDGMENTS AND MODIFICATION BY FOREIGN COURTS.

Statute Invalid to the Extent it Conflicts with UIFSA. — Since the Uniform Interstate Family Support Act (UIFSA), G.S. 52C-1-100 et seq. is a more specific and more recent statute than G.S. 50-16.9(c), any conflict between UIFSA and G.S. 50-16.9(c) must be resolved in accordance with the provisions of UIFSA. Hook v. Hook, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

G.S. 52C-2-205 and G.S. 52C-2-206 of the Uniform Interstate Family Support Act, G.S. 52C-1-100 et seq., which prohibit a responding state from modifying spousal support orders issued in another state, control over any conflict created by G.S. 50-16.9(c). Hook v. Hook, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

North Carolina law applies prospectively from the date of registration under the former Uniform Reciprocal Enforcement of Support Act, G.S. 52A-1 et seq. Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988), aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

But Not Retroactively. — Registration is a ministerial duty of the clerk, not exercising any power over the obligor's person or property. Such registration cannot lawfully transform foreign alimony orders that are modifiable as to past-due installments in the jurisdiction of rendition into North Carolina orders subject to North Carolina law retrospectively. Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

Alimony orders registered pursuant to former G.S. 52A-26, et seq., retain, for their lifespan prior to registration, their foreign identity, and the laws of the foreign jurisdiction apply in any subsequent enforcement proceeding. This means that at any enforcement proceeding under former G.S. 52A-30 the obligor may apply, just as at a civil action instituted under subsection (c) of this section, for a new order modifying or superseding the foreign order "to the extent that it could have been so modified in the jurisdiction where granted." Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

An obligee may not strip an obligor of rights and defenses otherwise available by the simple expedient of litigating under Chapter 52A, the Uniform Reciprocal Enforcement of Support Act, rather than under subsection (c) of this section. Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

Refusal to Hear Evidence for Modification Held Error. — In an action to recover past due alimony payments under a foreign judgment, the trial judge erred in refusing to hear evidence offered by the defendant of changed circumstances as it related to possible modification of future payments. Thompson v. Thompson, 34 N.C. App. 51, 237 S.E.2d 282 (1977).

Modification of a Texas judgment to provide for payment of one-half of retirement pay to plaintiff was not necessary, since retirement pay and the division thereof is not alimony in Texas but under certain circumstances is community property. Brown v. Brown, 21 N.C. App. 435, 204 S.E.2d 534 (1974).

A money judgment for arrears of alimony, not by its terms conditional and on which execution was directed to issue, was not subject to modification or recall, and hence was entitled to full faith and credit. Barber v. Barber, 323 U.S. 77, 65 S. Ct. 137, 89 L. Ed. 82 (1944).

Seeking Relief as to Future Payments under Foreign Alimony Decree. — There is no impediment to a defendant's seeking relief as to future alimony payments in an action by a plaintiff for recovery of payments accrued under a foreign alimony decree. However, it is advisable that he should do so by counterclaim specifically alleging a change of circumstances and specifically seeking relief only as to future payments. Thompson v. Thompson, 34 N.C. App. 51, 237 S.E.2d 282 (1977).

Power of Alabama Court to Modify North Carolina Alimony Decree. — An Alabama court which had in personam jurisdiction over the parties could modify a North Carolina alimony decree, where the Alabama court in effect found that circumstances had changed since the entry of the North Carolina decree. Vincent v. Vincent, 38 N.C. App. 580, 248 S.E.2d 410 (1978).

An Alabama court with in personam jurisdiction over the parties could not modify retroactively a North Carolina alimony judgment where there was no showing of any sudden emergency requiring such a reduction. Vincent v. Vincent, 38 N.C. App. 580, 248 S.E.2d 410 (1978).

Where an Alabama court which had in personam jurisdiction over the parties modified a North Carolina alimony decree, the dependent spouse's right to alimony was terminated as of the entry of the Alabama decree. There was no need to prolong the litigation by requiring the supporting spouse to commence a third proceeding in North Carolina to set aside the prior North Carolina judgment. Vincent v. Vincent, 38 N.C. App. 580, 248 S.E.2d 410 (1978).

§ 50-16.10. Alimony without action.

Alimony without action may be allowed by confession of judgment under G.S. 1A-1, Rule 68.1. (1967, c. 1152, s. 2; 1985, c. 689, s. 19.)

CASE NOTES

Sections 50-16.1 through 50-16.10 Construed in Pari Materia. — The statutes codified as G.S. 50-16.1 through 50-16.10 all deal with the same subject matter, alimony, and are to be construed in pari materia. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982).

Section 50-16.9 does not list factors to help in the modification decision, but the alimony statutes, G.S. 50-16.1 through 50-16.10, have been read in pari materia because they deal with the same subject matter. Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Cited in Richardson v. Richardson, 4 N.C. App. 99, 165 S.E.2d 678 (1969).

§ 50-16.11: Repealed by Session Laws 1995, c. 319, s. 1.

Editor's Note. — Session Laws 1995, c. 319, which repealed this section, in section 12 provides that this act applies to civil actions filed on or after that date, and shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995.

This section, prior to the repeal by Session Laws 1995, c. 319, read as follows:

"**Judgment that a supporting spouse is not liable for alimony.**

"If a final judgment is entered in any action denying alimony because none of the grounds specified in G.S. 50-16.2 exists, upon motion by the supporting spouse, the court shall enter a judgment against the spouse to whom the payments were made for the amount of all alimony paid by the supporting spouse to that spouse pending a final disposition of the case. In addition, upon motion by the supporting spouse, if a final judgment is entered in any action denying alimony because none of the grounds specified in G.S. 50-16.2 exists, the court may enter a judgment against the spouse to whom the payments were made for the amount of alimony pendente lite paid by the supporting spouse to that spouse pending a final disposition of the case. When there has been judgment entered granting permanent alimony, after a prior denial of alimony pendente lite upon the same allegations, the court may enter judgment against the supporting spouse and in favor of the dependent spouse in an amount equal to the monthly permanent alimony awarded multiplied by the number of months between entry of the prior order denying alimony pendente lite and entering of the final judgment.

"A judgment awarded against a dependent spouse under this section may not be satisfied by setting off any award of child support to the dependent spouse."

CASE NOTES

Plain Meaning. — The plain and definite meaning of this section is that when a jury or trial judge finds that none of the grounds on which a spouse alleges entitlement to permanent alimony pursuant to G.S. 50-15.2 exists, the trial court, in its discretion, may order recoupment of any alimony pendente lite paid by the supporting spouse. Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994).

§ 50-17. Alimony in real estate, writ of possession issued.

In all cases in which the court grants alimony by the assignment of real estate, the court has power to issue a writ of possession when necessary in the judgment of the court to do so. (1868-9, c. 123, s. 1; Code, s. 1293; Rev., s. 1568; C.S., s. 1668.)

CASE NOTES

The court has the power to grant the possession of real estate as a part of alimony. Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978).

But Ordering Payment of Alimony by Possession of Real Property Is Not Required. — While a trial court has the authority to order payment of alimony by possession of real property under G.S. 50-16.7(a), as well as the power to issue a writ of possession when necessary under this section, the pertinent statutory provisions do not require it to do so. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980).

Statutes Do Not Require Transfer of Title or Possession. — While the court has authority to order a transfer of title or possession of real property under G.S. 50-16.7(a) and this section, these sections do not require it to do so. Clark v. Clark, 44 N.C. App. 649, 262 S.E.2d 659, rev'd on other grounds, 301 N.C. 123, 271 S.E.2d 58 (1980).

Award of Homeplace as Part of Support. — The award of the homeplace does not constitute a writ of possession within the meaning of this section, and the trial judge may award exclusive possession of the homeplace, even though it is owned by the entirety, as a part of the support under G.S. 50-13.4. Arnold v. Arnold, 30 N.C. App. 683, 228 S.E.2d 48 (1976).

Reversion of Title. — Where alimony is allotted to the wife (dependent spouse) in specific property of the husband (supporting spouse), the title to such property remains in him, and will revert at the death of the wife or upon a reconciliation. Taylor v. Taylor, 93 N.C. 418 (1885).

Cited in Whedon v. Whedon, 58 N.C. App. 524, 294 S.E.2d 29 (1982).

§ 50-18. Residence of military personnel; payment of defendant's travel expenses by plaintiff.

In any action instituted and prosecuted under this Chapter, allegation and proof that the plaintiff or the defendant has resided or been stationed at a United States army, navy, marine corps, coast guard or air force installation or reservation or any other location pursuant to military duty within this State for a period of six months next preceding the institution of the action shall constitute compliance with the residence requirements set forth in this Chapter; provided that personal service is had upon the defendant or service is accepted by the defendant, within or without the State as by law provided.

Upon request of the defendant or attorney for the defendant, the court may order the plaintiff to pay necessary travel expenses from defendant's home to the site of the court in order that the defendant may appear in person to defend said action. (1959, c. 1058.)

Legal Periodicals. — For note concerning residence requirement for servicemen, see 40 N.C.L. Rev. 343 (1962).

For comment, "Conflicts of Law in Divorce Litigation: A Looking-Glass World?," see 10 Campbell L. Rev. 145 (1987).

CASE NOTES

This section is an expression of policy by the General Assembly that a serviceman stationed on a military reservation in the State is capable of establishing his domicile in North Carolina. The statute removes the barriers which might prevent a serviceman so situated from establishing a legal residence in this State where he actually has the present intention of changing his domicile to this State. Martin v. Martin, 253 N.C. 704, 118 S.E.2d 29 (1961).

§ 50-19. Maintenance of certain actions as independent actions permissible.

(a) Notwithstanding the provisions of G.S. 1A-1, Rule 13(a), any action for divorce under the provisions of G.S. 50-5.1 or G.S. 50-6 that is filed as an independent, separate action may be prosecuted during the pendency of an action for:

(1) Alimony;
(2) Postseparation support;
(3) Custody and support of minor children;
(4) Custody and support of a person incapable of self-support upon reaching majority; or
(5) Divorce pursuant to G.S. 50-5.1 or G.S. 50-6.

(b) Notwithstanding the provisions of G.S. 1A-1, Rule 13(a), any action described in subdivision (a)(1) through (a)(5) of this section that is filed as an independent, separate action may be prosecuted during the pendency of an action for divorce under G.S. 50-5.1 or G.S. 50-6.

(c) Repealed by Session Laws 1991, c. 569, s. 1. (1979, c. 709, s. 2; 1985, c. 689, s. 20; 1991, c. 569, s. 1; 1995, c. 319, s. 10.)

Editor's Note. — Session Laws 1995, c. 319, which amended this section, in s. 12 provides that this act applies to civil actions filed on or after October 1, 1995, and shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995.

This section, prior to the amendment by Session Laws 1995, c. 319, read as follows: "**Maintenance of certain actions as independent actions permissible.**

"(a) Notwithstanding the provisions of G.S. 1A-1, Rule 13(a), any action for divorce under the provisions of G.S. 50-5.1 or G.S. 50-6 that is filed as an independent, separate action may be prosecuted during the pendency of an action for:

(1) Alimony;
(2) Alimony pendente lite;
(3) Custody and support of minor children;
(4) Custody and support of a person incapable of self-support upon reaching majority; or
(5) Divorce pursuant to G.S. 50-5.1 or G.S. 50-6.

"(b) Notwithstanding the provisions of G.S. 1A-1, Rule 13(a), any action described in subdivision (a)(1) through (a)(5) of this section that is filed as an independent, separate action may be prosecuted during the pendency of an action for divorce under G.S. 50-5.1 or G.S. 50-6.

"(c) Repealed by Session Laws 1991, c. 569, s. 1, effective October 1, 1991."

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For survey of 1982 law on civil procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

Effect on Legal Consequences of Prior Supreme Court Decision. — The enactment of this section, providing that an action for divorce could be maintained during the pendency of an action for alimony notwithstanding the provisions of G.S. 1A-1, Rule 13(a), did not apply to affect the legal consequences of a prior Supreme Court decision determining the law of the case. Gardner v. Gardner, 48 N.C. App. 38, 269 S.E.2d 630 (1980).

Applied in Arney v. Arney, 71 N.C. App. 218, 321 S.E.2d 472 (1984).

Cited in Banner v. Banner, 86 N.C. App. 397, 358 S.E.2d 110 (1987).

§ 50-20. Distribution by court of marital and divisible property.

(a) Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section.

(b) For purposes of this section:

(1) "Marital property" means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection. Marital property includes all vested and nonvested pension, retirement, and other deferred compensation rights, and vested and nonvested military pensions eligible under the federal Uniformed

Services Former Spouses' Protection Act. It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection. This presumption may be rebutted by the greater weight of the evidence.

(2) "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property. All professional licenses and business licenses which would terminate on transfer shall be considered separate property.

(3) "Distributive award" means payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include alimony payments or other similar payments for support and maintenance which are treated as ordinary income to the recipient under the Internal Revenue Code.

(4) "Divisible property" means all real and personal property as set forth below:

a. All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.

b. All property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.

c. Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends.

d. Increases and decreases in marital debt and financing charges and interest related to marital debt.

(c) There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. The court shall consider all of the following factors under this subsection:

(1) The income, property, and liabilities of each party at the time the division of property is to become effective.

(2) Any obligation for support arising out of a prior marriage.

(3) The duration of the marriage and the age and physical and mental health of both parties.

(4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects.

(5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property.

(6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.

(7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.

(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage.

(9) The liquid or nonliquid character of all marital property and divisible property.

(10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party.

(11) The tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.

(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution.

(11b) In the event of the death of either party prior to the entry of any order for the distribution of property made pursuant to this subsection:

a. Property passing to the surviving spouse by will or through intestacy due to the death of a spouse.

b. Property held as tenants by the entirety or as joint tenants with rights of survivorship passing to the surviving spouse due to the death of a spouse.

c. Property passing to the surviving spouse from life insurance, individual retirement accounts, pension or profit-sharing plans, any private or governmental retirement plan or annuity of which the decedent controlled the designation of beneficiary (excluding any benefits under the federal social security system), or any other retirement accounts or contracts, due to the death of a spouse.

d. The surviving spouse's right to claim an "elective share" pursuant to G.S. 30-3.1 through G.S. 30-33, unless otherwise waived.

(12) Any other factor which the court finds to be just and proper.

(c1) Notwithstanding any other provision of law, a second or subsequent spouse acquires no interest in the marital property and divisible property of his or her spouse from a former marriage until a final determination of equitable distribution is made in the marital property and divisible property of the spouse's former marriage.

(d) Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property or divisible property, or both, in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

(e) Subject to the presumption of subsection (c) of this section that an equal division is equitable, it shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable. This presumption may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind. In any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.

(f) The court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties. After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.

(g) If the court orders the transfer of real or personal property or an interest therein, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(h) If either party claims that any real property is marital property or divisible property, that party may cause a notice of lis pendens to be recorded pursuant to Article 11 of Chapter 1 of the General Statutes. Any person whose conveyance or encumbrance is recorded or whose interest is obtained by descent, prior to the filing of the lis pendens, shall take the real property free of any claim resulting from the equitable distribution proceeding. The court may cancel the notice of lis pendens upon substitution of a bond with surety in an amount determined by the court to be sufficient provided the court finds that the claim of the spouse against property subject to the notice of lis pendens can be satisfied by money damages.

(i) Upon filing an action or motion in the cause requesting an equitable distribution or alleging that an equitable distribution will be requested when it is timely to do so, a party may seek injunctive relief pursuant to G.S. 1A-1, Rule 65 and Chapter 1, Article 37, to prevent the disappearance, waste or conversion of property alleged to be marital property, divisible property, or separate property of the party seeking relief. The court, in lieu of granting an injunction, may require a bond or other assurance of sufficient amount to protect the interest of the other spouse in the property. Upon application by the owner of separate property which was removed from the marital home or possession of its owner by the other spouse, the court may enter an order for reasonable counsel fees and costs of court incurred to regain its possession, but such fees shall not exceed the fair market value of the separate property at the time it was removed.

(i1) Unless good cause is shown that there should not be an interim distribution, the court may, at any time after an action for equitable distribution has been filed and prior to the final judgment of equitable distribution, enter orders declaring what is separate property and may also enter orders dividing part of the marital property, divisible property or debt, or marital debt between the parties. The partial distribution may provide for a distributive award and may also provide for a distribution of marital property, marital debt, divisible property, or divisible debt. Any such orders entered shall be taken into consideration at trial and proper credit given.

Hearings held pursuant to this subsection may be held at sessions arranged by the chief district court judge pursuant to G.S. 7A-146 and, if held at such sessions, shall not be subject to the reporting requirements of G.S. 7A-198.

(j) In any order for the distribution of property made pursuant to this section, the court shall make written findings of fact that support the determination that the marital property and divisible property has been equitably divided.

(k) The rights of the parties to an equitable distribution of marital property and divisible property are a species of common ownership, the rights of the respective parties vesting at the time of the parties' separation.

(*l*)(1) A claim for equitable distribution, whether an action is filed or not, survives the death of a spouse so long as the parties are living separate and apart at the time of death.

(2) The provisions of Article 19 of Chapter 28A of the General Statutes shall be applicable to a claim for equitable distribution against the estate of the deceased spouse.

(3) Any claim for equitable distribution against the surviving spouse made by the estate of the deceased spouse must be filed with the district court within one year of the date of death of the deceased spouse or be forever barred. (1981, c. 815, s. 1; 1983, c. 309; c. 640, ss. 1, 2; c. 758, ss. 1-4; 1985, c. 31, ss. 1-3; c. 143; c. 660, ss. 1-3; 1987, c. 663; c. 844, s. 2; 1991, c. 635, ss. 1, 1.1; 1991 (Reg. Sess., 1992), c. 960, s. 1; 1995, c. 240, s. 1; c. 245, s. 2; 1997-212, ss. 2-5; 1997-302, s. 1; 1998-217, s. 7(c); 2001-364, ss. 2, 3; 2002-159, s. 33; 2003-168, ss. 1, 2; 2005-353, s. 1.)

Cross References. — As to claims for equitable distribution against decedent's estate, see G.S. 28A-19-19.

Legal Periodicals. — For comment on resulting trusts in entireties property when the wife furnishes purchase money, see 17 Wake Forest L. Rev. 415 (1981).

For survey of 1981 family law, see 60 N.C.L. Rev. 1379 (1982).

For comment on the tax effects of equitable distribution upon divorce, see 18 Wake Forest L. Rev. 555 (1982).

For comment on this section, see 18 Wake Forest L. Rev. 735 (1982).

For note on Mims v. Mims, 305 N.C. 41, 286 S.E.2d 779 (1982), see 18 Wake Forest L. Rev. 780 (1982).

For analysis of North Carolina's equitable distribution of property statute, see 61 N.C.L. Rev. 247 (1983).

For survey of 1982 family law, see 61 N.C.L. Rev. 1155 (1983).

For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

For comment on contingent fees in domestic relations actions, see 62 N.C.L. Rev. 381 (1984).

For article, "The Professional Degree as Marital Property Under North Carolina's Equitable Distribution Statute," see 6 Campbell L. Rev. 101 (1984).

For article, "Divisibility of Advanced Degrees in North Carolina — An Examination and Proposal," see 15 N.C. Cent. L.J. 1 (1984).

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For note, "The Validity of Foreign Divorce Decrees in North Carolina," see 20 Wake Forest L. Rev. 765 (1984).

For 1984 survey, "Property Settlement or Separation Agreement: Perpetuating the Confusion," see 63 N.C.L. Rev. 1166 (1985).

For 1984 survey, "Equitable Distribution Without Consideration of Marital Fault," see 63 N.C.L. Rev. 1204 (1985).

For 1984 survey, "The Brief Death of Alienation of Affections and Criminal Conversation in North Carolina," see 63 N.C.L. Rev. 1317 (1985).

For note, "The Contingent Fee Contract in Domestic Relations Cases," see 7 Campbell L. Rev. 427 (1985).

For comment, "The Wedding Veil or the Corporate Veil?: Appreciation of Close Corporation Stock Under North Carolina's Equitable Distribution Law," see 15 N.C. Cent. L.J., 213 (1985).

For note on contractual agreements as a means of avoiding equitable distribution, in light of Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984), see 21 Wake Forest L. Rev. 213 (1985).

For note, "North Carolina's Equitable Distribution Statute: Recent Developments," see 64 N.C.L. Rev. 1395 (1986).

For note, "Branch Banking & Trust Co. v. Wright — Creditors' Rights to Entireties Property Awarded to Nondebtor Spouse Upon Divorce," see 64 N.C.L. Rev. 1471 (1986).

For article, "The Partnership Ideal: The Development of Equitable Distribution in North Carolina," see 65 N.C.L. Rev. 195 (1987).

For 1987 note on equitable distribution law as it relates to personal injury awards in divorce actions, see 65 N.C.L. Rev. 1332 (1987).

For note on the continued prohibition of contingency fees in divorce actions, see 65 N.C.L. Rev. 1378 (1987).

For article, "The Equitable Distribution of Professional Degrees upon Divorce in North Carolina," see 10 Campbell L. Rev. 69 (1987).

For note, the valuation of a professional practice in equitable distribution, in light of 75 N.C. App. 414, 331 S.E.2d 266, disc. rev. denied, 314 N.C. 543, 335 S.E.2d 316 (1985), see 22 Wake Forest L. Rev. 327 (1987).

For note relating to revocation of the marital presumption and adoption of the analytic approach to the classification of personal injury settlements, in light of Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1986), see 22 Wake Forest L. Rev. 931 (1987).

For note on separation agreements, see 66 N.C.L. Rev. 1254 (1988).

For note on post-separation sexual intercourse precluding enforcement of agreement requiring parties to live separate and apart, see 11 Campbell L. Rev. 73 (1988).

For article, "Increases in Separate Property and the Evolving Marital Partnership," see 24 Wake Forest L. Rev. 239 (1989).

For note, "McLean v. McLean: North Carolina Adopts the Gift Presumption in Equitable Distribution," see 68 N.C. L. Rev. 1269 (1990).

For article, "Semantics as Jurisprudence: The Elevation of Form Over Substance in the Treatment of Separation Agreements in North Carolina," see 69 N.C.L. Rev. 319 (1991).

For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For note, "Kuder v. Schroeder: The North Carolina Court of Appeals Holds That a Professional Education Is Not Within the Spousal Duty of Support," see 72 N.C.L. Rev. 1784 (1994).

For note, "Family Law — Equitable Distribution — Brown v. Brown, 112 N.C. App. 15, 434 S.E.2d 873 (1993)," see 72 N.C.L. Rev. 1801 (1994).

For note, "The Diploma Dilemma: An Inequitable Result Under North Carolina's Equitable Distribution Statute — Kuder v. Schroeder," see 17 Campbell L. Rev. 361 (1995).

For survey, "Termination of Lump Sum Alimony upon the Remarriage of a Dependent Spouse: Potts v. Tutterow," see 73 N.C.L. Rev. 2432 (1995).

For article, "Giving Credit Where Credit is Due: North Carolina Recognizes Custodial Obligations as a Factor in Determining Alimony Entitlements," see 74 N.C.L. Rev. 2128 (1996).

For article, "A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?," see 18 Campbell L. Rev. 203 (1996).

For 1997 legislative survey, see 20 Campbell L. Rev. 459.

For an article on the creation of a new category of property — divisible property — in divorce law, see 76 N.C.L. Rev. 2017 (1998).

For note, "O'Brien v. O'Brien: The Changing Nature of Property Under the Equitable Distribution Laws in North Carolina," see 77 N.C. L. Rev. 2280 (1999).

For recent development, "Death and the Partnership Principle: Interpreting Recent Abatement Amendments to North Carolina's Equitable Distribution Act," see 80 N.C.L. Rev. 1089 (2002).

CASE NOTES

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I. GENERAL CONSIDERATION.

Constitutionality. — This section is not unconstitutionally vague. Ellis v. Ellis, 68 N.C. App. 634, 315 S.E.2d 526 (1984).

Legislative Intent. — In enacting the equitable distribution statute, the General Assembly intended to avoid taxable events which would chill the use of equitable distribution. Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

The legislature did not intend the Equitable Distribution Act to apply solely to property acquired on or after the effective date of the act or its amendments. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Only married persons are afforded the protections of this statute; therefore, the Court of Appeals would not expand the legislature's clear definition of marital property to include property acquired prior to marriage. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

No Right to Jury Trial in Equitable Distribution Action. — No right to bring an action for equitable distribution of marital property existed prior to the adoption of the equitable distribution statutes, this section and G.S. 50-21, and the language of the statutes themselves create no new right to trial by jury; therefore, there is no right to trial by jury for such an action under the Constitution of North Carolina. Kiser v. Kiser, 325 N.C. 502, 385 S.E.2d 487 (1989).

This section sets forth reasonably clear guidelines and definitions for courts to interpret and administer it uniformly and in accordance with the legislative intent. Ellis v. Ellis, 68 N.C. App. 634, 315 S.E.2d 526 (1984).

Same Rules to Apply to Both Spouses. — With the enactment of this section the legislature indicated its view that the same rules should apply to both spouses in determining ownership of property. Mims v. Mims, 305 N.C. 41, 286 S.E.2d 779 (1982).

This section is a remedial statute enacted to ensure a fairer distribution of marital assets than under common-law rules. Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260, cert. denied, 313 N.C. 612, 330 S.E.2d 616 (1985).

Separate Trials for Divorce and Distribution. — The trial court's order granting the plaintiff's motion for separate trials of his claim for absolute divorce and the defendant's claim for equitable distribution of the marital property did not constitute an abuse of discretion, nor did it prejudice the defendant's substantial rights. Sharp v. Sharp, 84 N.C. App. 128, 351 S.E.2d 799 (1987).

Section 52-4 is not inconsistent with or repugnant to this section. Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1986).

Section 52-4 governs legal interests in property during an ongoing marriage, while this section governs its disposition after divorce. Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1986).

Trial judge is required to conduct a three-stage analysis in order to equitably distribute the marital assets. He must first ascertain, upon appropriate findings of fact, what is marital property; then determine the net market value of the marital property as of the date of separation; and finally, make an equitable distribution between the parties. Willis v. Willis, 86 N.C. App. 546, 358 S.E.2d 571 (1987).

In applying our equitable distribution statutes, the trial court must follow a three-step procedure: (1) classification, (2) evaluation and (3) distribution. Seifert v. Seifert, 82 N.C. App. 329, 346 S.E.2d 504 (1986), aff'd, 319 N.C. 367, 354 S.E.2d 506 (1987).

Equal division of marital property is favored by public policy behind the Equitable Distribution Act. Weaver v. Weaver, 72 N.C. App. 409, 324 S.E.2d 915 (1985), overruled in part on other grounds, Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

One policy underlying the Equitable Distribution Act is to wind up the marriage and distribute the marital property fairly with as much certainty and finality as possible. Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

Public policy of this State is that equitable distribution of property shall follow a decree of absolute divorce. Hendrix v. Hendrix, 67 N.C. App. 354, 313 S.E.2d 25 (1984).

But Written Agreement Between the Parties Is an Alternative. — It is North Carolina's public policy that an equitable distribution of property shall follow a decree of absolute divorce. However, a resort to the equitable distribution law is not the only recognized way for married people to dispose of their marital property. An alternative is in G.S. 50-20(d). Case v. Case, 73 N.C. App. 76, 325 S.E.2d 661, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985). See also, Hendrix v. Hendrix, 67 N.C. App. 354, 313 S.E.2d 25 (1984).

Purpose of Section. — This section is designed to divide property equitably, based upon the relative positions of the parties at the time of the divorce, rather than on what they may have intended when the property was acquired. Mims v. Mims, 305 N.C. 41, 286 S.E.2d 779 (1982).

This section's primary focus is to devise a procedure for equitably distributing "marital," as opposed to "separate," property upon dissolution of the marriage. Mims v. Mims, 305 N.C. 41, 286 S.E.2d 779 (1982).

This section reflects a trend nationwide towards recognizing marriage as a partnership, a shared enterprise to which both spouses make valuable contributions, albeit often in different ways. Loeb v. Loeb, 72 N.C. App. 205, 324 S.E.2d 33 (1985), overruled in part on other grounds, Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Equitable distribution reflects the idea that marriage is a partnership enterprise to which both spouses make vital contributions and which entitles the homemaker spouse to a share of the property acquired during the relationship. White v. White, 312 N.C. 770, 324 S.E.2d 829 (1985).

A spouse's vested right to equitable distribution of marital property does not create a property right in marital property, nor does separation create a lien on specific marital property in favor of the spouse. Hearndon v. Hearndon, 132 N.C. App. 98, 510 S.E.2d 183 (1999).

Effect of Section. — This section was enacted in recognition of marriage as a partnership, economic and otherwise, to which both parties contribute, either directly or indirectly. By enacting this section, the Legislature granted courts the power to consider factors other than legal title in distributing the marital assets upon the dissolution of the marriage, thereby permitting the courts to make an equitable distribution which effects a return to each party of that which he or she contributed to the marriage. Hinton v. Hinton, 70 N.C. App. 665, 321 S.E.2d 161 (1984).

Section Is Applicable Only to Divorce Actions Filed on or After October 1, 1981. — The Equitable Distribution Act was enacted in 1981 and made applicable only when the action for an absolute divorce is filed on or after October 1, 1981. Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

As to history and purposes of the Equitable Distribution Act, see White v. White, 312 N.C. 770, 324 S.E.2d 829 (1985).

For a case applying subsection (c) prior to its amendment, effective October 1, 1991, in upholding equitable distribution, see Munn v. Munn, 112 N.C. App. 151, 435 S.E.2d 74 (1993).

Jurisdiction Must Meet Minimum Contacts Standard. — In an equitable distribution action, the court is exercising jurisdiction over the interests of persons in property and not over a status of the parties. Exercise of this jurisdiction must meet the minimum contacts standard. Carroll v. Carroll, 88 N.C. App. 453, 363 S.E.2d 872 (1988).

Personalty in State Is Not Sufficient to Confer Jurisdiction. — The fact that there exists some personal property in North Carolina in which a nonresident defendant may have an interest because of the equitable distribution statute is not alone sufficient to establish jurisdiction over defendant or his property. Carroll v. Carroll, 88 N.C. App. 453, 363 S.E.2d 872 (1988).

Jurisdiction Not Shown. — Where defendant had not lived in North Carolina during any part of the parties' marriage, although certain property of the parties was located in North Carolina, and there was no indication of any action by defendant purposefully directed towards this state, the trial court lacked jurisdiction over defendant and his property for equitable distribution purposes and therefore could not properly determine the equitable distribution claim. Carroll v. Carroll, 88 N.C. App. 453, 363 S.E.2d 872 (1988).

Jurisdiction of Bankruptcy Court. — A claim for equitable distribution is a claim against property of the estate and therefore within the jurisdiction of the bankruptcy court. Perlow v. Perlow, 128 Bankr. 412 (E.D.N.C. 1991).

An equitable distribution action can be a "claim" under the bankruptcy code. Hearndon v. Hearndon, 132 N.C. App. 98, 510 S.E.2d 183 (1999).

Rights in Bankruptcy. — Wife, separated from her debtor husband, was entitled to relief from the automatic stay, 11 U.S.C.S. § 362, to liquidate her right to an equitable distribution against debtor because she held an unsecured claim against debtor's bankruptcy estate, the matter was one controlled by state law, and relief would not unduly delay the administration of debtor's estate. In re Linville, — Bankr. —, 2005 Bankr. LEXIS 1115 (Bankr. M.D.N.C. Feb. 1, 2005).

Right to Equitable Distribution Must Be Asserted Before Final Divorce. — Under G.S. 50-11, a judgment of absolute divorce destroys the right to equitable distribution unless the right is asserted prior to judgment of absolute divorce. Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987).

Where death ends all chance for divorce, any equitable distribution action then pending must abate; the 1995 amendment to G.S. 50-21 did not change the relationship between equitable distribution and divorce. Instead, the amendment continued the legislative trend for equitable distribution to occur at any time prior to or after an absolute divorce. Brown v. Brown, 353 N.C. 220, 539 S.E.2d 621, 2000 N.C. LEXIS 904 (2000), decided prior to the 2001 amendment clarifying that an action for equitable distribution does not abate upon the death of a party.

Heirs of wife's deceased husband were necessary parties to equitable distribution action in which husband's administrator had been substituted as defendant, and they were properly added as parties defendant. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

Rights of Creditors Without Notice. — Legislative intent is that rights of creditors without notice be protected in the equitable distribution of real property. Branch Banking & Trust Co. v. Wright, 74 N.C. App. 550, 328 S.E.2d 840 (1985).

The trial court did not abuse its discretion in denying defendant's motion for a compulsory reference in an equitable distribution proceeding. Vick v. Vick, 80 N.C. App. 697, 343 S.E.2d 245, cert. denied, 317 N.C. 341, 346 S.E.2d 149 (1986).

Trial court erred in granting defendant wife's motion to be "relieved of the effect" of a divorce judgment solely to the extent that the judgment barred her claim for equitable distribution. Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987).

Claim to Property Was Not Notice of Equitable Distribution Claim. — In divorce case, defendant's answer asserting a claim to an interest in a specific piece of property, or to proceeds in plaintiff's possession flowing from defendant's interest in that piece of property, was not sufficient to put plaintiff on notice that he was asserting a claim for equitable distribution under this section. Goodwin v. Zeydel, 96 N.C. App. 670, 387 S.E.2d 57 (1990).

Attorneys' fees are not recoverable from the other spouse in an action for equitable distribution, so that, in a combined action, the fees awarded must be attributable to work by the attorneys on the divorce, alimony and child support actions. Patterson v. Patterson, 81 N.C. App. 255, 343 S.E.2d 595 (1986).

Actions for Breach of Fiduciary Duty, Unjust Enrichment, and Marital Destruction Are Not Maintainable Against Former Spouse. — A spouse or former spouse may not maintain actions against the other spouse for breach of fiduciary duty, unjust enrichment, and intentional marital destruction, all pertaining to the marital relationship and its dissolution either in an equitable distribution proceeding, or other proceedings. Smith v. Smith, 113 N.C. App. 410, 438 S.E.2d 457, cert. denied, 336 N.C. 74, 445 S.E.2d 37 (1994).

Power of Court Upon Finding of Contempt. — Upon a finding of contempt, in situations where original order requires transfer of property (including intangible property such as that represented by stock certificates), the trial court has authority to order contemnor to transfer said property as a condition of purging contempt, but does not have authority to require contemnor to pay compensatory damages incurred as a result of his noncompliance with original order. Hartsell v. Hartsell, 99 N.C. App. 380, 393 S.E.2d 570 (1990).

But the contempt power of the district court includes the authority to require one to pay attorneys' fees in order to purge himself from a previous order of contempt for failing and refusing to comply with an equitable distribution order. Conrad v. Conrad, 82 N.C. App. 758, 348 S.E.2d 349 (1986).

Applied in Dixon v. Dixon, 62 N.C. App. 744, 303 S.E.2d 606 (1983); Crumbley v. Crumbley, 70 N.C. App. 143, 318 S.E.2d 525 (1984); Brown v. Brown, 72 N.C. App. 332, 324 S.E.2d 287 (1985); Phillips v. Phillips, 73 N.C. App. 68, 326 S.E.2d 57 (1985); Dusenberry v. Dusenberry, 73 N.C. App. 177, 326 S.E.2d 65 (1985); Appelbe v. Appelbe, 76 N.C. App. 391, 333 S.E.2d 312 (1985); Hill v. Hill, 94 N.C. App. 474, 380 S.E.2d 540 (1989); Swilling v. Swilling, 99 N.C. App. 551, 393 S.E.2d 303 (1990); Christensen v. Christensen, 107 N.C. App. 431, 420 S.E.2d 469 (1992); Albritton v. Albritton, 109 N.C. App. 36, 426 S.E.2d 80 (1993); Wilkins v. Wilkins, 111 N.C. App. 541, 432 S.E.2d 891 (1993); Leighow v. Leighow, 120 N.C. App. 619, 463 S.E.2d 290 (1995); Becker v. Becker, 127 N.C. App. 409, 489 S.E.2d 909 (1997); Atkinson v. Chandler, 130 N.C. App. 561, 504 S.E.2d 94 (1998); Kroh v. Kroh, 154 N.C. App. 198, 571 S.E.2d 643, 2002 N.C. App. LEXIS 1404 (2002); Roberts v. Roberts, 173 N.C. App. 354, 618 S.E.2d 761, 2005 N.C. App. LEXIS 2030 (2005).

Cited in Diggs v. Diggs, 116 N.C. App. 95, 446 S.E.2d 873; Mims v. Mims, 305 N.C. 41, 286 S.E.2d 779 (1982); Burmann v. Burmann, 64 N.C. App. 729, 308 S.E.2d 101 (1983); Myers v. Myers, 61 N.C. App. 748, 301 S.E.2d 522 (1983); Myers v. Myers, 62 N.C. App. 291, 302 S.E.2d 476 (1983); Cator v. Cator, 70 N.C. App. 719, 321 S.E.2d 36 (1984); Williams v. Williams, 72 N.C. App. 184, 323 S.E.2d 463 (1984); Blount v. Blount, 72 N.C. App. 193, 323 S.E.2d 738 (1984); McIntosh v. McIntosh, 74 N.C. App. 554, 328 S.E.2d 600 (1985); Gebb v. Gebb, 77 N.C. App. 309, 335 S.E.2d 221 (1985); Bruce v. Bruce, 79 N.C. App. 579, 339 S.E.2d 855 (1986); Basinger v. Basinger, 80 N.C. App. 554, 342 S.E.2d 549 (1986); North Carolina Baptist Hosps. v. Harris, 319 N.C. 347, 354 S.E.2d 471 (1987); Collar v. Collar, 86 N.C. App. 109, 356 S.E.2d 405 (1987); Lefler v. Lefler, 91 N.C. App. 286, 371 S.E.2d 287 (1988); Lee v. Lee, 93 N.C. App. 504, 378 S.E.2d 554 (1989); Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989); Lowry v. Lowry, 99 N.C. App. 246, 393 S.E.2d 141 (1990); Hartsell v. Hartsell, 99 N.C. App. 380, 393 S.E.2d 570 (1990); State v. Morris, 103 N.C. App. 246, 405 S.E.2d 351 (1991); Lemons v. Lemons, 103 N.C. App. 492, 406 S.E.2d 8 (1991); Smith v. Smith, 104 N.C. App. 788, 411 S.E.2d 197 (1991); Topper v. Topper, 105 N.C. App. 239, 412 S.E.2d 173 (1992); Sonek v. Sonek, 105 N.C. App. 247, 412 S.E.2d 917 (1992); Halverson v. Halverson, 151 Bankr. 358 (M.D.N.C. 1993); Broome v. Broome, 112 N.C. App. 823, 436 S.E.2d 918 (1993); Gilbert v. Gilbert, 111 N.C. App. 233, 431 S.E.2d 805 (1993); King v. King, 112 N.C. App. 92, 434 S.E.2d 669 (1993); Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993); King v. King, 114 N.C. App. 454, 442 S.E.2d 154 (1994); Stanley v. Stanley, 118 N.C. App. 311, 454 S.E.2d 701 (1995); Loving v. Loving, 118 N.C. App. 501, 455 S.E.2d 885 (1995); Forsyth Mem. Hosp. v. Chisholm, 342 N.C. 616, 467 S.E.2d 88 (1996); Holterman v. Holterman, 127 N.C. App. 109, 488 S.E.2d 265 (1997); Weatherford v. Keenan, 128 N.C. App. 178, 493 S.E.2d 812 (1997); Vann v. Vann, 128 N.C. App. 516, 495 S.E.2d 370 (1998); Inman v. Inman, 134 N.C. App. 719, 518 S.E.2d 777 (1999); Torres v. McClain, 140 N.C. App. 238, 535 S.E.2d 623, 2000 N.C. App. LEXIS 1114 (2000); Huntley v. Huntley, 140 N.C. App. 749, 538 S.E.2d 239, 2000 N.C. App. LEXIS 1269 (2000); Friend-Novorska v.

Novorska, 143 N.C. App. 387, 545 S.E.2d 788, 2001 N.C. App. LEXIS 302 (2001); Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004); McKyer v. McKyer, 179 N.C. App. 132, 632 S.E.2d 828, 2006 N.C. App. LEXIS 1829 (2006).

II. MARITAL AND SEPARATE PROPERTY.

A. In General.

Classification as Marital Property by Stipulation of Parties. — Husband's deferred compensation plan was marital property, notwithstanding that the deferred compensation plan had not vested, where the parties had stipulated in a pre-trial order that the deferred compensation plan was marital property. Hamby v. Hamby, 143 N.C. App. 635, 547 S.E.2d 110, 2001 N.C. App. LEXIS 337 (2001), cert. denied, 354 N.C. 69, 553 S.E.2d 39 (2001).

North Carolina recognizes the dual nature of property acquired with both marital and separate assets. This approach has generally been referred to as the source of funds theory. Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260, cert. denied, 313 N.C. 612, 330 S.E.2d 616 (1985).

Property can have a dual nature, and can be classified as part separate and part marital. This approach takes into account the active appreciation of separate property which often results from contributions made by one or both spouses. Nix v. Nix, 80 N.C. App. 110, 341 S.E.2d 116 (1986).

Under G.S. 50-20(a), when a trial court classified property involved in a divorce as either marital property or separate property, property could have a dual nature and be classified as part separate and part marital, and where property was dual in nature, the court applied a "source of funds" approach to distinguish between marital and separate contributions to the property, and the marital and separate estates were each entitled to an interest in the property in the ratio its contribution bore to the total investment in the property. Goldston v. Goldston, 159 N.C. App. 180, 582 S.E.2d 685, 2003 N.C. App. LEXIS 1431 (2003).

Dual Nature of Property Shown. — Defendant's interest in financial corporation was of a dual nature, having both a marital property and a separate property component. Smith v. Smith, 111 N.C. App. 460, 433 S.E.2d 196, petition denied as to additional issues, 335 N.C. 177, 438 S.E.2d 202 (1993), rev'd on other grounds, 336 N.C. 575, 444 S.E.2d 420 (1994).

Dual Nature of Home Not Shown. — Trial court erred in concluding that the home purchased by the parties was only partly marital property, where the wife met her burden of showing that the home was marital property, by showing that it was acquired by the couple during the marriage, and was owned by them on the date of separation, and no evidence supported the trial court's conclusion that the husband had no intention of making a gift of his separate funds to acquire the home; however, the husband was entitled to have the gift of his separate property to the marital estate considered as a distributional factor. Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

Three-Step Analysis of Equitable Distribution. — A trial judge is required to conduct a three-step analysis when making an equitable distribution of the marital assets. These steps are: (1) To determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner. Beightol v. Beightol, 90 N.C. App. 58, 367 S.E.2d 347, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

The requirements that the trial court (1) classify and value all property of the parties, both separate and marital, (2) consider the separate property in making a distribution of the marital property, and (3) distribute the marital property necessarily exist only when evidence is presented to the trial court which supports the claimed classification, valuation and distribution. Miller v. Miller, 97 N.C. App. 77, 387 S.E.2d 181 (1990).

There may be both marital and separate ownership interests in the same property. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

Both legal and equitable interest in real and personal property are subject to distribution under this section. Upchurch v. Upchurch, 122 N.C. App. 172, 468 S.E.2d 61 (1996), review denied, 343 N.C. 517, 472 S.E.2d 26 (1996).

"Source of Funds" Rule as to When Property Is Acquired. — The Court of Appeals has adopted the source of funds rule, by which property is "acquired" as it is paid for, so that it may include both marital and separate ownership interests. Under the source of funds rule acquisition is an ongoing process. It does not depend upon inception of title, but upon monetary or other contributions made by one or both of the parties. McLeod v. McLeod, 74 N.C. App. 144, 327 S.E.2d 910, cert. denied, 314 N.C. 331, 333 S.E.2d 488 (1985).

Under the source of the funds theory, when both the marital and separate estates contribute assets towards the acquisition of property, each estate is entitled to an interest in the property in the ratio which its contribution bears to the total investment in the property. Thus, both the separate and marital estates receive a proportionate and fair return on their investments. Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260, cert. denied, 313 N.C. 612, 330 S.E.2d 616 (1985).

The courts have adopted a source of funds approach to distinguish marital and separate contributions to a single asset. Under the source of funds approach, each party retains as separate property the amount he contributed to purchase the property plus passive appreciation in value. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

In applying the source of funds rule, the financial or other contributions by the marital and separate estates toward the acquisition of property must be identified and accounted for. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

The trial court erred in using a source of funds approach to determine what portion of a tract of land was marital property as opposed to separate property; the source of funds analysis is not applicable until the donor spouse has rebutted the gift presumption by clear, cogent and convincing evidence. Lawrence v. Lawrence, 100 N.C. App. 1, 394 S.E.2d 267 (1990).

"Source of Funds" Rule Is Applicable Even When Property Is Converted After Separation. — North Carolina has adopted the "source of funds" rule to determine whether and to what extent an asset is part of the marital estate. Even when property is converted after the date of separation, this rule continues to apply, and the dispositive question in determining if an asset is a marital asset remains whether the source of funds therefor were marital funds. Mauser v. Mauser, 75 N.C. App. 115, 330 S.E.2d 63 (1985); Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992).

Only after determining the nature of the asset received by one spouse after separation, yet claimed by the other to be "marital property," may a classification be made of that asset as between "marital" or "separate" property. Locklear v. Locklear, 92 N.C. App. 299, 374 S.E.2d 406 (1988).

Premarital Contributions. — Premarital contributions are relevant in an equitable distribution proceeding, to the extent those contributions constitute separate property, entitling the contributing spouse to credit when property of mixed marital and separate character is distributed. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

For the purpose of classification of property, the marital estate is frozen as of the date of separation. While its components clearly may increase in value after separation and before distribution, no new property may be added to the marital estate after the date of separation. Becker v. Becker, 88 N.C. App. 606, 364 S.E.2d 175 (1988).

Debt, as well as assets, must be classified as marital or separate property; if the debt is classified as marital, the court must value the debt and distribute it pursuant to subsection (c). Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987); Rawls v. Rawls, 94 N.C. App. 670, 381 S.E.2d 179 (1989).

Medical debts incurred for the benefit of defendant's child were not for the joint benefit of the parties and thus were not marital debts. Crisp v. Crisp, 126 N.C. App. 625, 486 S.E.2d 485 (1997), cert. granted, 347 N.C. 264, 493 S.E.2d 744 (1997), aff'd in part, cert. dismissed in part, 347 N.C. 659, 496 S.E.2d 379 (1998).

Reduction in Separate Debt Using Marital Assets. — A reduction in the separate debt of a party to a marriage, caused by the expenditure of marital funds, is, in the absence of an agreement to repay the marital estate, neither an asset nor a debt of the marital estate and such a reduction is properly considered as a distributional factor within the context of subdivision (c)(12). Adams v. Adams, 115 N.C. App. 168, 443 S.E.2d 780 (1994).

Debt incurred after the separation of the parties was not subject to equitable distribution. Harrington v. Harrington, 110 N.C. App. 782, 431 S.E.2d 240 (1993).

The burden of proof is on the party seeking to classify a debt as marital. If the debt is classified as separate, the court must value it and then, pursuant to subdivision (c)(1), consider it in making a distribution. Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987).

The burden of proof is on the party claiming that property is marital property to show by a preponderance of the evidence that the property: (1) was acquired by either spouse or both spouses; (2) during the marriage; (3) before the date of the separation of the parties; and (4) is presently owned. Caudill v. Caudill, 131 N.C. App. 854, 509 S.E.2d 246 (1998).

Showing That Property Is Separate. — A spouse may challenge a claim that property is marital by showing by a preponderance of the evidence that the property: (1) was acquired by the spouse by bequest, devise, descent, or gift from a third party during the course of the marriage; or (2) was acquired by gift from the other spouse during the course of the marriage and the intent that it be separate property was stated in the conveyance; or (3) was acquired in exchange for separate property and no contrary intention that it be marital property was stated in the conveyance. Caudill v. Caudill, 131 N.C. App. 854, 509 S.E.2d 246 (1998).

Classification of Increases in Value to Separate Property — Burden of Proof. — Plaintiff, as the party claiming the increases in value to separate property to be marital, had the burden of showing by the preponderance of the evidence that the increases in value were marital property. Plaintiff met her burden by showing that all the increases in value were acquired by either or both spouses, were acquired during the course of the marriage, were acquired before the date of separation, and were presently owned. Accordingly, the burden shifted to the defendant to show by the preponderance of the evidence that the acquired increases in value to the properties were his separate property. Ciobanu v. Ciobanu, 104 N.C. App. 461, 409 S.E.2d 749 (1991).

If the party claiming the property to be separate and the party claiming the property to be marital both meet their burdens, then under the statutory scheme of N.C.G.S. subdivisions (b)(1) and (2) of this section, the property is excepted from the definition of marital property and is, therefore, separate property. This allocation of the burdens of proof is consistent with the General Assembly's recent amendment to subsection (b)(1) establishing a rebuttable presumption that property acquired between the dates of marriage and separation is marital property. Ciobanu v. Ciobanu, 104 N.C. App. 461, 409 S.E.2d 749 (1991).

Property acquired after separation of the parties is specifically excepted from the definition of marital property contained in subdivision (b)(1) of this section. However, property acquired in exchange for marital funds is considered marital property to the extent of the contribution even after separation. Peak v. Peak, 82 N.C. App. 700, 348 S.E.2d 353 (1986), decided under this section as it read in 1983.

Use of Marital Property to Acquire Separate Property After Separation. — The fact that marital property was used to acquire other property after the date of the parties' separation did not cause it to lose its marital character. The characterization of property as separate or marital depends not on whether it was acquired after the date of separation, but on whether the source of funds for its purchase was marital property or separate property. Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Acquisition of Entireties Property in Exchange for Separate Property. — When property titled by the entireties is acquired in exchange for separate property, the conveyance itself indicates the "contrary intention" to preserving separate property required by the statute. Furthermore, when separate property is used as consideration to acquire entireties property, a gift of separate property to the marital estate is presumed, which is rebuttable by clear, cogent, and convincing evidence. Manes v. Harrison-Manes, 79 N.C. App. 170, 338 S.E.2d 815 (1986).

When property titled by the entireties is acquired in exchange for separate property, the conveyance itself indicates the "contrary intention" to preserving separate property required by the statute. McLeod v. McLeod, 74 N.C. App. 144, 327 S.E.2d 910, cert. denied, 314 N.C. 331, 333 S.E.2d 488 (1985).

Presumption of gift of property to which title is taken by the entirety is limited to real property acquired by both spouses, as tenants by the entirety, in exchange for the separate property of one of them. The presumption does not extend to jointly held personal property which is acquired in exchange for the separate property of one spouse, as to do so would seem to defeat the legislative intent of subdivision (b)(2) of this section. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

House Built with Marital Funds on Property Acquired Prior to Marriage. — By treating a house and lot as separate property solely because the house, built with marital funds, was built on land acquired by defendant prior to the marriage, the court erred in classifying the property. Classification must be according to the statutory definitions of separate property and marital property. Cable v. Cable, 76 N.C. App. 134, 331 S.E.2d 765, cert. denied, 315 N.C. 182, 337 S.E.2d 856 (1985).

Additions, etc., to Wife's Real Property Made During Marriage. — That part of the real property (i.e., house and water-front area) consisting of the unimproved property owned by the wife prior to marriage should have been characterized as separate, and that part of the property consisting of the additions, alterations and repairs provided during marriage should have been considered marital in nature and the marital estate was entitled to proportionate return of its investment. Lawrence v. Lawrence, 75 N.C. App. 592, 331 S.E.2d 186, cert. denied, 314 N.C. 541, 335 S.E.2d 18 (1985).

Findings Required as to Debts Incurred During Marriage. — Where trial court failed to make adequate findings regarding the actual use of proceeds from a debt husband and wife incurred jointly, the findings were inadequate to determine whether the debt was marital or separate property; therefore, the case was remanded for further factual findings on the issue. Rawls v. Rawls, 94 N.C. App. 670, 381 S.E.2d 179 (1989).

Marital Investment of Mortgage Payments. — Where marital home was purchased by wife before the marriage and remained in her name only, and the marital estate invested $9,900 into the home by way of mortgage payments during the marriage, while the separate estate vested an amount not disclosed in the record, the trial judge should have divided the equity based on the proportion invested by the marital and separate estates, so as to determine what percentage of the total investment in the property was marital and what was separate, and then award each estate a proportionate return on its investment. Willis v. Willis, 85 N.C. App. 708, 355 S.E.2d 828, rev'd on other grounds, 86 N.C. App. 546, 358 S.E.2d 571 (1987).

Home Equity Derived from Wife's Contribution. — Where wife's contribution to marital residence was a gift, and there was no statement of her intent that it be separate property, the proportion of the home equity derived from her contribution was marital property. Dewey v. Dewey, 77 N.C. App. 787, 336 S.E.2d 451 (1985), cert. denied, 316 N.C. 376, 344 S.E.2d 1 (1986).

Effect of Dissolution of Tenancy by Entirety. — Although conveyances from wife to husband dissolved tenancy by the entirety in the parcels of land and vested title thereto solely in the husband, as provided by G.S. 39-13.3(c), husband nevertheless acquired title to the property thereunder, not by gift, but during the course of the marriage and before the parties separated, and property so acquired is ipso facto marital property. Thus, contrary to the husband's contention, dissolving of the tenancy by entirety did not remove the property involved from the ambit of the Equitable Distribution Act, and the trial judge did not err in finding and concluding otherwise. Beroth v. Beroth, 87 N.C. App. 93, 359 S.E.2d 512, cert. denied, 321 N.C. 296, 362 S.E.2d 778 (1987), overruled in part on other grounds, Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Fact that both names were on note, standing alone, was not sufficient to show an intent to make a gift to the marital estate. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

Findings Needed to Determine Portion of Spouse's Inheritance Constituting Marital Property. — In order to determine what part of a spouse's inherited interest in a corporation constituted marital property, the trial court would be required to make findings as to: (1) the value of plaintiff's minority interest at the time of inheritance; (2) the value of plaintiff's controlling interest at the date of separation; (3) the difference between the two; and (4) the proportion of that difference that were due to active appreciation, i.e., attributable to funds, talent, or labor that were assets of the marital community. The resulting amount would be marital property subject to equitable distribution. McLeod v. McLeod, 74 N.C. App. 144, 327 S.E.2d 910, cert. denied, 314 N.C. 331, 333 S.E.2d 488 (1985).

Property Acquired While Parties Cohabited Out-of-Wedlock. — It was error for the trial judge to classify as marital property any interest in property acquired before the parties were married but while they lived together. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

The interests acquired by the parties in a parcel of real property that they purchased together, but as unmarried persons before they were married, were their respective separate property; however, any increases in equity and any debt incurred during the marriage were marital property. Glaspy v. Glaspy, 143 N.C. App. 435, 545 S.E.2d 782, 2001 N.C. App. LEXIS 305 (2001).

Property Purchased in Anticipation of Marriage. — The sole fact that property was purchased in anticipation of marriage is not, in and of itself, sufficient to establish donative intent. Tiryakian v. Tiryakian, 91 N.C. App. 128, 370 S.E.2d 852 (1988).

Even though a tax refund was not actually paid until the parties separated, Court did not err in treating it as divisible marital property because it was attributable to activities of both parties in the course of their involvement with a family business. Allen v. Allen, 168 N.C. App. 368, 607 S.E.2d 331, 2005 N.C. App. LEXIS 265 (2005).

Term "acquired" has a dynamic meaning, thus adopting the source of funds theory which recognizes that because property is acquired over time, it may have a dual nature and must therefore be designated according to whether the funds used for acquisition were marital or separate. Tiryakian v. Tiryakian, 91 N.C. App. 128, 370 S.E.2d 852 (1988).

Property Acquired During Marriage Prior to Effective Date of Equitable Distribution. — The fact that husband acquired property during marriage but prior to the effective date of the Equitable Distribution Act does not mean that he also acquired a vested right in the law governing the disposition of property upon divorce which was in effect either at the time the property was acquired or at the time of his marriage. There is no such thing as a vested right in the continuation of an existing law. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Classification of property must be supported by the evidence and by appropriate findings of fact. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

Availability of Equitable Remedies Does Not Affect Classification of Property. — The potential availability of equitable remedies—such as constructive trust, resulting trust, recovery in quantum meruit or quasi-contract—does not transform property acquired before marriage into marital property subject to equitable distribution under this section. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

Awards or settlements arising from a personal injury claim frequently are composed of many elements of recovery, some of which represent compensation for injury to, or loss of, marital property and some of which represent compensation for injury to separate property of the injured spouse. Personal injury recoveries may also include compensation for injury to the separate property of the non-injured spouse, such as the right of consortium, where such injuries have been properly alleged and proved. Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1986).

Proceeds representing a settlement recovered by a spouse upon a claim for his or her personal injuries sustained during the marriage of the parties may constitute marital property subject to distribution upon dissolution of the marriage, depending on the purpose for which they were received. Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1986).

Any part of an award compensating a non-injured spouse for loss of consortium is the separate property of the non-injured spouse. Lilly v. Lilly, 107 N.C. App. 484, 420 S.E.2d 492 (1992).

Although, based on his evidence, husband technically met his burden of proving that insurance proceeds from wife's personal injury settlement were marital property, the characterization of a spouse's personal injury settlement as marital or separate property depends on what the award was intended to replace. Lilly v. Lilly, 107 N.C. App. 484, 420 S.E.2d 492 (1992).

To the extent that an award replaces medical expenses, lost wages, or loss of earning capacity sustained during the marriage, it is marital property subject to equitable distribution. To the extent that the award replaces such economic loss occurring after separation, it is the separate property of the injured spouse. However, if the party claiming that the award is marital, i.e., the noninjured spouse, shows by a preponderance of the evidence that the award was acquired by the injured spouse during the marriage and before separation, then the entire award will be marital property unless the other party proves by a preponderance that the award, or some portion of it, was to compensate for economic loss occurring after the date of separation and is therefore separate property. Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992).

Wife was entitled to a claim against one-half of any monies which represented reimbursement for husband's lost wages prior to the parties' separation and those reimbursing him for medical expenses incurred prior to separation. Taylor v. Taylor, 92 N.C. App. 413, 374 S.E.2d 644 (1988).

Personal injury award is composed of three potential elements of damages: (1) Those compensating the injured spouse for pain and suffering, disability, disfigurement, or lost limbs; (2) those compensating for lost wages, lost earning capacity, and medical and hospital expenses; and (3) those compensating the non-injured spouse for loss of services or loss of consortium. The portion of an award representing compensation for non-economic loss, i.e., personal suffering and disability, is the separate property of the injured spouse; the portion of an award representing compensation for economic loss, i.e., lost wages, loss of earning capacity during the marriage, and medical and hospital expenses paid out of marital funds, is marital property. Dunlap v. Dunlap, 85 N.C. App. 324, 354 S.E.2d 734 (1987).

Gift From a Third Party. — A gift received by a spouse from a third party is the separate property of the receiving spouse. Friend-Novorska v. Novorska, 131 N.C. App. 508, 507 S.E.2d 900 (1998).

Distinction Between Active and Passive Appreciation. — There is a distinction between active and passive appreciation of separate property, in that active appreciation refers to financial or managerial contributions of one of the spouses to the separate property during the marriage, while passive appreciation refers to enhancement of the value of separate property due solely to inflation, changing economic conditions or other such circumstances beyond the control of either spouse. O'Brien v. O'Brien, 131 N.C. App. 411, 508 S.E.2d 300 (1998).

Test for Active Increase. — If either or both of the spouses perform substantial services during the marriage which result in an increase in the value of an investment account, that increase is to be characterized as an active increase and classified as a marital asset. O'Brien v. O'Brien, 131 N.C. App. 411, 508 S.E.2d 300 (1998).

Workers' compensation awards are classified as either marital or separate property depending on what the award was intended to replace. Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992).

The trial court erred in determining that the plaintiff converted certain marital funds to her own use during the marriage and in treating the allegedly converted funds as part of the marital estate in making its equitable distribution order, as defendant did not prove that any of this money was used to purchase assets that were owned by either of the parties on the date of separation. Lawrence v. Lawrence, 100 N.C. App. 1, 394 S.E.2d 267 (1990).

Refusal to Consider Evidence of Husband's Conversion of Property After Separation Held Error. — The trial court erred in refusing to consider evidence concerning the husband's conversion of property (i.e., shares of stock) after the parties' separation. The ruling was error regardless of whether the property was originally obtained with marital or separate funds. Mauser v. Mauser, 75 N.C. App. 115, 330 S.E.2d 63 (1985).

Court to Determine What Is Marital Property. — Subsection (a) of this section makes it incumbent upon the court to determine what is marital property. Thomas v. Thomas, 102 N.C. App. 127, 401 S.E.2d 367 (1991).

"Use and Possession" of Marital Asset. — It is plain on the face of this section that the provision for transfer of "the use and possession" of a marital asset contemplates the transfer of an asset in kind; transferring the "use and possession" means that the spouse receiving the transfer is entitled to hold the asset pending a final equitable distribution award and use it as it was meant to be used. Brown v. Brown, 112 N.C. App. 15, 434 S.E.2d 873 (1993).

B. Marital Property Generally.

This section mandates a complete listing of marital property, and an order that fails to do so is fatally defective. Little v. Little, 74 N.C. App. 12, 327 S.E.2d 283 (1985); Cornelius v. Cornelius, 87 N.C. App. 269, 360 S.E.2d 703 (1987).

"Acquired" as Used in Subdivision (b)(1). — A dynamic rather than static interpretation of the term "acquired" as used in subdivision (b)(1) will best serve to prevent inequity. Acquisition must be recognized as the ongoing process of making payment for property or contributing to the marital estate rather than being fixed on the date that legal title to property is obtained. Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260, cert. denied, 313 N.C. 612, 330 S.E.2d 616 (1985).

"Vested" as Used in Subdivision (b)(1). — Vesting occurs when an employee has completed the minimum terms of employment necessary to be entitled to receive retirement pay at some point in the future. Milam v. Milam, 92 N.C. App. 105, 373 S.E.2d 459 (1988), cert. denied, 324 N.C. 247, 377 S.E.2d 755 (1989).

"Presently owned" defined. — "Presently owned" under subsection (b)(1) refers to the date of separation, not the date of trial. Wornom v. Wornom, 126 N.C. App. 461, 485 S.E.2d 856 (1997).

The legislature's decision not to provide by statute for a marital property presumption was deliberate. Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1986).

Assets to Be Classified According to Proof. — Under our statutory scheme, without the aid of any presumption, assets, the classification of which is disputed, must be labeled for equitable distribution purposes either as "marital" or "separate," depending upon the proof presented to the trial court of the nature of those assets. Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1986).

Where plaintiff failed to meet his burden of proving that liability was marital, he could not later claim error in the trial court's classification of the debt. Tucker v. Miller, 113 N.C. App. 785, 440 S.E.2d 315 (1994).

Evidence of Valuable Consideration Rather Than Donative Intent. — Mobile home park was properly classified as marital property in an equitable distribution order under G.S. 50-20(b)(1) because both parties operated the park during the marriage and there was no credible documentation of the donative intent of the former husband's father to contradict a general warranty deed showing valuable consideration given for the property. Joyce v. Joyce, 180 N.C. App. 647, 637 S.E.2d 908, 2006 N.C. App. LEXIS 2502 (2006).

Joint Account. — Absent clear and convincing evidence to the contrary, creation of a spousal joint account should as a matter of law imply consent by each spouse to the use by the other of funds from the account for purposes of sustaining the family or enhancing its standard of living. Spence v. Jones, 83 N.C. App. 8, 348 S.E.2d 819 (1986).

Trial court did not err in classifying a checking account held in a former husband's name only as marital property because the former wife presented evidence that the bank account in question was opened five days before the parties separated, and the husband failed to rebut, by the greater weight of the evidence, the presumption that the checking account was marital property; Cochran v. Cochran, — N.C. App. —, 679 S.E.2d 469, 2009 N.C. App. LEXIS 1161 (July 21, 2009).

Separate Property Not "Transmuted" into Marital Property. — Insurance settlement, originally the separate property of wife, was not transmuted into marital property as a result of wife's having deposited it into the parties' joint checking account. Lilly v. Lilly, 107 N.C. App. 484, 420 S.E.2d 492 (1992).

Entireties Property Presumed to Be Gift to Marital Estate. — A presumption of a gift to the marital estate of entireties property is consistent with a public policy to further the intent of both parties as evidenced by their mutual agreement. When one party titles property jointly it is reasonable that the other party expects it to be an addition to marital property. To protect those expectations the property should be classified as marital unless the donor's contrary intent was clearly brought to the attention of the donee. McLeod v. McLeod, 74 N.C. App. 144, 327 S.E.2d 910, cert. denied, 314 N.C. 331, 333 S.E.2d 488 (1985).

Trial court did not err in finding that the entire parcel was marital property as the only relevant evidence that the husband offered to rebut the marital gift presumption was his own testimony. Thus, the husband did not demonstrate that he did not intend to make his interest in the parcel a gift to the marital estate. Warren v. Warren, 175 N.C. App. 509, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

While there was evidence that plaintiff's grandmother intended checks written to plaintiff and the checks written to defendant husband only as a gift to plaintiff, where the record was void of any evidence concerning plaintiff's intent when placing those checks into property titled in the entireties, the trial court erred by finding that plaintiff did not intend to make a gift to the marital estate. Upon remand, the trial court could consider the individual contributions of separate property if it viewed those contributions as an appropriate factor under subdivision (c)(12). Hunt v. Hunt, 85 N.C. App. 484, 355 S.E.2d 519 (1987).

Property Held As Tenancy By the Entireties After Party's Death. — Trial court's order declaring an ex-wife as the owner of three parcels of property held with a decedent as tenancy by the entireties was reversed as an equitable distribution proceeding was pending at the time of the decedent's death and title to the parcels was not acquired in a manner prescribed by G.S. 50-20(b)(2); the parcels were marital property, subject to the equitable distribution action, which did not abate upon the death of the decedent. Estate of Nelson v. Nelson, 179 N.C. App. 166, 633 S.E.2d 124, 2006 N.C. App. LEXIS 1831 (2006).

Presumption May Be Overcome by Clear, Cogent and Convincing Evidence. — Under common law, a deed conveying real estate to a husband and wife creates an estate by the entireties. However, title is not absolutely controlling under the Equitable Distribution Act. Joint title merely creates a rebuttable presumption of marital property, which may be overcome by clear, cogent, and convincing evidence of the third party donor's contrary intent. Loeb v. Loeb, 72 N.C. App. 205, 324 S.E.2d 33 (1985), overruled in part on other grounds, Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Where a spouse furnishing consideration from separate property causes property to be conveyed to the other spouse in the form of tenancy by the entireties, a presumption of a gift of separate property to the marital estate arises, which is rebuttable by clear, cogent, and convincing evidence. McLeod v. McLeod, 74 N.C. App. 144, 327 S.E.2d 910, cert. denied, 314 N.C. 331, 333 S.E.2d 488 (1985); McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, Garris v. Garris, 92 N.C. App. 467, 374 S.E.2d 638 (1988).

Presumption That Gifts Between Spouses Are Marital Property. — Provision of subdivision (b)(2) of this section that "property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance" has been interpreted as creating a presumption that gifts between spouses are marital property. Dewey v. Dewey, 77 N.C. App. 787, 336 S.E.2d 451 (1985), cert. denied, 316 N.C. 376, 344 S.E.2d 1 (1986).

Presumption of Use for Marital Purposes Overcome. — Findings, along with plaintiff's testimony that he was unaware that defendant was converting funds, and defendant's acknowledgment that she could not account for $150,000 she spent were sufficient to overcome the presumption that the withdrawal of funds was with plaintiff's consent and for marital purposes. Wornom v. Wornom, 126 N.C. App. 461, 485 S.E.2d 856 (1997).

In order for property to be considered marital property it must be acquired before date of separation and must be owned at date of separation. Foster v. Foster, 90 N.C. App. 265, 368 S.E.2d 26 (1988), cert. denied, 324 N.C. 245, 376 S.E.2d 739 (1989).

Marital property is valued as of the date of the parties' separation. This valuation date is used to determine the equitable distributive share of each party. However, where there is evidence of active or passive appreciation of the marital assets after that date, the court must consider such appreciation as a factor under subdivision (c)(11a) or (12), respectively. Mishler v. Mishler, 90 N.C. App. 72, 367 S.E.2d 385, cert. denied, 323 N.C. 174, 373 S.E.2d 111 (1988).

The trial court must make a written finding of the passive or active character of post-separation appreciation and in that context the trial court is not required to quantify the post-separation increase on each marital asset as active or passive but must make ultimate findings of fact regarding the character of the total post-separation appreciation. Smith v. Smith, 336 N.C. 575, 444 S.E.2d 420 (1994).

Requiring trial courts to make ultimate findings of fact as to whether post-separation appreciation is active or passive will effectuate meaningful appellate review by informing appellate judges as to how distributional factors were used. Smith v. Smith, 336 N.C. 575, 444 S.E.2d 420 (1994).

Passive Appreciation in Investment Account. — Any appreciation of an investment account established with the wife's separate funds was purely passive appreciation, and thus, appreciation was the wife's separate property, where the spouses merely met with an investment advisor and chose among investment alternatives. O'Brien v. O'Brien, 131 N.C. App. 411, 508 S.E.2d 300 (1998).

Increase in Value of Separate Property Due to Active Appreciation Is Marital Property. — Subdivision (b)(2) of this section refers only to passive appreciation of separate property, such as that due to inflation, and not to active appreciation resulting from the contributions, monetary or otherwise, by one or both spouses. The increase in the value of separate property due to active appreciation, which otherwise would have augmented the marital estate, is marital property. Lawrence v. Lawrence, 75 N.C. App. 592, 331 S.E.2d 186, cert. denied, 314 N.C. 541, 335 S.E.2d 18 (1985).

While an inherited interest in a closely-held corporation qualifies as separate property under the statute, any increase in its value due to active appreciation is marital property. McLeod v. McLeod, 74 N.C. App. 144, 327 S.E.2d 910, cert. denied, 314 N.C. 331, 333 S.E.2d 488 (1985).

An increase in value of separate property due to active appreciation, which otherwise would have augmented the marital estate, is marital property. Thus the marital partnership shares in increases in the value of property it has proportionately "acquired" in its own right. McLeod v. McLeod, 74 N.C. App. 144, 327 S.E.2d 910, cert. denied, 314 N.C. 331, 333 S.E.2d 488 (1985).

Active appreciation of the value of separate property due to contributions of either spouse during marriage is nonetheless marital property, and therefore, is subject to equitable distribution. Rogers v. Rogers, 90 N.C. App. 408, 368 S.E.2d 412, cert. denied, 323 N.C. 366, 373 S.E.2d 548 (1988).

The post-separation appreciation of marital property must be treated as a distributional factor under subdivision (c)(11a) or (c)(12). Mrozek v. Mrozek, 129 N.C. App. 43, 496 S.E.2d 836 (1998).

Payments Decreasing Marital Debt and Related Financing Charges and Interest. — Since the husband's payments decreased financing charges and interest related to marital debt, those payments, to the extent made after the amendment to G.S. 50-20(b)(4)(d), constituted divisible property. Warren v. Warren, 175 N.C. App. 509, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

When a spouse uses separate property in the acquisition of property titled by the entireties, a gift to the marital estate is presumed; this presumption is rebuttable only by clear, cogent and convincing evidence that a gift was not intended. McLean v. McLean, 323 N.C. 543, 374 S.E.2d 376 (1988).

Bonus Payments. — A bonus based upon work performed during the marriage is not necessarily marital property. The bonus must also be vested. Edwards v. Edwards, 110 N.C. App. 1, 428 S.E.2d 834, cert. denied, 335 N.C. 172, 436 S.E.2d 374 (1993).

Vested Stock Options. — Stock options granted an employee by his or her employer which are exercisable upon the date of separation or which may not be cancelled, and which may, therefore, be said to be vested as of the date of separation, are marital property. Hall v. Hall, 88 N.C. App. 297, 363 S.E.2d 189 (1987).

Unvested Entitlement to Stock. — Where the wife entered into an employment agreement with the employer just prior to the parties' separation under which the wife was entitled to receive 10,000 shares of the employer's stock, which was eventually exchanged with the stock of a corporation that later purchased the employer, the proceeds from the sale of the corporation's stock were properly classified as divisible under G.S. 50-20(b)(4)(b), or in the alternative, marital under G.S. 50-20(b)(1); marital property under G.S. 50-20(b)(1) included both vested and nonvested stock options, and although the wife's shares of stock did not vest until after the date of separation, the wife's employment agreement, executed prior to the separation, created the wife's right to the shares. Ubertaccio v. Ubertaccio, 161 N.C. App. 352, 588 S.E.2d 905, 2003 N.C. App. LEXIS 2197 (2003), aff'd, 359 N.C. 175, 604 S.E.2d 912 (2004).

With regard to failure of trial court to equally divide the marital debts, subdivision (c)(11a) was not controlling where the payment of the marital debts in question was ordered as a part of the award of alimony pendente lite. Morris v. Morris, 90 N.C. App. 94, 367 S.E.2d 408 (1988).

Active Appreciation in Nonowned Real Property. — Where marital funds were expended to make improvements upon the couple's nonowned dwelling, the improvements were an asset acquired by the parties during marriage; consequently, plaintiff was entitled to an equitable share in the insurance proceeds realized upon destruction of the premises. Locklear v. Locklear, 92 N.C. App. 299, 374 S.E.2d 406 (1988).

Improvements on Nonowned Property. — Parties had a marital property interest in premises owned by defendant's parents arising from the improvements in the property accomplished by the parties during their marriage. Locklear v. Locklear, 92 N.C. App. 299, 374 S.E.2d 406 (1988).

When a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property. Upchurch v. Upchurch, 122 N.C. App. 172, 468 S.E.2d 61 (1996), review denied, 343 N.C. 517, 472 S.E.2d 26 (1996).

Taxes on Maritally Owned Property. — A debt incurred during marriage for the joint benefit of husband and wife is a marital debt, and taxes on maritally owned property is such a debt. Bowman v. Bowman, 96 N.C. App. 253, 385 S.E.2d 155 (1989).

Insurance proceeds intended as exclusive recompense for a spouse's lost wages and medical expenses are part of the marital estate subject to distribution. Little v. Little, 74 N.C. App. 12, 327 S.E.2d 283 (1985).

Wife was entitled to a proportionate return on the $5,000 in marital funds which she contributed toward purchase of property. Peak v. Peak, 82 N.C. App. 700, 348 S.E.2d 353 (1986), remanding for findings to determine the reasonableness of the court's award.

The trial court properly classified the parties' residence as marital property, where the parties' residence was titled in their names as entireties property, and the defendant did not come forward with clear, cogent, and convincing evidence to rebut the presumption created by the property being titled as entireties property. Thompson v. Thompson, 93 N.C. App. 229, 377 S.E.2d 767 (1989).

Since in an equitable distribution proceeding, only marital property is subject to distribution by the court, the trial court was without authority to appoint the spouses as trustees of an educational fund belonging to the parties' two children; further, the condition that the funds would be distributed to the children only after they complete four years of college is a creation of the court and one for which the trial court had no authority. Lawrence v. Lawrence, 100 N.C. App. 1, 394 S.E.2d 267 (1990).

Property Subject to Bankruptcy Proceedings. — When a pending claim for equitable distribution concerns property whose status as marital is foreseeably a matter of some dispute, a former spouse cannot sit on her rights in bankruptcy, only to surface later and lay claim to that property after it had already been subjected to possible liquidation, attachment, or other manner of disposal. Walston v. Walston, 190 Bankr. 66 (E.D.N.C. 1995).

Leased Car. — The trial court did not err in failing to classify, value, and distribute a leased Porsche as a marital asset, where after the separation date, defendant returned the car to the leasing company and received no money in return because he had no equity in it. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

Goodwill of Corporation. — The trial court erred in concluding that the goodwill of the corporation was an asset unique to plaintiff and in finding 100% of the goodwill to be a marital asset. Using the uncontested value of the goodwill, the trial court should include that value as part of the valuation of the corporation, calculate the portion of the corporation that is marital at 80%, and distribute accordingly. Tucker v. Miller, 113 N.C. App. 785, 440 S.E.2d 315 (1994).

Post-separation appreciation of a marital asset is not marital property and therefore cannot be distributed by the trial court. Such appreciation is a distributional factor which the court must consider in resolving what division of the marital property would be equitable. Fox v. Fox, 114 N.C. App. 125, 441 S.E.2d 613 (1994).

A marital debt is one incurred, during the marriage and before the date of separation, by either or both spouses for the joint benefit of the parties. Huguelet v. Huguelet, 113 N.C. App. 533, 439 S.E.2d 208, cert. denied, 336 N.C. 605, 447 S.E.2d 392 (1994).

Any debt incurred by one or both of the spouses after the date of separation to pay off a marital debt which exists on the date of separation is properly classified as a marital debt. Huguelet v. Huguelet, 113 N.C. App. 533, 439 S.E.2d 208, cert. denied, 336 N.C. 605, 447 S.E.2d 392 (1994).

Separate debt cannot be distributed; however, the trial court should consider such debt as a factor in deciding what constitutes an equitable division of the marital property. Fox v. Fox, 114 N.C. App. 125, 441 S.E.2d 613 (1994).

Federal Tax Lien Properly Classified as Marital Debt. — A federal tax lien on a masonry business started by the husband after the parties' marriage was properly determined to be a marital debt since the business profits were for the joint benefit of the parties as husband and wife during the marriage. Glaspy v. Glaspy, 143 N.C. App. 435, 545 S.E.2d 782, 2001 N.C. App. LEXIS 305 (2001).

Marital Property in Bankruptcy Proceedings. — Where a bankruptcy trustee objected to the use by a wife of her wild card exemption for property owned by her husband, a claim for equitable distribution was, under G.S. 50-20(b), a species of common ownership that vested at the time of the parties' separation; this vested right, however, did not create a property right in the marital property. In re Horstman, 276 Bankr. 80, 2002 Bankr. LEXIS 379 (Bankr. E.D.N.C. 2002).

C. Separate Property Generally.

Legislative Intent. — Subsection (b) expresses a clear legislative intent that separate property brought into the marriage or acquired by a spouse during the marriage be returned to that spouse, if possible, upon dissolution of the marriage. Friend-Novorska v. Novorska, 131 N.C. App. 508, 507 S.E.2d 900 (1998).

There is no requirement that spouse who owns separate property declare the intention that the property remain separate, or that the property for which separate property is exchanged be separate. Lewis v. Lewis, 98 N.C. App. 138, 389 S.E.2d 638, cert. denied, 327 N.C. 637, 399 S.E.2d 124 (1990).

Separate property remains separate property when it is exchanged for other separate property unless the conveyance states a contrary intention. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

Property acquired in exchange for separate property is separate property, as is income derived from separate property and as are increases in the value of separate property. Caudill v. Caudill, 131 N.C. App. 854, 509 S.E.2d 246 (1998).

Separate property is not subject to equitable distribution. McLeod v. McLeod, 74 N.C. App. 144, 327 S.E.2d 910, cert. denied, 314 N.C. 331, 333 S.E.2d 488 (1985).

And Must Be Returned to Spouse Who Owns It. — Separate property brought into the marriage or acquired by a spouse during the marriage must be returned to that spouse, if possible, upon dissolution of the marriage. Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260, cert. denied, 313 N.C. 612, 330 S.E.2d 616 (1985).

Separate Property Remained Separate Absent a Clear Expression of Intent to Give it to the Marital Estate. — When a husband moved a house he had owned prior to the parties' marriage onto a lot owned by the parties as tenants by the entirety, and the lot and house were sold, it was error for a trial court to classify all of the proceeds from that sale as marital property because, under G.S. 50-20(b)(2), the separate property remained separate absent a clear expression of the husband's intent to give the property to the marital estate, and there were no findings indicating such an intent, so the trial court had to determine how much of the proceeds were attributable to the husband's separate house, and how much were attributable to the lot. Goldston v. Goldston, 159 N.C. App. 180, 582 S.E.2d 685, 2003 N.C. App. LEXIS 1431 (2003).

Effect of Title. — Where land or personalty is purchased with the "separate property" of either spouse, it remains the "separate property" of that spouse, regardless of how the title is made. Mims v. Mims, 305 N.C. 41, 286 S.E.2d 779 (1982).

Passive Appreciation in Separate Property's Value Is Separate Property. — Subdivision (b)(2) of this section, which classifies an increase in value of separate property as separate property, refers only to an increase due to passive appreciation, which does not deplete the marital state. McLeod v. McLeod, 74 N.C. App. 144, 327 S.E.2d 910, cert. denied, 314 N.C. 331, 333 S.E.2d 488 (1985).

Increases in value of separate property remain separate property only to the extent that the increases are passive, as opposed to active appreciation resulting from the contributions of the parties during the marriage. Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

No Active Appreciation In Value of Medical License. — Where plaintiff was unable to show an increase in the value of defendant's medical license and the evidence tended to show that marital efforts led to the acquisition of the separate property rather than to an active increase in its value, the trial court did not err in refusing to value the active appreciation. Conway v. Conway, 131 N.C. App. 609, 508 S.E.2d 812 (1998).

No Difference Between Passive and Active Increases in Evaluating Contributions. — For the purposes of evaluating contributions to the marital economy for equitable distribution, there is no difference between "passive" increases in separate property (interest, inflation) and "active" increases brought about by the labor of third parties for whom neither spouse has responsibility. Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

Wife's Contribution to Husband's Separate Property. — Fact that wife's contributions to husband's separate property, a beach condominium, consisted of those functions which a homemaker performs did not disentitle her from having the appreciation in the property's value classified as marital property. Beightol v. Beightol, 90 N.C. App. 58, 367 S.E.2d 347, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Courts have consistently recognized the interest acquired by the nontitled spouse in separately-owned property which increases in value due to the personal efforts of the nontitled spouse. Beightol v. Beightol, 90 N.C. App. 58, 367 S.E.2d 347, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

There is no rule of law which even intimates that a nontitled spouse should be penalized and not allowed a return on his or her investment because the efforts expended were characteristic of those which a caring and loving spouse would have performed in any event. Beightol v. Beightol, 90 N.C. App. 58, 367 S.E.2d 347, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Annuity and Bank Account. — As to annuity and bank account acquired in exchange for separate property of husband, there was no error in the trial court's conclusion that the property remained the separate property of husband, where although husband added wife's name to the bank account and annuity, the record disclosed no evidence of any intention that the funds would not remain his separate property. Manes v. Harrison-Manes, 79 N.C. App. 170, 338 S.E.2d 815 (1986).

Social Security Disability Benefits. — The defendant's Social Security disability benefits should not have been valued within the marital estate and distributed as part of the marital estate. Cooper v. Cooper, 143 N.C. App. 322, 545 S.E.2d 775, 2001 N.C. App. LEXIS 270 (2001).

Spouse's Disability Benefits. — Where a spouse's disability benefits replaced the spouse's post-separation loss of earning capacity, the benefits were properly classified as separate marital property and was not includable in the property distribution. Finkel v. Finkel, 162 N.C. App. 344, 590 S.E.2d 472, 2004 N.C. App. LEXIS 117 (2004), cert. denied, 358 N.C. 234, 595 S.E.2d 150 (2004).

Separate Property Used to Pay Mortgage. — Separate property in the sum of $8,983.37 acquired by wife from her mother, which was used to help pay the mortgage on the family residence held as tenants by the entirety, became marital property upon such use. Draughon v. Draughon, 82 N.C. App. 738, 347 S.E.2d 871 (1986), cert. denied, 319 N.C. 103, 353 S.E.2d 107 (1987).

Where mortgage payments made after separation consisted entirely of defendant's separate property, it would appear that defendant should be credited with at least the amount by which he decreased the principal owed in the marital home. Hunt v. Hunt, 85 N.C. App. 484, 355 S.E.2d 519 (1987).

Despite fact that the plaintiff and the defendant shared custody of the children by alternating their presence in the marital home during the couple's separation, the court erred in failing to credit plaintiff with paying the entire mortgage debt on the marital property as of the date of separation. Hendricks v. Hendricks, 96 N.C. App. 462, 386 S.E.2d 84 (1989), cert. denied, 326 N.C. 264, 389 S.E.2d 113 (1990).

The entireties conveyance itself sufficiently indicated the "contrary intention" under this section to preserving separate property. Thompson v. Thompson, 93 N.C. App. 229, 377 S.E.2d 767 (1989).

Separate Property Exchanged for Property Owned as Tenants by the Entireties. — Husband was presumed to have made gift of separate property to marital estate where separate property was exchanged for residential lot which was owned by parties as tenants by the entireties without reservation of interest. Haywood v. Haywood, 106 N.C. App. 91, 415 S.E.2d 565, cert. denied, 331 N.C. 553, 418 S.E.2d 665 (1992), cert. denied, 331 N.C. 553, 418 S.E.2d 666 (1992).

House Bought with Proceeds of Separate Property. — The proceeds from the subsequent sale during marriage of a boat which husband had built before the marriage belonged to him, as the source of those funds, the boat, was his; when the monies were then used to construct husband's and wife's house, the house became the separate property of the husband, absent evidence that the home was taken by the entireties, or that husband made a gift of the house to his wife. Lewis v. Lewis, 98 N.C. App. 138, 389 S.E.2d 638, cert. denied, 327 N.C. 637, 399 S.E.2d 124 (1990).

Storage of Separate Property in Joint Safety Deposit Box. — Gold coins that were acquired in exchange for the plaintiff's separate property were the plaintiff's separate property. That the plaintiff stored the coins in a joint safety deposit box was not an express contrary intention in the conveyance that the coins be considered to be marital property. Haywood v. Haywood, 106 N.C. App. 91, 415 S.E.2d 565, cert. denied, 331 N.C. 553, 418 S.E.2d 665 (1992), cert. denied, 331 N.C. 553, 418 S.E.2d 666 (1992).

Where a $17,000 BMW was paid with $10,000 given to the husband by his grandmother and deposited by him in a joint bank account, and there was no evidence of any donative intent, absent the deposit, $10,000 of the BMW purchase price should be considered the husband's separate property. Tiryakian v. Tiryakian, 91 N.C. App. 128, 370 S.E.2d 852 (1988).

Where an automobile was purchased prior to marriage with a $7,000 down payment by husband, and was titled to both husband and wife, and they both made payments out of separate funds before marriage, and wife continued to make payments during separation, the automobile should not have been included as marital property in divorce proceedings but instead should have been apportioned pro rata to each estate (husband's separate, wife's separate, and marital). Tiryakian v. Tiryakian, 91 N.C. App. 128, 370 S.E.2d 852 (1988).

Trial court did not err in classifying husband's various aircraft, and related income, as his separate property, under G.S. 50-20(b)(2), because it was all traceable to an airplane the husband purchased prior to the parties' marriage. Fountain v. Fountain, 148 N.C. App. 329, 559 S.E.2d 25, 2002 N.C. App. LEXIS 36 (2002).

Trial Court Erred in Classifying Husband's Settlement Fees as Separate Property. — Husband's right, as partner of the law firm, to a share in the settlement fees was secured and established prior to the date of separation and could not be canceled; thus, pursuant to former G.S. 50-20(b)(1), it was error to classify the husband's portion of the settlement fee as the husband's separate property. Rice v. Rice, 159 N.C. App. 487, 584 S.E.2d 317, 2003 N.C. App. LEXIS 1496 (2003).

Nonvested Stock Options. — Stock options granted to an employee by his or her employer which are not exercisable as of the date of separation and which may be lost as a result of events occurring thereafter are not vested, and should be treated as the separate property of the spouse for whom they may, depending upon circumstances, vest at some time in the future. Hall v. Hall, 88 N.C. App. 297, 363 S.E.2d 189 (1987).

Money in Separate Account. — In divorce proceeding, where defendant argued that because her father gave money to her, and she deposited it in an account which was solely in her name, that the account should be classified as her separate property, however, the only evidence which was presented indicating donative intent as to this gift was defendant's testimony that "well, my daddy wants me to have this and I'm going to keep it separate," defendant did not meet the burden of showing by a preponderance of the evidence that the account met the definition of separate property. Johnson v. Johnson, 114 N.C. App. 589, 442 S.E.2d 533 (1994).

Inherited Funds Deposited in Joint Account. — Funds deposited into a joint account were the separate property of the husband, where the funds were inherited from the husband's mother even though he stated he intended to use part of the inheritance for marital purposes. Friend-Novorska v. Novorska, 131 N.C. App. 508, 507 S.E.2d 900 (1998).

Transmutation Doctrine Rejected. — The doctrine of transmutation is not recognized in this state, so that the mere commingling of marital funds with separate funds alone does not automatically transmute the separate property into marital property. O'Brien v. O'Brien, 131 N.C. App. 411, 508 S.E.2d 300 (1998).

Gifts to Spouse. — In equitable distribution cases, gifts to a spouse from the other spouse may be classified as separate property under subsection (b)(2). Milner v. Littlejohn, 126 N.C. App. 184, 484 S.E.2d 453 (1997).

The party seeking to show its separate nature must show by the preponderance of the evidence that the gift was given with such and intention. Milner v. Littlejohn, 126 N.C. App. 184, 484 S.E.2d 453 (1997).

Checks from the wife's aunt made out to the husband were the wife's separate property, where in attempting to distribute her property to her beneficiaries to avoid inheritance taxes, the aunt sent two $10,000 checks to the husband but noted in a letter her intention that the checks were gifts for the wife. O'Brien v. O'Brien, 131 N.C. App. 411, 508 S.E.2d 300 (1998).

Trial court's treatment of the husband's separate property interest in the medical practice as a distributional practice was not an abuse of discretion. White v. Davis, 163 N.C. App. 21, 592 S.E.2d 265, 2004 N.C. App. LEXIS 256 (2004).

D. Professional and Business Licenses.

Valuation of Professional Practice and Goodwill Generally. — In ordering an equitable distribution of marital property, a court should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied. The court may appoint an additional expert witness under G.S. 8C-1, Rule 706, if needed. On appeal, if it appears that the trial court reasonably approximated the net value of the practice and its goodwill, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed. Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266, cert. denied, 314 N.C. 543, 335 S.E.2d 316 (1985).

Where trial court established a net value for husband's landscaping business equal to the net value of the tangible assets of that business, and it could not be determined from the court's findings what method the court used in determining that the business had no goodwill and whether that determination was based on a sound method of valuation, the cause would be remanded for further findings as to the value of plaintiff's business. Draughon v. Draughon, 82 N.C. App. 738, 347 S.E.2d 871 (1986), cert. denied, 319 N.C. 103, 353 S.E.2d 107 (1987).

Criteria for valuation of a professional association set out in Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266, cert. denied, 314 N.C. 543, 335 S.E.2d 316 (1985), are factors for the court to consider in valuing a professional interest, and are not criteria for admissibility of the expert's opinion. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

Goodwill is an asset which must be valued and considered in determining the value of a professional practice for purposes of equitable distribution. Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266, cert. denied, 314 N.C. 543, 335 S.E.2d 316 (1985).

Trial court's recognition of the existence of corporation's goodwill, but failure to determine its value, was error. Locklear v. Locklear, 92 N.C. App. 299, 374 S.E.2d 406 (1988).

Method of Valuation. — Any legitimate method of valuation that measures the present value of goodwill by taking into account past results, and not the post-marital efforts of the professional spouse, is a proper method of valuing the goodwill of a professional practice. Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266, cert. denied, 314 N.C. 543, 335 S.E.2d 316 (1985).

Factors listed in Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266, cert. denied, 314 N.C. 543, 335 S.E.2d 316 (1985), as relevant in valuing goodwill, namely, age, health, reputation of the practitioner, nature of the practice, length of time in existence, profitability, and comparative professional success, are helpful, though not exclusive or absolute. McLean v. McLean, 323 N.C. 543, 374 S.E.2d 376 (1988).

When a professional practice has not been established for a sufficient period to determine goodwill based on comparable past earnings, the capitalization of excess earnings method of valuing goodwill should be used, which is based in part on the amount by which the earnings of the professional spouse exceed that which would have been earned by a person with similar education, experience, and skill as an employee in the same general locale. Conway v. Conway, 131 N.C. App. 609, 508 S.E.2d 812 (1998).

License to Practice Dentistry. — It was error for the trial court to fail to find that a spouse's license to practice dentistry was separate property. Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266, cert. denied, 314 N.C. 543, 335 S.E.2d 316 (1985).

In an equitable distribution action, the dental license of a practicing dentist was separate property, which the trial court should have considered as one of the factors affecting equitable distribution. Dorton v. Dorton, 77 N.C. App. 667, 336 S.E.2d 415, cert. denied, 314 N.C. 543, 335 S.E.2d 316 (1985).

Medical License and Interest in Medical Clinic. — The trial court did not commit error in concluding as a matter of law that the husband's medical license, including any increases or additions thereto, whether active or passive, as well as his interest in a medical clinic, constituted his separate property. Stewart v. Stewart, 141 N.C. App. 236, 541 S.E.2d 209, 2000 N.C. App. LEXIS 1439 (2000).

Value of Spouse's Law Practice. — On remand to determine the value of spouse's law practice, the trial court was directed to consider the following components of the association as enumerated in Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266, cert. denied, 314 N.C. 543, 335 S.E.2d 316 (1985): (a) its fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities. McLean v. McLean, 323 N.C. 543, 374 S.E.2d 376 (1988).

Appointment of Expert to Appraise Dental Practice. — In an equitable distribution action, the trial court has the authority under G.S. 8C-1, Rule 706 to appoint an expert witness to appraise the goodwill and other value of a dental practice. Dorton v. Dorton, 77 N.C. App. 677, 336 S.E.2d 415 (1985).

Criteria for admissibility of an expert opinion as to the value of a professional association set out in Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266, cert. denied, 314 N.C. 543, 335 S.E.2d 316 (1985), are factors for the court to consider in valuing the professional interest, and are not criteria for admissibility of the expert's opinion. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

Valuation Held Unsupported. — The trial court's valuation of a spouse's professional association, based on "available evidence including the tangible assets and net income" of the practice, did not appear to be based on a sound method of valuation, nor was it supported by the evidence, and for this reason the equitable distribution order was vacated and remanded for a new hearing. Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266, cert. denied, 314 N.C. 543, 335 S.E.2d 316 (1985).

E. Pension and Retirement Benefits.

Editor's Note. *— Some of the cases below were decided prior to the amendments to this section by Session Laws 1987, c. 663, and all were decided prior to the amendment by Session Laws 1991 (Reg. Sess., 1992), c. 960.*

As to distributive award of benefits, see also analysis line III. C., Distributive Awards.

Constitutionality of Reclassifying Pension as Marital Property. — Claim that husband's rights to due process and equal protection were violated because the Equitable Distribution Act was applied retroactively and in a way which took his property without compensation was meritless. Husband's expectation of a continuance of existing law relating to pension payments did not amount to a vested right. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

The 1987 amendment did not change the portion of the section permitting retirement benefits to be made payable "[a]s a prorated portion of benefits." In both versions of the section, the award is based on the benefits vested at the time of separation and must include any "growth" or "gains and losses" arising out of the vested benefits. Neither version permits an award based on contributions after the date of separation. Workman v. Workman, 106 N.C. App. 562, 418 S.E.2d 269 (1992).

Applicability of Amendment Making Vested Pension Rights Marital Property. — The 1983 amendment to this section which reclassified vested pension and retirement rights as marital property is applicable only to actions for absolute divorce filed on or after August 1, 1983. Morton v. Morton, 76 N.C. App. 295, 332 S.E.2d 736, cert. denied and appeal dismissed, 314 N.C. 667, 337 S.E.2d 582 (1985); Dewey v. Dewey, 77 N.C. App. 787, 336 S.E.2d 451 (1985), cert. denied, 316 N.C. 376, 344 S.E.2d 1 (1986).

Where an action for divorce is filed before August 1, 1983, all pension and retirement rights are considered separate property for purposes of equitable distribution. Where a divorce action is filed on or after August 1, 1983, vested pension and retirement rights are considered marital property, and the expectation of nonvested rights are considered separate property. Johnson v. Johnson, 74 N.C. App. 593, 328 S.E.2d 876 (1985).

The amendment of this section to include military pensions as marital property, made effective August 1, 1983, is presumed to apply prospectively only. Morris v. Morris, 79 N.C. App. 386, 339 S.E.2d 424, cert. denied, 316 N.C. 733, 345 S.E.2d 390 (1986).

In an action instituted on July 29, 1983, only three days prior to August 1, 1983, when amendment to subdivision (b)(1) of this section took effect making vested pension or retirement rights marital property, the trial court's consideration, under the "catchall" provision of subdivision (c)(12), of the timing of the action in deciding whether an equal distribution of the marital property would be equitable was essentially a superfluous restatement of its finding under subdivision (c)(5) as it then read, requiring the court to consider pension or retirement rights, and was not error. Peak v. Peak, 82 N.C. App. 700, 348 S.E.2d 353 (1986).

Defendant, an enlisted man, was not guaranteed the right to receive retirement benefits because defendant had served only 17 years in the military; therefore, defendant did not have a vested right to retirement benefits at the time the parties separated. George v. George, 115 N.C. App. 387, 444 S.E.2d 449 (1994).

Application of Equitable Distribution Held Not Retroactive When Pension Benefits Had Accrued Prior to Adoption. — Although the defendant's right to his pension benefits had accrued fully prior to the adoption of the Equitable Distribution Act and the August 1, 1983 amendment to G.S. 50-20 subjecting his pension to equitable distribution, the act and amendment did not affect his property interests until the plaintiffs claim for equitable distribution was filed on May 14, 1984, well after both the act and the amendment became effective. This was not a retroactive application of the act or of the amendment. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

1982 Agreement Held to Bar Share in Spouse's Military Pension. — Separation agreement entered into on August 2, 1982, which contained no reference to defendant-husband's military pension, but specifically provided that each party was forever barred from any or all rights or claims not therein reserved which arose out of the marital relation and that each party released and relinquished all claims or interest in and to all property of the other, whether then owned or subsequently acquired, barred an award to plaintiff wife under the Equitable Distribution Act of a share in defendant-husband's military pension; the subsequent amendment of the act effective August 1, 1983, to include military pensions as marital property, did not permit plaintiff-wife to avoid the release provisions of the agreement. Morris v. Morris, 79 N.C. App. 386, 339 S.E.2d 424, cert. denied, 316 N.C. 733, 345 S.E.2d 390 (1986).

Interest in Military Pension Not Dischargeable in Bankruptcy. — Marital property interests in a debtor's military pension are not dischargeable in bankruptcy. Walston v. Walston, 190 Bankr. 66 (E.D.N.C. 1995).

In the absence of an agreement of the parties, there are two methods for dividing retirement benefits: (1) award the pension to the employee-spouse and award other marital property of offsetting value to the other spouse under subdivision (b)(3)d, or (2) of this section divide the pension benefits if and when paid, under subdivision (b)(3)c of this section. The first method is known as the present value method, or the immediate offset method, while the second method is known as the fixed percentage method, or the deferred distribution method. Bishop v. Bishop, 113 N.C. App. 725, 440 S.E.2d 591 (1994).

Disability payments must be classified as the retiree's separate property and, as such, treated as a distributional factor. Bishop v. Bishop, 113 N.C. App. 725, 440 S.E.2d 591 (1994).

The amount of plaintiff's "disability retirement benefits" clearly attributable to his physical disability was plaintiff's separate property, under this section. Johnson v. Johnson, 117 N.C. App. 410, 450 S.E.2d 923 (1994).

Wife's Contributions as Homemaker to Husband's Vested Interest in Pension Plan. — In light of the subsequent recognition that vested pension and retirement rights should be considered marital property in the 1983 amendment to subsection (b)(1), fairness required that wife's contributions as a homemaker to the acquisition of at least husband's vested interests in the pension and profit sharing plans of his professional association should have been considered by the court under subsection (c)(12) in determining an equitable division of the marital property. Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266, cert. denied, 314 N.C. 543, 335 S.E.2d 316 (1985).

Because of the substantial disparity between the value of the pension benefits and the other assets of the parties, it was determined to be equitable to award fifty-five percent (55%) of the portion of the defendant's pension benefits that were accumulated during the marriage to the plaintiff, as provided for in subsection (b)(3)(c). Barlow v. Barlow, 116 N.C. App. 257, 447 S.E.2d 464 (1994).

The increased component of a retirement annuity, offered to a spouse only after separation and for which the spouse was not eligible without additional service after the date of separation, is separate property for purposes of equitable distribution, since the increase vested only after the date of separation, and since the incentive increase in pension benefits was compensation for the loss of future earnings. Boger v. Boger, 103 N.C. App. 340, 405 S.E.2d 591 (1991).

Gains on Retirement Benefits After Separation. — The trial court did not err by failing to account for and distribute gains which accrued on the parties' retirement benefits after the date of separation. Harvey v. Harvey, 112 N.C. App. 788, 437 S.E.2d 397 (1993).

Methods of Evaluation and Distribution. — For case discussing the relative advantages and disadvantages of the present discounted value method and the deferred distribution method in evaluating and distributing pension and retirement benefits, see Seifert v. Seifert, 82 N.C. App. 329, 346 S.E.2d 504 (1986), aff'd, 319 N.C. 367, 354 S.E.2d 506 (1987).

Distribution of Pension Was Not Restricted to Proportionally Equal Division. — Pursuant to former G.S. 50-20(b)(3), the trial court had various distributive choices that did not restrict it to a proportionally equal division of the pension itself as advocated by the wife. Rice v. Rice, 159 N.C. App. 487, 584 S.E.2d 317, 2003 N.C. App. LEXIS 1496 (2003).

Prescribed valuation method under this section can be expressed as a fraction. The numerator of the fraction is the total period of time the marriage existed (up to the date of separation) simultaneously with the employment which earned the vested pension or retirement rights; the denominator is the total amount of time the employee spouse is employed in the job which earned the vested pension or retirement rights. This statutorily prescribed fraction automatically provides the method by which to value the pension or retirement pay, as marital property, as of the date of separation, by requiring the numerator to be the amount of time up to the date of separation that the employment which earns the retirement pay exists simultaneously with the marriage period. Lewis v. Lewis, 83 N.C. App. 438, 350 S.E.2d 587 (1986).

Division of Retirement Pay Upheld. — Where at the time the parties separated defendant had been in the Marine Corps during the marriage for 21 years, and at the time of the equitable distribution hearing defendant had been in the Marine Corps for 30 years and thus had achieved the maximum amount of retirement pay permitted regardless of the number of years served, the trial court properly calculated the amount of military retirement pay attributable to the marriage as 21/30 or seventy percent (70%), and having determined that an equal division was equitable, properly awarded the wife one-half of this seventy percent (70%), or thirty-five percent (35%), of the defendant's gross military retirement pay, while limiting this award to fifty percent (50%) of the defendant's disposable retired or retainer pay, consistent with the requirement of this section. Lewis v. Lewis, 83 N.C. App. 438, 350 S.E.2d 587 (1986) (decided prior to 1992 amendment).

Trial court properly awarded nonemployee spouse joint and survivor annuity benefits and pre-retirement benefits. Workman v. Workman, 106 N.C. App. 562, 418 S.E.2d 269 (1992).

Because the trial court had not previously addressed the issues of retirement included in the separation agreement entered into by the parties pursuant to G.S. 50-20(d), the trial court had the authority to enter its subsequent order awarding the ex-wife a portion of the ex-husband's military retirement pay; additionally, the appellate court concluded that the retirement provision of the separation agreement was not so overly broad or vague as to prevent the trial court from awarding the wife a portion of the husband's retirement pay. Brenenstuhl v. Brenenstuhl, 169 N.C. App. 433, 610 S.E.2d 301, 2005 N.C. App. LEXIS 603 (2005).

Section 135-9 and this section do not mandate entry of a Qualified Domestic Relations Order to assign a retirement plan; therefore, the plain language of a property settlement agreement incorporated into a consent order served to secure ex-wife's 20% interest in her ex-husband's state university retirement plan. Patterson ex rel. Jordan v. Patterson, 137 N.C. App. 653, 529 S.E.2d 484, 2000 N.C. App. LEXIS 505 (2000).

Date-of-Separation Value for 401(k) Account. — The trial court erred in assigning a marital estate value to the 401(k) account other than its value on the date of separation. Cooper v. Cooper, 143 N.C. App. 322, 545 S.E.2d 775, 2001 N.C. App. LEXIS 270 (2001).

Calculation of Pension Value. — Under subsection (b)(3) the value of defendant's pension must be calculated as of the date of separation and years of service after the date of separation are not to be included in the valuation. Surrette v. Surrette, 114 N.C. App. 368, 442 S.E.2d 123 (1994).

Deferral of Distribution of Pension Benefits Held Error. — The trial court erred and abused its discretion when, after properly choosing in its discretion to use the present value evaluation method of husband's pension, it impermissibly postponed or deferred payment to wife instead of ordering immediate payment. Seifert v. Seifert, 82 N.C. App. 329, 346 S.E.2d 504 (1986), aff'd, 319 N.C. 367, 354 S.E.2d 506 (1987).

Court erred in deferring, until actual receipt, payments calculated under present valuation method of evaluating pension and retirement benefits. This, in effect, operated as a double reduction: plaintiff received a discounted value for immediate distribution, but nevertheless was required to wait to receive payment until, if and when, the defendant reached retirement and began receiving benefits. Seifert v. Seifert, 319 N.C. 367, 354 S.E.2d 506 (1987).

But Deferral Possible Under Fixed Percentage Method. — Under the fixed percentage method of evaluating pension and retirement benefits, deferral of payment is possible without unfairly reducing the value of the award. The present value of the pension or retirement benefits is not considered in determining the percentage to which the nonemployee spouse is entitled. Moreover, because the nonemployee spouse receives a percentage of the benefits actually paid to the employee spouse, the nonemployee spouse shares in any growth in the benefits. Yet, the formula gives the nonemployee spouse a percentage only of those benefits attributable to the period of the marriage, and that spouse does not share in benefits based on contributions made after the date of separation. Seifert v. Seifert, 319 N.C. 367, 354 S.E.2d 506 (1987).

Fifty-percent Cap Under Fixed Percentage Formula. — Use of the fixed percentage formula prohibits nonemployee spouse from receiving more than 50% of the retirement benefits. Workman v. Workman, 106 N.C. App. 562, 418 S.E.2d 269 (1992).

In-Kind Distribution, Anticipating Future Benefits, Allowed. — If the marital estate contains adequate property other than pension and retirement benefits, an in-kind or monetary distribution of these assets may be made which takes into account the anticipated pension and retirement benefits. This is impermissible only when the value of the pension or retirement benefits is so disproportionate in relation to other marital property that an immediate distribution would be inappropriate. Seifert v. Seifert, 319 N.C. 367, 354 S.E.2d 506 (1987).

Benefits of amended pension plan which listed the vesting date prior to the date of separation were properly classified as marital property, and the court was also correct in valuing the pension at its net value, by subtracting the taxes which defendant had paid thereon. Mishler v. Mishler, 90 N.C. App. 72, 367 S.E.2d 385, cert. denied, 323 N.C. 174, 373 S.E.2d 111 (1988).

Social Security Retirement Benefits Cannot Be Disbursed In Equitable Distribution Award. — Where at separation husband had received monthly Social Security retirement benefits of six hundred seventy-nine dollars ($679.00) and trial court awarded wife four-ninths of husband's Social Security, trial court erred in its award of Social Security benefits to wife since Social Security benefits cannot be disbursed in equitable distribution award. Cruise v. Cruise, 92 N.C. App. 586, 374 S.E.2d 882 (1989).

Court improperly used the withdrawal value of a pension plan as valuation method where the pension plan did not allow early withdrawal of accumulated monies. Stiller v. Stiller, 98 N.C. App. 80, 389 S.E.2d 619 (1990).

The trial court erred by failing to classify a husband's retirement account as either marital or separate property where the husband's partnership agreement provided for vesting and both the husband's and the wife's experts testified about the value of the retirement interest. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

Trial court erred in a divorce proceeding by classifying a wife's civil service retirement system pension as separate property; the General Assembly had indicated through the plain language of G.S. 50- 20(b)(1) that all pensions were to have been classified as marital property. Rowland v. Rowland, 175 N.C. App. 237, 623 S.E.2d 287, 2005 N.C. App. LEXIS 2716 (2005).

Burden Was on Husband to Show What Portion of His Pension Was Separate Property. — When a trial court classified a husband's pension plan solely as marital property, even though a portion of the plan's value was earned prior to the marriage, this was not error, as the husband did not meet his burden of showing what portion of the pension was separate property. Embler v. Embler, 159 N.C. App. 186, 582 S.E.2d 628, 2003 N.C. App. LEXIS 1421 (2003).

Failure to Rebut Presumption Spouse was Entitled to Half of 401K. — Wife was entitled to half the husband's 401(k) retirement account because the husband failed to rebut the presumption that the wife was entitled to half of the account and failed to meet the burden of showing what portion of the account was separate property. Helms v. Helms, 191 N.C. App. 19, 661 S.E.2d 906, 2008 N.C. App. LEXIS 1173 (2008).

Trial Court Properly Adopted Methodology Wife's Expert Used to Determine Life Expectancy. — Trial court properly applied step two of Bishop when adopting the methodology the wife's expert used to determine life expectancy because the expert performed precisely the calculations mandated by Bishop on a year-by-year basis until there would be no further life expectancy; the trial court's finding of fact setting out that methodology was sufficient to comply with Bishop. Cochran v. Cochran, — N.C. App. —, 679 S.E.2d 469, 2009 N.C. App. LEXIS 1161 (July 21, 2009).

III. DISTRIBUTION OF PROPERTY.

A. In General.

Only Marital Property Distributed. — Under subsection (c), only marital property is subject to distribution. Rogers v. Rogers, 90 N.C. App. 408, 368 S.E.2d 412, cert. denied, 323 N.C. 366, 373 S.E.2d 548 (1988).

Pursuant to G.S. 50-20(a), once the trial court found that the vehicle was separate property, that property was not subject to distribution, and the trial court erred in specifying that the car was the property of the couple's oldest child. The trial court had no authority to distribute separate property. Warren v. Warren, 175 N.C. App. 509, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

Only considerations which are just and proper within the meaning of subdivision (c)(12) of this section are those related to the marital economy. Burnett v. Burnett, 122 N.C. App. 712, 471 S.E.2d 649 (1996).

Both legal and equitable interests are subject to distribution as marital property. Upchurch v. Upchurch, 128 N.C. App. 461, 495 S.E.2d 738 (1998), cert. denied, 348 N.C. 291, 501 S.E.2d 925 (1998).

Statue Does Not Create a Substantive Property Right in Marital Property. — Claimant spouse's assertion of the "innocent owner" defense provided by 18 U.S.C.S. § 983(d) in her claim to a camper, failed because the spouse could not establish that the camper was owned as tenants by the entirety, and although the spouse asserted that she was an owner of the camper because it was martial property under the North Carolina equitable distribution statute, North Carolina law was clear that the equitable distribution statue did not create a substantive property right in marital property. United States v. 1999 Starcraft Camper Trailer, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 76839 (M.D.N.C. Oct. 10, 2006).

Subsection (c) of this section establishes a presumption of equal division of the marital property. White v. White, 64 N.C. App. 432, 308 S.E.2d 68 (1983); Smith v. Smith, 71 N.C. App. 242, 322 S.E.2d 393 (1984), modified and aff'd, 314 N.C. 80, 331 S.E.2d 682 (1985).

And Equal Division Is Mandatory Absent Determination That It Would Not Be Equitable. — This section is a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made mandatory unless the court determines that an equal division is not equitable. White v. White, 312 N.C. 770, 324 S.E.2d 829 (1985); Bradley v. Bradley, 78 N.C. App. 150, 336 S.E.2d 658 (1985); Hall v. Hall, 88 N.C. App. 297, 363 S.E.2d 189 (1987).

Equal division of marital property is mandatory unless the trial court determines that equal is not equitable. Coleman v. Coleman, 89 N.C. App. 107, 365 S.E.2d 178 (1988).

Equal division of the marital property mandatory, unless the court determines in the exercise of its discretion that such a distribution is inequitable. Beightol v. Beightol, 90 N.C. App. 58, 367 S.E.2d 347, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Right to Equitable Distribution Revived. — Although G.S. 50-11(e) requires that a claim for equitable distribution be brought prior to the granting of the divorce; where the trial court granted defendant relief from the judgment of absolute divorce and permitted defendant to file her answer, the effect was the same as if the judgment had never been entered, and defendant's right to equitable distribution was revived. Baker v. Baker, 115 N.C. App. 337, 444 S.E.2d 478 (1994).

Where an executrix appealed the trial court's order, which dismissed the decedent's claims for divorce and equitable distribution against the decedent's wife, the trial court improperly dismissed the executrix's equitable distribution claim on basis that the claim abated upon the decedent's death; as there was no final determination of the claim, it was still pending on the effective date of G.S. 50-20(l), which caused the statute to apply retroactively to the executrix's claim. Bowen v. Mabry, 154 N.C. App. 734, 572 S.E.2d 809, 2002 N.C. App. LEXIS 1541 (2002).

The trial court did not abuse its discretion in ordering an unequal division of the marital property in favor of the defendant where the trial court concluded that because the defendant had physical custody of the two minor children born of the marriage she had a need to occupy the marital residence and because the plaintiff had an income approximately twice the defendant's income an unequal division in favor of the defendant was equitable. Barlowe v. Barlowe, 113 N.C. App. 797, 440 S.E.2d 279 (1994), aff'd, 339 N.C. 732, 453 S.E.2d 865 (1995).

When evidence is presented from which a reasonable finder of fact could determine that an equal division would be inequitable, the trial court is required to consider the factors set forth in subsection (c), but guided always by the public policy expressed in the act favoring an equal division. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Burden of Proving That Equal Division Is Not Equitable. — A party desiring an unequal division of marital property bears the burden of producing evidence concerning one or more of the twelve factors in the statute and the burden of proving by a preponderance of the evidence that an equal division would not be equitable. White v. White, 312 N.C. 770, 324 S.E.2d 829 (1985); Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

Subsection (c) of this section requires an equal division unless the trial court, in its discretion, determines that an equal division would not be equitable. The party seeking a greater than equal share bears the burden of proving that an unequal division would be equitable with respect to the 12 factors listed under subsection (c). Dewey v. Dewey, 77 N.C. App. 787, 336 S.E.2d 451 (1985), cert. denied, 316 N.C. 376, 344 S.E.2d 1 (1986).

The burden is on the party seeking an unequal division of marital assets to prove by a preponderance of the evidence that an equal division is not equitable. Hall v. Hall, 88 N.C. App. 297, 363 S.E.2d 189 (1987).

Where the trial court has accepted an expert's methodology, a party desiring to challenge the methodology must produce other testimony challenging that methodology and set out the prejudicial error which resulted from its use. Sharp v. Sharp, 116 N.C. App. 513, 449 S.E.2d 39, cert. denied, 338 N.C. 669, 453 S.E.2d 181 (1994).

Failure in Burden to Present Evidence. — Where the party claiming a debt to be marital has failed in his burden to present evidence from which the trial court can classify, value and distribute the property, that party cannot on appeal claim error when the trial court fails to classify the property as marital and distribute it. Miller v. Miller, 97 N.C. App. 77, 387 S.E.2d 181 (1990).

Because defendant did not seek to set aside her stipulations and present evidence to the trial court as to the value of the property at the date of distribution, defendant was bound by her stipulations. Sharp v. Sharp, 116 N.C. App. 513, 449 S.E.2d 39, cert. denied, 338 N.C. 669, 453 S.E.2d 181 (1994).

Trial Judge Must Consider Distributional Factors. — Where the trial court's valuation of the marital home on the date of separation, the trial judge did not properly consider the post-separation appreciation as a distributional factor under subdivision (c)(11a) or (12). The trial judge must consider those distributional factors raised by the evidence of post-separation appreciation under subdivisions (c)(11a) and (12). Truesdale v. Truesdale, 89 N.C. App. 445, 366 S.E.2d 512 (1988).

Trial court erred in making no findings regarding the G.S. 50-20(c) factors and instead concluded only that an equal distribution of the property was equitable. The husband offered evidence in support of his request for an unequal distribution and the trial court was required to make findings of fact under G.S. 50-20(c) regarding any of the factors for which evidence was introduced at trial. Warren v. Warren, 175 N.C. App. 509, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

Task of a trial court when faced with an action under this section is to equitably distribute the marital property between the litigants. This is evident from the language and the title of the Act. White v. White, 312 N.C. 770, 324 S.E.2d 829 (1985).

Procedure to Be Followed. — In an action for equitable distribution, first the court must classify property as either marital or separate, as defined in subdivisions (b)(1) and (b)(2) of this section. Next it must divide the marital property equally, unless it determines that an equal division is not equitable. McLeod v. McLeod, 74 N.C. App. 144, 327 S.E.2d 910, cert. denied, 314 N.C. 331, 333 S.E.2d 488 (1985).

In applying the Equitable Distribution Statute, the trial judge must follow a three step procedure, i.e., (i) classification, (ii) evaluation and (iii) distribution. Cable v. Cable, 76 N.C. App. 134, 331 S.E.2d 765, cert. denied, 315 N.C. 182, 337 S.E.2d 856 (1985).

Under subsection (c) of this section, equitable distribution applies only to the net value of marital property. This requires the trial court to first ascertain what is marital property, then to find the net value of that property, and finally to make a distribution based upon the equitable goals of the statute and the various factors specified therein. Turner v. Turner, 64 N.C. App. 342, 307 S.E.2d 407 (1983); Lawrence v. Lawrence, 75 N.C. App. 592, 331 S.E.2d 186, cert. denied, 314 N.C. 541, 335 S.E.2d 18 (1985).

To equitably distribute property, it is necessary to identify the property owned, evaluate it and order its distribution. Capps v. Capps, 69 N.C. App. 755, 318 S.E.2d 346 (1984).

Court Must Weigh Factors and Balance Evidence. — When evidence tending to show that an equal division of marital property would not be equitable is admitted, the trial court must exercise its discretion in assigning the weight each factor should receive in any given case. It must then make an equitable division of the marital property by balancing the evidence presented by the parties in light of the legislative policy which favors equal division. White v. White, 312 N.C. 770, 324 S.E.2d 829 (1985).

Court Not Required to Read Distribution Proposal in Open Court. — Where record established facts from which it reasonably appeared that the parties understood the terms of a proposed distribution of marital property, including the fact that both parties were represented by counsel, that the parties had participated in an equitable distribution hearing, that the major asset was the marital home encumbered by a deed of trust and unpaid tax lien, and that the parties indicated that they either read or understood the terms of the proposed distribution, the trial court was not required to read to the parties in open court the terms of the proposed distribution of marital property. Watson v. Watson, 118 N.C. App. 534, 455 S.E.2d 866 (1995).

If a court divided the property equally after referring to this section and considering the factors and evidence, any improper reliance upon the statute could only result in harmless error, as the property was in fact divided equally. Eubanks v. Eubanks, 109 N.C. App. 127, 425 S.E.2d 742 (1993).

Guide as to Which Party Gets What Specific Property. — Once property has been properly designated marital property and valued, and the court has decided in what proportions its value should be divided, there appears to be no other guide than the discretion and good conscience of the trial judge in determining which party gets what specific property. An exception might arise with regard to the marital home or in cases of property of great sentimental value. Andrews v. Andrews, 79 N.C. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

Pleadings. — Since there is no specific requirement in this section regarding the correct manner in which to plead a claim for equitable distribution, where defendant joined in plaintiff's prayer for equitable distribution in his answer, the defendant's answer was, in effect, a counterclaim. Rabon v. Rabon, 102 N.C. App. 452, 402 S.E.2d 461 (1991).

Wife sufficiently preserved her claim to an equitable distribution of marital property under G.S. 50-11(e) when her answer to her husband's complaint for divorce requested and reserved a right to equitable distribution, because the remedy of equitable distribution in a divorce case only applied to marital assets, and G.S. 50-21(a) gave a party asserting a claim for such redress 90 days to provide specific information about the property claimed to be subject to equitable distribution; so, to constitute a valid equitable distribution claim, the wife's counterclaim for equitable distribution did not have to state that it applied to the parties' marital assets or property, and the husband was put on notice that the wife asked the court to equitably distribute the parties' marital and divisible property. Coleman v. Coleman, 182 N.C. App. 25, 641 S.E.2d 332, 2007 N.C. App. LEXIS 475 (2007).

Distribution of Articles Having No Net Value Not Required. — The Equitable Distribution Act requires the distribution of marital assets according to their "net value." It does not require the distribution of articles that have no net value. McManus v. McManus, 76 N.C. App. 588, 334 S.E.2d 270 (1985).

Deed of Trust Executed Without Wife's Consent Attached to Husband's Interest. — When defendants were divorced, the tenancy by the entirety in which their marital home was held became a tenancy in common, and the lien of deed of trust executed by husband without wife's consent attached to defendant husband's one-half undivided interest in the property. Thus when the marital home was distributed pursuant to this section, defendant wife took title in fee simple absolute, subject to plaintiff bank's deed of trust on defendant husband's one-half undivided interest. Branch Banking & Trust Co. v. Wright, 74 N.C. App. 550, 328 S.E.2d 840 (1985).

Equitable distribution judgment held incomplete and erroneous in several respects, i.e., failure to identify, classify, value and distribute various bank accounts and household property, failure to find net value of marital estate, failure to make findings pursuant to subsection (c) of this section, failure to properly divide and distribute three tracts of marital real estate, and failure to make conclusions of law. Carr v. Carr, 92 N.C. App. 378, 374 S.E.2d 426 (1988).

Defendant Entitled to Have Court Consider Post-Separation Appreciation. — Although defendant was entitled to have the trial court consider the post-separation appreciation of marital property and the effect the appreciation had on the parties, defendant was not necessarily entitled to a distribution of this post-separation appreciation. Sharp v. Sharp, 116 N.C. App. 513, 449 S.E.2d 39, cert. denied, 338 N.C. 669, 453 S.E.2d 181 (1994).

Post-Separation Rental Income. — Rental income received from marital property between the date of separation and the date of the equitable distribution action may not be added to the marital estate. Rather than distributing the sums representing the income received from marital property, the trial court must consider the existence of this income, determine to whose benefit the income has accrued, and then consider that benefit when determining whether an equal or unequal distribution of the marital estate would be equitable. Chandler v. Chandler, 108 N.C. App. 66, 422 S.E.2d 587 (1992).

Award of Rental Value of Marital Residence for Post Separation Period. — Trial court did not err in denying the application by the defendant for judgment against the plaintiff for one-half of the fair rental value of the residence of the parties from the time of the separation of the parties through the date of the hearing. Black v. Black, 94 N.C. App. 220, 379 S.E.2d 879 (1989).

Post-Separation Appreciation of a Marital Asset Cannot Be Distributed. — Post-separation appreciation of a marital asset, whether passive appreciation or appreciation due to the efforts of an individual spouse, is not marital property and cannot be distributed by the trial court. Gum v. Gum, 107 N.C. App. 734, 421 S.E.2d 788 (1992).

But Should Be Considered as a Distributional Factor. — An increase in the value of a marital asset which occurs after separation of the parties but before the date of the equitable distribution trial should be considered pursuant to subdivisions (c)(11a) or (c)(12) as a distributional factor by the court in its determination of what constitutes an equitable distribution of the marital estate. Chandler v. Chandler, 108 N.C. App. 66, 422 S.E.2d 587 (1992).

Failure to File For Equitable Distribution Because of Misrepresentation. — If plaintiff did not file a claim for equitable distribution before the entry of the divorce judgment due to misrepresentations made by defendant, the trial court is not barred from making an equitable distribution. Where defendant's misrepresentation caused the plaintiff to forego pleading for equitable distribution prior to divorce, the defendant shall be equitably estopped from pleading G.S. 50-11(e) as a bar to plaintiff's claim for an equitable distribution of the marital property. Harroff v. Harroff, 100 N.C. App. 686, 398 S.E.2d 340 (1990), discretionary review denied, 328 N.C. 330, 402 S.E.2d 833 (1991).

Death Subsequent to Claim for Equitable Distribution. — Ex-wife's death, which came subsequent to her divorce from plaintiff and which followed the institution of the claim for equitable distribution, did not abate her estate's action for equitable distribution. Tucker v. Miller, 113 N.C. App. 785, 440 S.E.2d 315 (1994).

Plaintiff's actions in dissuading his brother from seeking criminal charges against defendant did not affect the marital economy and therefore was not a proper distributional factor under subdivision (c)(12). Wornom v. Wornom, 126 N.C. App. 461, 485 S.E.2d 856 (1997).

Voluntary Dismissal of Claim. — Where at the time the plaintiff filed his voluntary dismissal of his claim for equitable distribution, the defendant had filed no pleadings, plaintiff was free to enter his voluntary dismissal of his equitable distribution claim without any notice to the defendant or the defendant's consent. Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991).

Credit Not Allowed. — Defendant was not entitled to a credit for debts incurred by defendant for paying a house cleaning bill, grocery bills, a clothing bill, a telephone bill, dry cleaning bills, etc., which debts were incurred after separation. Edwards v. Edwards, 110 N.C. App. 1, 428 S.E.2d 834, cert. denied, 335 N.C. 172, 436 S.E.2d 374 (1993).

Credit for Debt Payment Properly Given Through Credit to Support Arrearage. — Trial court properly considered the husband's postseparation payments made towards the marital debt and gave him credit for those payments through a credit to his postseparation support arrearage, and properly found that, as a result of this credit, there was no divisible property related to the husband's interest payments. Wirth v. Wirth, — N.C. App. —, 668 S.E.2d 603, 2008 N.C. App. LEXIS 2023 (2008).

Unequal Division Upheld. — Where at the time the division of property was to become effective wife had no earnings and was receiving no monies other than those in the form of child support, food stamps, and Aid to Families with Dependent Children (AFDC), whereas husband had earnings of at least five to six thousand dollars a year, this evidence supported the court's finding that there was a disparity in the parties' income within the meaning of subdivision (c)(1) of this section and tended to show that an equal division of the marital property would not be equitable, and the Court of Appeals could not say that the trial court abused its discretion in ordering an unequal division in favor of wife, particularly in light of wife's poor health. Bradley v. Bradley, 78 N.C. App. 150, 336 S.E.2d 658 (1985).

Findings of the court that an equal distribution would not be equitable, relying on child custody, household services, and difficulty of evaluation factors, supported the court's discretionary decision to make an unequal distribution. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986), overruled in part on other grounds, Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Although none of the equitable distribution cases suggest that a spouse should take out of the marriage exactly that which was brought into it, plus at least one half of the marital estate, defendant who was awarded just that had no reason to complain. Nix v. Nix, 80 N.C. App. 110, 341 S.E.2d 116 (1986).

Defendant mother's custody of children, children's residency in family home for most of their lives, their attendance at nearby schools, and defendant's need to occupy the marital residence (i.e., her lower income) were all factors supporting trial court's disproportionate award in equitable distribution proceeding. Hendricks v. Hendricks, 96 N.C. App. 462, 386 S.E.2d 84 (1989), cert. denied, 326 N.C. 264, 389 S.E.2d 113 (1990).

Where the trial court found the presence of a number of distributional factors, including appellee's payment of property taxes, interest, insurance, and repairs on marital property over a period of three years, the trial court did not err in ordering an unequal distribution of marital property. Cobb v. Cobb, 107 N.C. App. 382, 420 S.E.2d 212 (1992).

Trial court's findings were sufficient to support its finding of an unequal division where the plaintiff established five grounds, including the parties disparate income and future earning capacity, present and future pension benefits, the liquidity of the marital assets and tax consequences to each party, and plaintiff's mortgage payments. Mrozek v. Mrozek, 129 N.C. App. 43, 496 S.E.2d 836 (1998).

Trial court did not abuse its discretion by ordering an unequal distribution of the marital property and the ordered division did not result in an obvious miscarriage of justice. Davis v. Sineath, 129 N.C. App. 353, 498 S.E.2d 629 (1998).

Trial court did not err in awarding an unequal division of divisible property because the fact that a former husband's pension, when received, would constitute taxable income was not a tax consequence resulting from the ordered equitable distribution; as for the evidence that the former wife would not be taxed on any gain received upon a sale of the marital home, because there was no evidence that any such sale would be necessary or was imminent, the evidence presented merely a speculative tax consequence as to which the trial court could not make a finding of fact. Cochran v. Cochran, — N.C. App. —, 679 S.E.2d 469, 2009 N.C. App. LEXIS 1161 (July 21, 2009).

Where the district court's jurisdiction over equitable distribution was not invoked prior to a judgment for absolute divorce, the superior court was not precluded from exercising jurisdiction over the former husband's action for contribution pursuant to §n/ 23-5-116. Sparks v. Peacock, 129 N.C. App. 640, 500 S.E.2d 116 (1998).

Appellate Review. — In an equitable distribution of marital property, a trial court's discretion in determining the equitable distribution of marital property will not be upset on appeal absent a clear abuse of discretion; in order to reverse a trial court's equitable distribution judgment on appeal, it must be found that it was unsupported by the evidence. Urciolo v. Urciolo, 166 N.C. App. 504, 601 S.E.2d 905, 2004 N.C. App. LEXIS 1726 (2004).

Insufficient Findings to Support Award. — In an equitable distribution of the marital property case, a distribution award to a wife in the amount of $25,000 was reversed where the trial court failed to make any findings as to whether the presumption of an in-kind distribution had been rebutted and whether the husband had sufficient liquid assets to pay the distributive award. Urciolo v. Urciolo, 166 N.C. App. 504, 601 S.E.2d 905, 2004 N.C. App. LEXIS 1726 (2004).

Although it did not order an in-kind distribution of the parcel of land, the trial court erred because it made no findings of fact or conclusions of law regarding the in-kind presumption and whether it was rebutted, pursuant to G.S. 50-20(e). Warren v. Warren, 175 N.C. App. 509, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

B. Factors to Be Considered.

Single Factor May Support Unequal Distribution. — A finding that a single factor supported an unequal distribution, if supported by the evidence, would be within the court's discretion and upheld on appeal. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986), overruled in part on other grounds, Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988); Shoffner v. Shoffner, 91 N.C. App. 399, 371 S.E.2d 749 (1988).

Findings as to the parties' incomes, liabilities or health and other factors must be made and considered, when evidence concerning them is introduced, in determining whether marital property has been equitably divided. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

If, at an equitable distribution hearing, evidence concerning the income and health of the parties tends to show that an equal division of the marital property is inequitable, the trial court must make findings of fact as to these factors. Taylor v. Taylor, 92 N.C. App. 413, 374 S.E.2d 644 (1988).

Substantial Income Findings Properly Considered. — Court made findings required by G.S. 50-20 when it found, inter alia, that the husband had substantial income, and that the husband's age and health problems did not prevent the husband from earning income. Squires v. Squires, 178 N.C. App. 251, 631 S.E.2d 156, 2006 N.C. App. LEXIS 1410 (2006).

Timing of Professional Career. — The trial court property considered the brief amount of time which elapsed between the opening of defendant's medical practice and the termination of the marriage in determining the extent of plaintiff's contribution to defendant's career potential and development. Conway v. Conway, 131 N.C. App. 609, 508 S.E.2d 812 (1998).

Separate Property to Be Considered in Determining Division of Marital Property. — In determining an equitable division of the marital property, the court must consider the separate property owned by each party at the time the property division is to become effective. Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

A spouse's contribution of his separate property to acquire property titled in the entireties, and classified as marital, qualifies as a distributional factor under subsection (c). Collins v. Collins, 125 N.C. App. 113, 479 S.E.2d 240 (1997).

A spouse's contribution of his separate property to the marital estate is a distributional factor under subdivision (c)(12). Collins v. Collins, 125 N.C. App. 113, 479 S.E.2d 240 (1997).

Considering Source of Property Held by

the Entireties is Error. — The trial court could not award to the husband the entire interest in a tree farm on the ground that the source of the interest was the husband's mother as the mother gave an equal interest to the husband and wife, and the parties thereafter titled their separate interests as a tenancy by the entireties. Daetwyler v. Daetwyler, 130 N.C. App. 246, 502 S.E.2d 662 (1998), aff'd, 350 N.C. 375, 514 S.E.2d 89 (1999).

Court Authorized to Consider Parties' Future Prospects. — The factors listed under subsection (c) of this section indicate that the Legislature intended to grant the trial court the authority to consider the future prospects of the parties, as well as their status at the time of the hearing, in determining whether an equal division of marital assets would be equitable. Harris v. Harris, 84 N.C. App. 353, 352 S.E.2d 869 (1987).

Future Events Not Considered in Determining Marital Property Value. — While trial court had authority on remand to reassess the date of separation value of a logging company, the trial court erred in its consideration of estimated expenses associated with the possible future sale of the logging company since the sale of the logging company was a hypothetical future event uncertain in both occurrence and amount. Crowder v. Crowder, 147 N.C. App. 677, 556 S.E.2d 639, 2001 N.C. App. LEXIS 1233 (2001).

The future value of timber, which is planted but will not mature until some years in the future, should not be considered for the purposes of equitable distribution. Cobb v. Cobb, 107 N.C. App. 382, 420 S.E.2d 212 (1992).

Increase in Value of Marital Property. — Trial court did not err in considering, as a distributional factor, that the value of the marital property had increased from the date of the separation to the date of the trial and that such increase inured to the benefit of the defendant husband. Atkins v. Atkins, 102 N.C. App. 199, 401 S.E.2d 784 (1991).

While the trial court made findings with respect to the value of the real property as of the date of separation, it made no findings with respect to the value of the tracts as of the date of distribution, notwithstanding some evidence that the values had changed and thus failed to identify and determine the value of the divisible property from the date of separation to the date of distribution and hence could not properly and equitably distribute the divisible property. Edwards v. Edwards, 152 N.C. App. 185, 566 S.E.2d 847, 2002 N.C. App. LEXIS 890 (2002), cert. denied, 356 U.S. 611, 356 N.C. 611, 574 S.E.2d 679 (2002).

Post-separation appreciation, only refers to that which accumulates to the date of the order for equitable distribution, not in the future. If the rule allowed otherwise, parties would attempt to project the future value of any number of items of marital property, and the equitable distribution trial would become overwhelmingly complicated. Cobb v. Cobb, 107 N.C. App. 382, 420 S.E.2d 212 (1992).

Increase in Value of Stock. — Where it was established by the court's findings of fact that defendant's stock had no value when parties separated and that its increase in value was largely due to his efforts, award of the post-separation increase therein to defendant was authorized by G.S. 50-20(c)(11a) and (12). Nye v. Nye, 100 N.C. App. 326, 396 S.E.2d 91 (1990).

Consideration of Penalties Caused by Distribution of Thrift Plan. — Evidence was sufficient to require the trial court to make appropriate findings concerning husband's thrift plan before ordering the husband to make a lump sum distributive award from the plan where such a withdrawal would result in the loss of employer contributions or harsh tax consequences. Shaw v. Shaw, 117 N.C. App. 552, 451 S.E.2d 648 (1995).

Spouse's Earning Potential to Be Considered. — The trial court properly considered the defendant husband's earning potential as a factor leading to its determination that an equal division would be inequitable. Harris v. Harris, 84 N.C. App. 353, 352 S.E.2d 869 (1987).

Loan Eligibility of Spouse. — Defendant's VA loan eligibility did not constitute distributable property for purposes of equitable distribution. Jones v. Jones, 121 N.C. App. 523, 466 S.E.2d 342 (1996).

Subdivision (c)(1) of this section requires the court to consider all debts of the parties, whether a debt is one for which the parties are legally, jointly liable or one for which only one party is legally, individually liable. Geer v. Geer, 84 N.C. App. 471, 353 S.E.2d 427 (1987).

Marital Debt. — Regardless of who is legally obligated for the debt, for the purposes of an equitable distribution, a marital debt is defined as a debt incurred during the marriage for the joint benefit of the parties. Geer v. Geer, 84 N.C. App. 471, 353 S.E.2d 427 (1987); Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987).

The mere fact that a judgment was entered against both spouses is not alone evidence sufficient to require classification of the debt as marital. Miller v. Miller, 97 N.C. App. 77, 387 S.E.2d 181 (1990).

Pursuant to equitable distribution statute, the trial court is required to classify, value and distribute, if marital, the debts of the parties to the marriage. The party claiming the debt to be marital has the burden of proving the value of the debt on the date of separation and that it was incurred during the marriage for the joint benefit of the husband and wife. Miller v. Miller, 97 N.C. App. 77, 387 S.E.2d 181 (1990).

Distribution of Marital Debts. — The court has the discretion, when determining what constitutes an equitable distribution of the marital assets, to also apportion or distribute the marital debts in an equitable manner. Geer v. Geer, 84 N.C. App. 471, 353 S.E.2d 427 (1987).

When the court distributes debts, the court must make findings to show it considered all debts of the parties and to identify those which comprise marital debts. Geer v. Geer, 84 N.C. App. 471, 353 S.E.2d 427 (1987).

Under this section, the court had the discretion to assign one-half of the marital debts to each party and to then award defendant additional funds sufficient to pay plaintiff's one-half share of the debt. Geer v. Geer, 84 N.C. App. 471, 353 S.E.2d 427 (1987).

Since the assets and obligations of a husband and wife are reciprocally related, there can be no complete and equitable distribution of their property without also considering and distributing their debt. Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987).

Credit for Decreasing Marital Debt. — The court must credit a former spouse with at least the amount by which he decreased the principal owed on marital debt by using his separate funds. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

Marital Residence. — While paragraph (4) of subsection (c) of this section requires the court to consider the custodial parent's need to occupy the marital residence, it does not require that a party must be a custodial parent in order to be awarded ownership of the marital residence. Geer v. Geer, 84 N.C. App. 471, 353 S.E.2d 427 (1987).

Need of spouse to occupy the marital residence, unless it involves a spouse with custody of children, does not relate to the economic condition of the marriage and is not properly considered as a distributional factor under subdivision (c)(12) of this section. Burnett v. Burnett, 122 N.C. App. 712, 471 S.E.2d 649 (1996).

A trial court is not foreclosed from considering the post-separation use of the marital residence in reaching its decision as to whether an equal distribution is equitable. Becker v. Becker, 88 N.C. App. 606, 364 S.E.2d 175 (1988).

A party's exclusive use of marital residence subsequent to date of separation is a relevant distributional factor. Burnett v. Burnett, 122 N.C. App. 712, 471 S.E.2d 649 (1996).

Payment by One of Spouses on Marital Home Mortgage. — Payment by one of the spouses, after the date of separation, on a marital home mortgage is a factor appropriately considered by the trial court pursuant to subdivisions (c)(11a) and (c)(12) in determining what division of marital property is equitable. However, trial court correctly refused to credit husband with any mortgage payments he made after the separation of the parties where they had stipulated that an equal division of property was equitable. Miller v. Miller, 97 N.C. App. 77, 387 S.E.2d 181 (1990).

The trial court did not err by failing to credit plaintiff with reducing mortgage on marital home and paying for taxes and insurance, where the court found that plaintiff made mortgage payments on the property since the date of separation, paid property taxes on the residence for one year, and paid homeowner's insurance premiums for three years, and also considered these facts as a distributional factor. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

Trial court properly considered defendant's post-separation payments toward mortgages as a distributional factor under subdivision (c)(11a) rather than crediting defendant for those payments. Edwards v. Edwards, 110 N.C. App. 1, 428 S.E.2d 834, cert. denied, 335 N.C. 172, 436 S.E.2d 374 (1993).

There was no error in an unequal distribution of marital property given one of the former spouse's post-separation mortgage payments, which benefited the other spouse, who was awarded the marital home. Fitzgerald v. Fitzgerald, 161 N.C. App. 414, 588 S.E.2d 517, 2003 N.C. App. LEXIS 2196 (2003).

Post-Separation Payments for Upkeep on Property Awarded to Spouse Making Payments. — To accommodate post-separation payments for the benefit or use of marital property, the trial court may treat post-separation payments as distributional factors, or provide direct credits for the benefit of the spouse making the payments; it was not an abuse of discretion to deny credits requested for the upkeep of marital property ultimately awarded to the spouse making the payments. Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

Payment by One of Spouses on Marital Home Mortgage. — It was not an abuse of discretion for the trial court to treat the husband's post-separation mortgage and other debt payments as distributional factors, under G.S. 50-20(c)(11a), (12), rather than giving the husband a dollar-for-dollar credit for them. Hay v. Hay, 148 N.C. App. 649, 559 S.E.2d 268, 2002 N.C. App. LEXIS 48 (2002).

Appreciation in the value of the marital home resulting from the husband's post-separation mortgage payments was not divisible property, as defined by G.S. 50-20(b)(4)a, because it resulted from the activities of one spouse. Hay v. Hay, 148 N.C. App. 649, 559 S.E.2d 268, 2002 N.C. App. LEXIS 48 (2002).

Waiver of Child Support. — In the absence of a separation agreement, nothing in the statute requires the trial court to take a waiver of child support into account in calculating an equitable distribution. To the contrary, the determination of child support is to be made separately from that of equitable distribution. Wieneck-Adams v. Adams, 104 N.C. App. 621, 410 S.E.2d 525 (1991), aff'd, 331 N.C. 688, 417 S.E.2d 449 (1992).

Custody is not an appropriate consideration within this section. The only factors considered "just and proper" within the meaning of the section are those relating to the source, availability, and use by a wife and husband of economic resources during the course of their marriage. Gum v. Gum, 107 N.C. App. 734, 421 S.E.2d 788 (1992).

Need of Custodial Parent as Justification for Unequal Distribution. — Under the facts, the need of the parent with custody of the child of the marriage to occupy the marital residence and to use or own household effects alone justified the unequal distribution of marital property, without requiring the trial judge to simply recite the other factors. Patterson v. Patterson, 81 N.C. App. 255, 343 S.E.2d 595 (1986).

Obligation to Care for Child. — The trial court erred by considering plaintiff's separate obligation to care for child as a distributional factor. Pott v. Pott, 126 N.C. App. 285, 484 S.E.2d 822 (1997).

Distributional Factors Did Not Include Obligation for the Wife's Child as the Husband Was Not Her Father. — Distributional factor found by the trial court did not address the husband's child support obligations but instead recognized his voluntary assumption of responsibilities and was therefore, properly considered under the catch-all provision of G.S. 50-20(c)(12) because the husband was not the father of the wife's daughter and had no legal obligation to care for the daughter. Rice v. Rice, 159 N.C. App. 487, 584 S.E.2d 317, 2003 N.C. App. LEXIS 1496 (2003).

Distributional Factors Do Not Control Classification of Property Under G.S. 50-20(b). — Trial court must follow three distinct analytical steps in making an equitable distribution award; it is only after the property has been classified as marital or separate property that the trial court applies the distributional factors found in G.S. 50-20(c) to effect an equitable distribution of marital property and while § 50-20(c) contains a number of factors the trial court may consider, § 50-20(c) does not manifest any intent that a distributional factor control the classification of property under subsection (b). Estate of Nelson v. Nelson, 179 N.C. App. 166, 633 S.E.2d 124, 2006 N.C. App. LEXIS 1831 (2006).

Value of Contributions by Nonstudent Spouse. — The Legislature gave no guidance on the issue of how to value the direct and indirect contributions of the nonstudent spouse under paragraph (7) of subdivision (c) of this section; thus, as with any statutory factor under subsection (c), it is a matter of discretion what weight the court assigns a particular factor in any given case. Geer v. Geer, 84 N.C. App. 471, 353 S.E.2d 427 (1987).

Professional Licenses. — As this section expressly provides that professional licenses are separate property, professional licenses are not subject to valuation and distribution; nevertheless, the Legislature recognized the need to consider the contributions of one spouse that enhance the career of the other when determining what constitutes an equitable result. Geer v. Geer, 84 N.C. App. 471, 353 S.E.2d 427 (1987).

Subdivision (c)(12) Is Limited to Considerations Relevant to Marital Economy. — Only items affecting the marital economy are considered under the first eleven factors of subsection (c). Thus, under subdivision (c)(12), the only other considerations which are "just and proper" within the theory of equitable distributions as expressed by subdivisions (c)(1) to (c)(11) are those which are relevant to the marital economy. Smith v. Smith, 314 N.C. 80, 331 S.E.2d 682 (1985).

The only factors which may properly be considered under the catchall provision of subdivision (c)(12) of this section are those factors which are relevant to the marital economy. Marital economy relates to the source, availability and use by the wife and husband of economic resources during the course of the marriage. Johnson v. Johnson, 78 N.C. App. 787, 338 S.E.2d 567 (1986).

Wife's cosmetic surgeries and choice to reside in another state during the marriage were inappropriate distribution factors considered by the trial court in making its equitable distribution under G.S. 50-20(c). Fountain v. Fountain, 148 N.C. App. 329, 559 S.E.2d 25, 2002 N.C. App. LEXIS 36 (2002).

The trial court failed to consider defendant's contributions to the marital estate as a distributional factor under subdivision (c)(12) of this section. Minter v. Minter, 111 N.C. App. 321, 432 S.E.2d 720, cert. denied, 335 N.C. 176, 438 S.E.2d 201 (1993).

Consideration of Post-Separation Income. — Where post-separation income is not a result of either party's action, the income can be considered as "any other distributional factor" under subdivision (c)(12). Chandler v. Chandler, 108 N.C. App. 66, 422 S.E.2d 587 (1992).

Monies Paid by Husband to Wife After Separation Were Advances. — Trial court correctly treated the $45,457 paid to wife as a distributional factor under subdivision (c)(11) or (12) of this section. Interspousal gifts under subdivision (b)(2) of this section do not become the separate property of the recipient spouse unless the donor expresses the intention to make a gift. This rule is applicable to an even greater extent after the parties have separated. As a matter of public policy, if trial courts are not allowed to consider such payments as distributional factors, then the spouse with possession of marital property during the period between separation and the order of equitable distribution may seek to hold this marital property exclusively. Cobb v. Cobb, 107 N.C. App. 382, 420 S.E.2d 212 (1992).

When Fault May Be Considered. — The general rule is that marital fault or misconduct of the parties which is not related to the economic condition of the marriage is not germane to a division of marital property and should not be considered. However, fault which is related to the economic condition of the marriage may be considered. Spence v. Jones, 83 N.C. App. 8, 348 S.E.2d 819 (1986).

Fault or misconduct which dissipates or reduces marital property for nonmarital purposes is just and proper to consider under subdivision (c)(12) of this section. Spence v. Jones, 83 N.C. App. 8, 348 S.E.2d 819 (1986).

Misconduct during the marriage which dissipates or reduces the value of marital assets for nonmarital purposes may properly be considered under this section, because it is consonant with the essential philosophy of equitable distribution. Smith v. Smith, 314 N.C. 80, 331 S.E.2d 682 (1985); Coleman v. Coleman, 89 N.C. App. 107, 365 S.E.2d 178 (1988).

Marital fault or misconduct which does not adversely affect the value of marital assets is not a just and proper factor within the meaning of subdivision (c)(12). Smith v. Smith, 314 N.C. 80, 331 S.E.2d 682 (1985); Dusenberry v. Dusenberry, 314 N.C. 608, 335 S.E.2d 892 (1985); Dewey v. Dewey, 77 N.C. App. 787, 336 S.E.2d 451 (1985), cert. denied, 316 N.C. 376, 344 S.E.2d 1 (1986).

Fault is not a relevant or appropriate consideration in determining an equitable distribution of marital property. Hinton v. Hinton, 70 N.C. App. 665, 321 S.E.2d 161 (1984).

Sanctions for Marital Misconduct That Has No Economic Impact on Marital Estate. — Marital misconduct that has no resulting economic impact on the marital estate may nonetheless have other consequences; for instance, the spouse can be sanctioned for the willful obstruction of an equitable distribution proceeding, directed to pay for costs incurred for the return of the other spouse's separate property, or be subject to an inspection for the purpose of inventory and valuation. Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

Removal of Spouse's Separate Property. — The trial court properly considered evidence that the defendant wife removed or disposed of the plaintiff husband's separate property as a non-statutory distributional factor where (1) the wife entered the dwelling of the husband after separation and removed approximately $4,000 worth of property, including all the furniture in the house with the exception of a bed, chair, and kitchen table, (2) she then entered the home again at a later date and removed such items as food, guns, a leather coat, frozen meats, and personal items of the plaintiff, and (3) she even hauled off their 1971 Chevy pickup truck and sold it for $400. Glaspy v. Glaspy, 143 N.C. App. 435, 545 S.E.2d 782, 2001 N.C. App. LEXIS 305 (2001).

Removal of Property Awarded to Spouse Who Removed It. — Wife's removal of truckloads of marital property from the marital home immediately pursuant to the parties' separation constituted marital misconduct, but the trial court erred in considering this as a distributional factor; as the property removed was awarded to the wife, there was no economic effect on the marital estate. Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

Misconduct During Litigation May Not Be Considered. — The court may not punish a plaintiff by considering his misconduct during litigation as a factor under subdivision (c)(12). Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260, cert. denied, 313 N.C. 612, 330 S.E.2d 616 (1985).

Failure to comply with discovery orders, or misconducting oneself during the course of litigation may not be considered as a factor in determining the distribution of marital property. Shoffner v. Shoffner, 91 N.C. App. 399, 371 S.E.2d 749 (1988).

When the failure to assist in the compilation and valuation of marital property during litigation causes one party to incur additional expenses, the court may consider such a purely financial consideration in making its distributive award. This is equivalent to the proper consideration of marital misconduct which is related to the economic condition of the marriage as a factor in making the distributive award. Shoffner v. Shoffner, 91 N.C. App. 399, 371 S.E.2d 749 (1988).

Parties' Premarital Relationship. — Recitation in the findings of the extramarital nature of the parties' premarital relationship suggested that the trial judge may have improperly considered fault in making the distribution; however, where the husband did not assert, nor was there anything to indicate that he was prejudiced by, this consideration, the error, if any, was harmless. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

Meaning of "Income". — The legislature used the word "income" in subdivision (c)(1) of this section to convey its natural and ordinary meaning. Bradley v. Bradley, 78 N.C. App. 150, 336 S.E.2d 658 (1985).

Food Stamps Are Not Income. — Based on 7 U.S.C. § 2017(b), which provides that the value of food stamp allotment provided to an eligible household shall not be considered income or resources for any purpose under any federal, state or local laws, the value of food stamps received by a party may not be considered as income under subdivision (c)(1) of this section. Bradley v. Bradley, 78 N.C. App. 150, 336 S.E.2d 658 (1985).

Child Support and AFDC Are Not Income. — Since the amounts received by a spouse in the form of child support and Aid to Families with Dependent Children (AFDC) are for the benefit and support of the parties' children, they are not income within the meaning of subdivision (c)(1) of this section. Bradley v. Bradley, 78 N.C. App. 150, 336 S.E.2d 658 (1985).

Working Outside Home and Participating in Child-Rearing and Homekeeping. — Under subdivision (c)(12) of this section, it is within the trial court's equitable powers to consider that one spouse worked outside the home and participated in child-rearing and homekeeping, while the other spouse only participated in child-rearing and homekeeping. Dorton v. Dorton, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

Consideration of Unvalued Inheritance and Fact of Appraisal Held Error. — Where there was no evidence to support the value of the inheritance the husband received from his mother, it was error for the trial court to consider as a distributional factor under subdivision (c)(1) of this section that the husband had received an inheritance of "significant value" from his mother's estate; furthermore, since the party claiming property to be marital has the burden of presenting evidence on the value of such property, it was error to consider as a distributional factor that the party with the burden of proof had the property appraised and the appraiser testified as to the value of the property. Atkins v. Atkins, 102 N.C. App. 199, 401 S.E.2d 784 (1991).

Decrease in Separate Property Through Activities Which Increased Marital Estate. — Where the marital estate was increased due to activities which decreased the value of wife's separate property, this decrease in separate property through depreciation related to the economy of the marriage; thus, the court properly considered this depreciation under subdivision (c)(12) when dividing the marital property. Johnson v. Johnson, 78 N.C. App. 787, 338 S.E.2d 567 (1986).

Disregarding Family Corporation Held Error. — Action of the trial court in equitable distribution action in disregarding the corporate entity of a family corporation on the grounds that the corporation was a "sham," and in distributing the assets of the corporation as marital property, but holding defendant personally liable for $23,000 worth of notes and deeds of trust which she had executed, apparently in the name of the corporation, after the parties separated, constituted reversible error, where several of the reasons cited by the trial court for disregarding the corporate entity were unsupported by the evidence or were irrelevant. Dorton v. Dorton, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

Trial court did not err in forbidding either party from receiving a commission or broker's fee on the sale of the marital home (the order being directed primarily at defendant, a licensed real estate broker), since if the parties could sell the home by themselves, without paying a real estate commission, then the net proceeds of the sale would be greater and there would be more marital property for equitable distribution. This was an equitable factor that the trial court could consider. Dorton v. Dorton, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

In case involving equitable distribution, trial court is required to consider liabilities of each party, whether the debts are joint or individual. Mishler v. Mishler, 90 N.C. App. 72, 367 S.E.2d 385, cert. denied, 323 N.C. 174, 373 S.E.2d 111 (1988).

Attribution of husband's payment of $3,000 debt accumulated by wife and minor children for necessities after date of separation to husband's continuing obligation to support his minor children did not constitute an improper use of child support to inflate the income of either party in violation of subsection (f) of this section, but, rather, was a determination that the debt was incurred to purchase necessities after the parties' separation. Beightol v. Beightol, 90 N.C. App. 58, 367 S.E.2d 347, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Failure of Court to Find Distributional Factors. — In determining an appropriate distribution of the marital property, the trial court erred by failing to consider the following factors: (1) evidence that the husband paid homeowner's insurance premiums on the marital home between the date of separation and the date of the trial should have been considered as a distributional factor under subdivision (c)(11a); (2) evidence that the husband was primarily responsible for maintaining and preserving the marital property between the date of separation and the date of trial also should have been considered as a distributional factor under subdivision (c)(11a); and (3) evidence that the wife earned a larger income than the husband should have been considered by the trial court as a distributional factor under subdivision (c)(1). Atkins v. Atkins, 102 N.C. App. 199, 401 S.E.2d 784 (1991).

It was error for a trial court to order an equitable distribution of divorcing parties' marital property under G.S. 50-20(b)(2) or (4) because the court did not make written findings supporting its determination, it did not indicate whether an equal division was an equitable division, and it could not be determined whether the court had properly valued, classified, and distributed the property. Davis v. Davis, 360 N.C. 518, 631 S.E.2d 114, 2006 N.C. LEXIS 593 (2006).

Statutory Factors Did Not Have to Be Considered. — Trial court did not err by determining reimbursement to a wife was equitable, even though the G.S. 50-20(c) factors were not considered, as the post-separation mortgage payments made by the wife while the husband was in exclusive possession of the marital home were not "divisible property," and the trial court was not required by G.S. 50-20(c) to consider the statutory factors; the trial court was only required to make a "reasoned decision." Cooke v. Cooke, 185 N.C. App. 101, 647 S.E.2d 662, 2007 N.C. App. LEXIS 1747 (2007).

C. Distributive Awards.

Subdivision (b)(3) of this section authorizes the court to make distributive awards for periods of not more than six years after the date on which the marriage ceases, except upon a showing by the payor spouse that legal or business impediments, or some overriding social policy, prevent completion of the distribution within the six-year period. Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

As Does Subsection (e). — Subsection (e) of this section clearly recognizes that the court may make a distributive award, payable over an extended period. Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

But a court's authority to make distributive awards is limited, and a court may not enter a distributive award that will be treated as ordinary income under the Internal Revenue Code. Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

Distributive awards for periods longer than six years, if necessary, should be crafted to assure completion of payment as promptly as possible. This will serve both statutory goals: Affording the recipient's share nonrecognition treatment under the Internal Revenue Code, and fairly wrapping up the marital affairs as quickly and certainly as possible. Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

Seven Year Payment Schedule Held Erroneous. — Where the court's decision to award the marital residence to the plaintiff wife resulted in property having a net value of $78,978.00 being distributed to her, while property passing to the defendant husband had a net value of only $13,140.63, the distributive award of $23,706.82 which the court ordered the wife to pay to the husband was within the authority vested in the court by subdivision (e) of this section; however, where the payment of the distributive award would not become due for more than seven years after the termination of the marriage, and the trial court made no findings which would permit completion of the payment of the distributive award beyond six years from the date the parties' marriage was terminated, that portion of the order providing for the distributive award would be vacated and the case remanded for further proceedings. Harris v. Harris, 84 N.C. App. 353, 352 S.E.2d 869 (1987).

18.3 Year Payment Schedule Held Erroneous. — Where payor husband made no showing of legal or business impediments to an earlier distribution, the 18.3 year payment schedule of distributive award to wife was erroneous as a matter of law and would be vacated. Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

Trial court erred in failing to make findings concerning the possible financial and tax consequences to a husband of paying a distributive award to the wife within 90 days, as such findings were required under G.S. 50-20(c); the trial court also should have considered the husband's liabilities along with his income. Robertson v. Robertson, 167 N.C. App. 567, 605 S.E.2d 667, 2004 N.C. App. LEXIS 2332 (2004).

Where escrow balance was not included in the trial court's net valuation of the marital home or otherwise considered in the order, the trial court erred by failing to properly distribute this asset. Pott v. Pott, 126 N.C. App. 285, 484 S.E.2d 822 (1997).

The trial court did not abuse its discretion in ordering an unequal distribution of the marital estate in favor of the defendant/husband, the effect of which was that he received $100,000 more than he would have received under an equal division and resulted in a split between the couple of their four Hallmark stores, nor was it error for the court to consider certain post-separation payments made by him, taxes incurred as a result of the forced sale of a residence, financial losses, and the allocation of associated debts as distributional factors. Khajanchi v. Khajanchi, 140 N.C. App. 552, 537 S.E.2d 845, 2000 N.C. App. LEXIS 1245 (2000).

Real Property. — While a hunting land and lodge had the potential to be a money-making business, neither party had the financial ability to "buy-out" the other party's share by paying a sizeable distributive award, thus, while economically desirable to keep the land and hunting lodge together, such a division was not possible, and the real estate had to be substantially split in order to achieve an equitable distribution. Edwards v. Edwards, 152 N.C. App. 185, 566 S.E.2d 847, 2002 N.C. App. LEXIS 890 (2002), cert. denied, 356 U.S. 611, 356 N.C. 611, 574 S.E.2d 679 (2002).

Reimbursement of Post-Separation Payments. — While the trial court erred in categorizing a wife's post-separation payments of a mortgage while a husband was in exclusive possession of the martial home as a distribution of divisible property, as the payments pre-dated the amendment to G.S. 50-20(b)(4)(d) and were not divisible property, the error did not require remand as the trial court had authority to reimburse the wife for her post-separation mortgage payments. Cooke v. Cooke, 185 N.C. App. 101, 647 S.E.2d 662, 2007 N.C. App. LEXIS 1747 (2007).

Distributive Award is a Sum Certain and Does Not Include Gains and/or Losses. — Retirement account award has to include gains and losses on the prorated portion of the benefit vested at the date of separation; however, a distributive award is a sum certain and does not include gains and/or losses. Harris v. Harris, 162 N.C. App. 511, 591 S.E.2d 560, 2004 N.C. App. LEXIS 183 (2004).

Distributive award that the trial court entered in favor of an ex-wife after her former husband died was not part of the husband's estate, and the trial court properly ordered the husband's personal representative to pay the award before she paid claims against the estate. Painter-Jamieson v. Painter, 163 N.C. App. 527, 594 S.E.2d 217, 2004 N.C. App. LEXIS 400 (2004).

Although it was likely that a distributive award in lieu of in-kind distribution was proper in light of the far greater involvement of one spouse than the other in a family-owned business, the trial court would have to provide more detailed findings to support its decision against in-kind distribution; the order already adequately identified sources of payment for such an award where it referenced both the proceeds of a refinancing of the former marital home and income received from the family business. Allen v. Allen, 168 N.C. App. 368, 607 S.E.2d 331, 2005 N.C. App. LEXIS 265 (2005).

Motion for Equitable Distribution Filed Before Divorce Was Absolute Was Valid. — Trial court erred in granting a husband's motion to dismiss a wife's motion for equitable distribution, pursuant to G.S. 50-20, in a divorce action where the wife filed the motion on the day before the judgment was signed by the judge and filed, at which point the judgment became final pursuant to G.S. 1A-1-58; therefore, G.S. 50-11(e) did not destroy the wife's right to seek equitable distribution as the motion was filed before an absolute divorce was granted. Santana v. Santana, 171 N.C. App. 432, 614 S.E.2d 438, 2005 N.C. App. LEXIS 1204 (2005).

Distributive Award Proper. — Contrary to the husband's argument, the trial court's order distributing several business holdings to the wife in a divorce case and in ordering the wife to pay a distributive award of $220,542 was proper despite the husband's claim that the wife did not possess any business experience or acumen; the record revealed that the business interests distributed to the wife did not require the active operation or management by the wife. Five businesses should have been distributed to one person in order to maximize the value of the companies. Wirth v. Wirth, — N.C. App. —, 668 S.E.2d 603, 2008 N.C. App. LEXIS 2023 (2008).

IV. VALUATION OF PROPERTY.

Subsection (a) of this section effectively provides for the "freezing" of the marital estate as of the date of the parties' separation, and marital assets, distributed thereafter, are valued as of that date; attempts by one or both spouses to deplete the marital estate or dispose of marital property after the date of separation but before distribution may be considered by the court when making the division, and any conversion of marital property for individual purposes may be charged against the acting spouse's share. Sharp v. Sharp, 84 N.C. App. 128, 351 S.E.2d 799 (1987).

Net Value Used to Determine Equitable Distribution. — In determining what distribution of the property is equitable, the court must use the net value of the property rather than its fair market value. Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260, cert. denied, 313 N.C. 612, 330 S.E.2d 616 (1985).

Net value, rather than fair market value, is the proper measure for valuing marital property for equitable distribution. Little v. Little, 74 N.C. App. 12, 327 S.E.2d 283 (1985).

The division of marital property is to be accomplished by using the net value of the property, i.e., its market value, if any, less the amount of any encumbrance serving to offset or reduce market value. Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Date of Separation to Be Used in Valuing Property. — The trial court did not err in failing to consider the current fair market value of all marital assets. Subsection (b) of this section provides that for purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties.

Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

Since the trial court was required by G.S. 50-21(b) to find the value of the IRA as of the date of separation, the court did not err by doing so. The husband's evidence was more properly considered as a distributional factor under G.S. 50-20(c). Warren v. Warren, 175 N.C. App. 509, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

For the test for determining the date of separation under the equitable distribution statutes, see Hall v. Hall, 88 N.C. App. 297, 363 S.E.2d 189 (1987).

Appreciation Is Factor to Be Considered. — Post-separation appreciation of marital property itself is neither marital nor separate property. Such appreciation must instead be treated as a distributional factor under subdivision (c)(11a) or (12). Truesdale v. Truesdale, 89 N.C. App. 445, 366 S.E.2d 512 (1988).

Where there is evidence of active or passive appreciation of marital assets after the date of separation, the court must consider the appreciation of the assets as a factor under subdivisions (c)(11a) or (12) of this section. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

Diminution in Value of Marital Property. — Trial court found both parties at fault in the diminution in value of the marital residence due to failure to maintain and repair it; the trial court therefore erred in failing to divide the diminution in value between the parties. Robertson v. Robertson, 167 N.C. App. 567, 605 S.E.2d 667, 2004 N.C. App. LEXIS 2332 (2004).

Failure to Classify Corporation's Loss in Value as Divisible Property was Error. — Trial court's failure in a divorce case to classify a corporation's loss in value as divisible property was error because, although the husband was the sole stockholder of the corporation, the trial court specifically stated that it was impossible to determine what portion of the loss was due to the husband's postseparation management and what part was due to forces beyond his control; thus, the G.S. 50-20(b)(4)(a) presumption was unrebutted. Wirth v. Wirth, — N.C. App. —, 668 S.E.2d 603, 2008 N.C. App. LEXIS 2023 (2008).

When Separation Held to Occur. — Where at all times prior to December 26, 1983, the relationship between plaintiff and defendant was of such a character as to give the appearance that they were husband and wife living together and that they held themselves out to be such, their separation, as that term is defined by case law, did not occur until December 26, 1983. Hall v. Hall, 88 N.C. App. 297, 363 S.E.2d 189 (1987).

Meaning of "Net Value". — The term "net value" is to be given its ordinary and commonly understood interpretation: i.e., market value, if any, less the amount of any encumbrance serving to offset or reduce market value. Alexander v. Alexander, 68 N.C. App. 548, 315 S.E.2d 772 (1984); Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266 (1985); Nix v. Nix, 80 N.C. App. 110, 341 S.E.2d 116 (1986).

Meaning of "Equity". — Equity is net value of property, i.e., its present value minus the outstanding mortgage. Willis v. Willis, 86 N.C. App. 546, 358 S.E.2d 571 (1987).

Meaning of "Presently Owned." — The term "presently owned" under subdivision (b)(1) refers to the date of separation. Wornom v. Wornom, 126 N.C. App. 461, 485 S.E.2d 856 (1997).

Failure of judge to value marital property as of date of separation was error prejudicial to wife. By looking only to funds in husband's account at time of equitable distribution hearing, rather than at time of separation, judge failed to properly trace marital property. Account in question was established by husband after separation and before hearing, and funds deposited to account came from three sources, two of which were part marital and part separate and one of which was wholly marital. Willis v. Willis, 86 N.C. App. 546, 358 S.E.2d 571 (1987).

The trial court erred in considering post-separation events in determining the value of the marital corporation where the case arose prior to the 1997 amendments to the Equitable Distribution Act; events which occurred following the date of separation were to be considered only as distributional factors under this section while events which occurred prior to the separation—for example, the wife's freezing the equity line which, for all practical purposes, destroyed the relationship between the marital corporation and its major client—could be considered in valuation of the property. Offerman v. Offerman, 137 N.C. App. 289, 527 S.E.2d 684, 2000 N.C. App. LEXIS 328 (2000).

Trial Court Is Required to Value Property Stipulated to Be Marital. — When parties to an equitable distribution action make a valid stipulation that certain property is to be classified as marital property, the trial court is nonetheless required to value and distribute that property. Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987).

Property Must Be Valued Before It Is Distributed. — Subsection (c) of this section requires the trial court to determine what is marital property, then to find the net value of the property, and finally to make an equitable distribution of that property; thus, where the court made some findings and conclusions regarding marital property, but did not place a value on the marital home, its order that the marital home be sold for not less than $140,000 was at least premature, as the court had not placed a value upon the marital property.

Soares v. Soares, 86 N.C. App. 369, 357 S.E.2d 418 (1987).

No Requirement to Assign Monetary Value to Medical License. — Having classified the husband's medical license as separate property and considered it as having "very substantial value" in making equitable distribution, the trial court did not err in refusing to assign it a monetary value. Conway v. Conway, 131 N.C. App. 609, 508 S.E.2d 812 (1998).

This section does not require the trial court to place a monetary value on any distributional factor; this would be an unnecessary burden upon the trial court. Gum v. Gum, 107 N.C. App. 734, 421 S.E.2d 788 (1992).

Dual Classification and Valuation. — Although evidence supported judge's dual classification of marital home, in that the home was acquired in part by separate estate and in part by marital estate, judge erred by assigning a combined marital and separate property value when he distributed property. Trial judge must divide the equity based on the proportion invested by marital and separate estates. Willis v. Willis, 86 N.C. App. 546, 358 S.E.2d 571 (1987).

Mortgage payments are acquisitive, not appreciative. Active/passive distinction concerning appreciation has no utility when property has dual classification (i.e., was acquired in part with separate property and in part with marital property). Each estate, marital and separate, is entitled to a proportionate return on its investment whether appreciation is active or passive. Willis v. Willis, 86 N.C. App. 546, 358 S.E.2d 571 (1987).

Valuation of Property After Separation Held Proper. — There was no error when the trial court based its distribution of the marital property on evidence of values of the marital property assigned after the date of the parties' separation, where although plaintiff and defendant were separated on December 24, 1984, the court valued the parties' pensions as of December 31, 1984, defendant failed to demonstrate that either of the parties made any additional contributions, or that any additional interest had accrued to the retirement plans during the seven day interval between the parties' date of separation and the date of valuation. Shoffner v. Shoffner, 91 N.C. App. 399, 371 S.E.2d 749 (1988).

Items Charged on Credit Card. — Court erred in its equitable distribution judgment by including the gross fair-market value of those marital properties which had an outstanding credit card balance and then failing to credit plaintiff for the debt; however, since plaintiff was awarded all of the items charged on the credit card in the property division award, the error was not prejudicial. Hendricks v. Hendricks, 96 N.C. App. 462, 386 S.E.2d 84 (1989), cert. denied, 326 N.C. 264, 389 S.E.2d 113 (1990).

Value of Truck and Lease of Truck. — Trial court did not commit error in assigning a value to, and including as marital property of the parties, both the net fair market value of the truck, and the net present fair market value of a lease of truck; the truck and the lease were two separate items of property and, therefore, the trial judge properly valued the truck and the lease as separate assets. Black v. Black, 94 N.C. App. 220, 379 S.E.2d 879 (1989).

Value of Growing Timber. — Trial judge correctly included the actual value of the land and timber at the date of separation. Because neither party presented evidence of appreciation, if any, between the time of separation and the order for equitable distribution, the trial judge was not required to find the presence of this distributional factor. Cobb v. Cobb, 107 N.C. App. 382, 420 S.E.2d 212 (1992).

For a thorough consideration of valuation and distribution of a considerable marital estate, see Smith v. Smith, 111 N.C. App. 460, 433 S.E.2d 196, petition denied as to additional issues, 335 N.C. 177, 438 S.E.2d 202 (1993), rev'd on other grounds, 336 N.C. 575, 444 S.E.2d 420 (1994).

Valuation Upheld. — Trial court's valuation of a 1995 Harley-Davidson motorcycle was upheld on appeal where the husband never objected to the fair market value that the trial court placed on the machine, and the trial court had made sufficient findings of fact that showed the motorcycle had a net equity value of $1,952.00. Urciolo v. Urciolo, 166 N.C. App. 504, 601 S.E.2d 905, 2004 N.C. App. LEXIS 1726 (2004).

Trial court's finding pursuant to G.S. 50-21(b) that the pickup truck had a value on the date of separation of $4,860.00 was supported by competent evidence. Warren v. Warren, 175 N.C. App. 509, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

Trial court did not err in valuing the real property portion of the marital property between a former husband and former wife because the only evidence the husband used to contradict the trial court's findings on the valuation of the land was his own testimony, which consisted of unsupported statements; those bald, self-serving statements did not constitute a basis for concluding that the trial court abused its discretion in the valuation. Troutman v. Troutman, — N.C. App. —, 667 S.E.2d 506, 2008 N.C. App. LEXIS 1803 (2008).

Valuation Held Erroneous. — Evidence held insufficient to support trial court's valuation of marital home for purposes of equitable distribution of the marital property. Coleman v. Coleman, 89 N.C. App. 107, 365 S.E.2d 178 (1988).

Appellate court was unable to determine whether a trial court in a dissolution of marriage proceeding properly found that equal distribution was inequitable in the case because, without the benefit of proper classification, valuation, and listing of all the property owned by the parties, the court could not discern whether the trial court's method of distribution was unreasonable or arbitrary; furthermore, because of the number and degree of errors the trial court committed, the appellate court concluded that a new trial was required. Dalgewicz v. Dalgewicz, 167 N.C. App. 412, 606 S.E.2d 164, 2004 N.C. App. LEXIS 2375 (2004).

Offer to Purchase or Sell as Evidence of Value. — While mere offers to purchase or sell are not generally competent as evidence of value, where the offer constitutes an admission against interest, operating against the landowner's or offeror's contended value, the rule has been relaxed. Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

For case upholding the valuation and award of the stock of a minority shareholder in a closely-held corporation in equitable distribution proceedings, see Hartman v. Hartman, 82 N.C. App. 167, 346 S.E.2d 196 (1986), aff'd, 319 N.C. 397, 354 S.E.2d 239 (1987).

Legal Malpractice Claim Failed as Client Did Not Value Marital Estate. — Client's legal malpractice action failed as even assuming an attorney negligently failed to advise the client or to value the client's estate properly under G.S. 50-20(e) and G.S. 50-21(b), the client made no forecast of the value of the marital estate as of the date of separation and therefore as to the value of the client's equitable distribution claim; thus, the client failed to show that any negligence by the attorney proximately caused damage to the client. Young v. Gum, 185 N.C. App. 642, 649 S.E.2d 469, 2007 N.C. App. LEXIS 1951 (2007).

Valuation of Partnership Interest. — When considering the value of a spouse's interest in a business partnership, the task of the appellate court on review is to determine whether the approach used by the trial court reasonably approximates the net value of the partnership interest. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

The withdrawal formula for valuing a partnership interest is presumptively correct, though it may be attacked if not reasonably representative of the value of the defendant's interest. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

In valuing husband's interest in a business partnership, the trial court did not err by using a withdrawal formula, as opposed to a book value approach. Nor did it err by using the withdrawal formula found in the partnership agreement. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

Where there was no evidence that defendant had actually withdrawn his partnership interest, or that the distribution ordered by the court would require him to do so, but the court deducted from the value of defendant's partnership interest the amount of income tax defendant would have owed had he withdrawn his partnership interest, it was improper for the court to consider such hypothetical and speculative tax consequences in valuing defendant's partnership interest. Harvey v. Harvey, 112 N.C. App. 788, 437 S.E.2d 397 (1993).

Downward adjustment in value of stock awarded to the spouse who had generally not managed the couple's investments to reflect loss in value between the date of separation and entry of equitable distribution was not improper where there was no showing that the loss in value had anything to do with actions or failures to act on the part of the manager spouse. Allen v. Allen, 168 N.C. App. 368, 607 S.E.2d 331, 2005 N.C. App. LEXIS 265 (2005).

Debts. — Trial court erred by failing to consider defendant's obligation on notes created to establish accounting firm and erred by finding defendant earned $120,000 a year without sufficient evidence. Pott v. Pott, 126 N.C. App. 285, 484 S.E.2d 822 (1997).

With respect to the increased amount paid as a result of the wife's $7,500.00 post-separation draw on the line of credit, the draw and the resulting finance charges and interest were not marital debt (or divisible property) and, therefore, the trial court had no authority to distribute that debt. The trial court was directed on remand to take into account the husband's payment of finance charges incurred for the wife's separate debt. Warren v. Warren, 175 N.C. App. 509, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

Classification of a husband's post-separation payment toward a mortgage on marital property as divisible property was proper because all post-separation payments of a marital debt were classified as divisible property pursuant to G.S. 50-20(b)(4)(d). McNeely v. McNeely, — N.C. App. —, 673 S.E.2d 778, 2009 N.C. App. LEXIS 247 (2009).

V. AGREEMENTS.

This section did not purport to change the general validity of separation agreements or to modify existing agreements. McArthur v. McArthur, 68 N.C. App. 484, 315 S.E.2d 344 (1984).

Subsection (d) was enacted to insure against fraud and overreaching on the part of one of the spouses. McIntosh v. McIntosh, 74 N.C. App. 554, 328 S.E.2d 600 (1985).

Effect of Subsection (d). — By the enactment of subsection (d) of this section, the General Assembly manifested a clear intent to change the former rule which required the actual separation of the parties to a marriage in order for a property settlement to be effective between spouses. Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984).

The public policy of the state, as expressed by subsection (d) of this section, permits spouses to execute a property settlement at any time, regardless of whether they separate immediately thereafter or not. Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984).

Trial court did not err by allowing equitable distribution of property acquired during the parties' marriage as the parties' prenuptial agreement did not waive their claims to equitable distribution, G.S. 50-20(d); based on the former husband's stated intentions regarding the creation of the agreement, his discussions with an attorney, and the actual language of the agreement, the trial court could properly find that the agreement constituted a "free trader" agreement that did not waive the parties' rights to equitable distribution. McIntyre v. McIntyre, 188 N.C. App. 26, 654 S.E.2d 798, 2008 N.C. App. LEXIS 85 (2008).

Subsection (d) did not reverse a prior public policy against agreements releasing spousal property rights; by incorporating G.S. 52-10, it instead mandated, among other things, that the policy favoring property settlements continue so that a prior settlement of spousal property rights would also constitute a plea in bar to the equitable distribution of "marital" property under G.S. 50-20. Small v. Small, 93 N.C. App. 614, 379 S.E.2d 273, cert. denied, 325 N.C. 273, 384 S.E.2d 519 (1989).

Interpretation of Settlement Agreement. — District court erred by interpreting a property settlement agreement via a declaratory judgment action brought by an ex-husband against his ex-wife because the proper remedy with regard to interpreting the agreement, which had been incorporated into a consent judgment of divorce, was a contempt proceeding and not an independent declaratory judgment action; as a result, the district court lacked subject matter jurisdiction of the matter and the order interpreting the agreement, which was in favor of the ex-husband, was vacated on appeal. Fucito v. Francis, 175 N.C. App. 144, 622 S.E.2d 660, 2005 N.C. App. LEXIS 2715 (2005).

Separation Agreement Fully Disposing of Property Rights. — If a court finds that a separation agreement fully disposes of the parties' rights arising out of the marriage, the court may not set aside the separation agreement and property settlement, absent fraud or misrepresentation. A separation agreement and property settlement entered into by the parties which fully disposes of the property rights arising out of a marriage acts as a bar to equitable distribution. Rabon v. Rabon, 102 N.C. App. 452, 402 S.E.2d 461 (1991).

Release of Rights Did Not Violate Public Policy. — Wife's release of property rights under 1980 Post-Nuptial Contract did not violate public policy simply because it was executed prior to the adoption of subsection (d) of this section. Small v. Small, 93 N.C. App. 614, 379 S.E.2d 273, cert. denied, 325 N.C. 273, 384 S.E.2d 519 (1989).

Right to Cancel Separation Agreement. — In enacting subsection (d) of this section, the General Assembly did not intend that a written separation agreement, once entered into, would be forever binding or forever a bar to an equitable distribution action. Rather, the parties to separation agreements must still be able to cancel their agreements, and the indicia of the intent to cancel as developed in the common law must also still be intact. Carlton v. Carlton, 74 N.C. App. 690, 329 S.E.2d 682 (1985).

When Separation Agreement Is Valid. — To be valid, a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties. McIntosh v. McIntosh, 74 N.C. App. 554, 328 S.E.2d 600 (1985).

Failure of husband and wife to separate until 31 days after the execution of a separation and property settlement agreement did not render the post-separation support and alimony provisions null and void. Newland v. Newland, 129 N.C. App. 418, 498 S.E.2d 855 (1998).

Transactions Between Spouses Must Be Fair and Reasonable. — The relationship between a husband and a wife is the most confidential of all relationships, and transactions between them, to be valid, must be fair and reasonable. A separation agreement must have been entered into without coercion. Stegall v. Stegall, 100 N.C. App. 398, 397 S.E.2d 306 (1990), cert. denied, 328 N.C. 274, 400 S.E.2d 461 (1991).

When examining whether both parties freely entered into separation agreement, trial courts should use considerable care because contracts between husbands and wives are special agreements. Stegall v. Stegall, 100 N.C. App. 398, 397 S.E.2d 306 (1990), cert. denied, 328 N.C. 274, 400 S.E.2d 461 (1991).

Railroad Retirement Benefits Under a Separation Agreement. — Trial court properly granted summary judgment in favor of ex-wife in her suit to enforce a separation agreement, and did not err in entering an order awarding the ex-wife 29.5 percent of the ex-husband's divisible railroad retirement benefits. Gilmore v. Garner, 157 N.C. App. 664, 580 S.E.2d 15, 2003 N.C. App. LEXIS 942 (2003).

Fraud Need Not Be Shown, Where Settlement Is Unfair Due to Other's Over-

reaching. — Courts have thrown cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably. To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if settlement is manifestly unfair to spouse because of other's overreaching. Stegall v. Stegall, 100 N.C. App. 398, 397 S.E.2d 306 (1990), cert. denied, 328 N.C. 274, 400 S.E.2d 461 (1991).

Unless both parties legally consent to rescinding the agreement, the court is without the power to discard valid contracts between the parties and to order equitable distribution. Rabon v. Rabon, 102 N.C. App. 452, 402 S.E.2d 461 (1991).

Existence of Confidential Relationship After One Spouse Has Left Home. — A confidential relationship, and a fiduciary duty, between husband and wife can exist even after one spouse has left the home. Where such a relationship exists, there is a duty to disclose all material facts relevant to a separation agreement, and failure to do so constitutes fraud. Harroff v. Harroff, 100 N.C. App. 686, 398 S.E.2d 340 (1990), discretionary review denied, 328 N.C. 330, 402 S.E.2d 833 (1991).

Same — After Involvement of Attorney. — The involvement of an attorney does not automatically end the confidential relationship of husband and wife. Where one spouse alleges and offers evidence that the confidential relationship still existed and that the attorneys' role was merely to record the agreement the spouses negotiated, it is a question of fact as to whether the confidential relationship has been terminated. Harroff v. Harroff, 100 N.C. App. 686, 398 S.E.2d 340 (1990), discretionary review denied, 328 N.C. 330, 402 S.E.2d 833 (1991).

Stipulations as to Division of Marital Property Must Be Scrutinized. — The same scrutiny which is applied to separation agreements must also be applied to stipulations entered into by a husband and a wife regarding the distribution of their marital property. McIntosh v. McIntosh, 74 N.C. App. 554, 328 S.E.2d 600 (1985).

Distribution Agreement Should Be Written, Executed, and Acknowledged. — Any agreement entered into by the parties regarding the distribution of their marital property should be reduced to writing, duly executed and acknowledged. McIntosh v. McIntosh, 74 N.C. App. 554, 328 S.E.2d 600 (1985).

Without the signature of both the husband and the wife, an agreement may not conform to the requirements of subsection (d) of this section. Collar v. Collar, 86 N.C. App. 105, 356 S.E.2d 407 (1987).

Judgment which effectuated a distribution of the parties' marital property pursuant to an agreement that was not signed by both husband and wife was a court-ordered equitable distribution granted before absolute divorce, and as such was expressly prohibited by G.S. 50-21(a). Collar v. Collar, 86 N.C. App. 105, 356 S.E.2d 407 (1987).

Otherwise, Record Must Show Understanding of and Agreement with Terms. — If oral stipulations between spouses regarding the distribution of their marital property are not reduced to writing, it must affirmatively appear in the record that the trial court made contemporaneous inquiries of the parties at the time the stipulations were entered into. It should appear that the court read the terms of the stipulations to the parties, and that the parties understood the legal effects of their agreement and the terms of the agreement and agreed to abide by those terms of their own free will. McIntosh v. McIntosh, 74 N.C. App. 554, 328 S.E.2d 600 (1985).

Although plaintiff claimed the parties stipulated for trial that certain land would be classified as marital property, the record showed no evidence of stipulation; therefore, as the property was a gift to defendant from his mother, trial court's classification of the land as marital property was error. Locklear v. Locklear, 92 N.C. App. 299, 374 S.E.2d 406 (1988).

Where there was no evidence of a written agreement nor any affirmative assurance that the parties were in agreement concerning the division of personal property, the trial court's reliance on the parties' oral agreement or existing division of personal property was error and all marital personal property should have been included in the equitable distribution. Holder v. Holder, 87 N.C. App. 578, 361 S.E.2d 891 (1987).

Handwritten agreement which was not acknowledged before a certifying officer as defined in G.S. 52-10(b) was not binding upon the court and the court was free to distribute the property. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

Handwritten Agreement Superseded by Later Agreement Incorporated in Judgment. — Trial court did not err in refusing to enforce a 1986 handwritten agreement between the parties which concerned the distribution of marital assets and which provided that defendant would pay plaintiff $15,000 upon her remarriage or upon her sale of a specific parcel of marital property. The language in the judgment clearly indicated that property settlement agreement of 1988, which was incorporated into the judgment, was a full and final settlement of the distribution of marital property which superseded any and all prior agreements between the parties. Rosania v. Rosania, 108 N.C. App. 58, 422 S.E.2d 348 (1992).

Separation Agreement as Bar to Equitable Distribution. — A separation agreement which contained no specific references to any real property, but only to personal property, nevertheless fully disposed of the parties' property rights arising out of the marriage and thus acted as a bar to equitable distribution. Hartman v. Hartman, 80 N.C. App. 452, 343 S.E.2d 11 (1986).

In view of separation agreement between the parties, which provided for (1) division of property, (2) effect of reconciliation on the property settlement, (3) mutual release of all personal and real property claims that the parties might have against each other or might acquire under any statute of distribution, right of election or otherwise, and (4) joint custody and support of the parties' two children, and which the court found valid, the trial court erred in ordering that further proceedings might be held to accomplish an equitable distribution of marital property which had allegedly not been taken account of. Rice v. Rice, 81 N.C. App. 247, 344 S.E.2d 41, cert. denied, 317 N.C. 706, 347 S.E.2d 439 (1986).

Valid marital agreements releasing all spousal property rights will bar claims for equitable distribution — even if those settlements were executed prior to the adoption of equitable distribution under this section. Morrison v. Morrison, 102 N.C. App. 514, 402 S.E.2d 855 (1991).

Separation agreement which released each spouse from the common law rights incident to marriage (dower, curtesy, inheritance, descent, and distribution), as well as "all other rights arising out of the marital relationship in and to any and all property," fully disposed of the parties' property rights arising out of the marriage and thus acted as a bar to equitable distribution. Hagler v. Hagler, 319 N.C. 287, 354 S.E.2d 228 (1987).

Equitable Distribution Barred Where Separation Agreement Dividing Property Has Been Executed. — If parties who had entered into a 1963 separation agreement divided and conveyed property prior to resuming their marital relationship, then the provisions of the separation agreement concerning that property were "executed," and an equitable distribution suit to divide that property upon the parties' again separating in 1982 would be barred, unless the evidence showed an intent to cancel those provisions of the separation agreement. Carlton v. Carlton, 74 N.C. App. 690, 329 S.E.2d 682 (1985).

Premarital agreements that exhibit a clear intention on the part of the parties to dispose of their property upon dissolution of their marriage through the provisions of their premarital agreement rather than through equitable distribution are expressly allowed; the ability to control the disposition of property upon the dissolution of a marriage appears to be the primary purpose of most, if not all, premarital agreements. Harllee v. Harllee, 151 N.C. App. 40, 565 S.E.2d 678, 2002 N.C. App. LEXIS 687 (2002).

But Not by Executory Promises. — Wife's promise in 1963 separation agreement that she would make no future claims to husband's future property required future performance and therefore was executory, and where the parties became reconciled and lived again as husband and wife between 1963 and 1982, then this promise was void as to property acquired after they resumed the marital relationship. A suit for equitable distribution of this property was therefore proper. Carlton v. Carlton, 74 N.C. App. 690, 329 S.E.2d 682 (1985).

Separation agreement is terminated insofar as it remains executory on resumption of marital relation. This rule has not been superseded by subsection (d). Camp v. Camp, 75 N.C. App. 498, 331 S.E.2d 163, cert. denied, 314 N.C. 663, 335 S.E.2d 493 (1985).

Condition in Separation Agreement Not Met. — Condition in separation agreement that if the parties lived continuously separate and apart for a full year, then in that event, wife would transfer her interest in residence and lot to husband as part of property settlement was not met where the evidence showed that on a number of occasions during the year the parties had had sexual relations. Higgins v. Higgins, 321 N.C. 482, 364 S.E.2d 426, rehearing denied, 322 N.C. 116, 367 S.E.2d 911 (1988), decided prior to § 52-10.2.

Misapplication of Stipulations in Agreement. — A trial court abused its discretion in misapplying a $5000 credit, where the parties agreed (1) that certain property would be divided unequally, and (2) that the husband would receive less personal property but would receive the $5000 credit. The trial court applied the credit but in effect ignored the remainder of the stipulation by including property against which the credit was to be an offset when it divided the marital estate equally. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

Property Settlement Not Negotiated as Reciprocal Consideration. — If a property settlement is negotiated as "reciprocal consideration" for a separation agreement, the agreements are deemed integrated and the resumption of marital relations will terminate the executory provisions of the property settlement agreement. If not in reciprocal consideration, the provisions of the property settlement are deemed separate and the resumption of marital relations will not affect either the executed or executory provisions of the property settlement agreement. Morrison v. Morrison, 102 N.C. App. 514, 402 S.E.2d 855 (1991).

The absence of a divorce decree did not cancel buy-sell agreement which provided that wife could purchase husband's equity in property "within one year of the date of the entry of an order of divorce"; that if she did not exercise her right of purchase within that time, he could purchase her equity for the same amount within 90 days after "the termination of the one-year period as is hereinabove set forth"; and that if neither bought the equity of the other, the property would be listed for sale with a licensed real estate broker and upon it being sold, the net proceeds would be equally divided. Riley v. Riley, 86 N.C. App. 636, 359 S.E.2d 252, cert. denied, 321 N.C. 121, 361 S.E.2d 596 (1987).

Tenancy by Entirety Not Destroyed by Separation Agreement. — Despite contention of creditor of husband that separation agreement executed by husband and wife destroyed tenancy by the entirety and vested a property interest in husband against which creditor was entitled to levy, where husband and wife were not divorced until over 8 months following the conveyance of the marital property to husband's parents, the property remained entirety property at the time of the conveyance and could not be the subject of a conveyance in defraud of husband's individual creditors. The trial court erred in ordering that creditor was entitled to receive the proceeds of the sale of this property. Dealer Supply Co. v. Greene, 108 N.C. App. 31, 422 S.E.2d 350 (1992), cert. denied, 333 N.C. 343, 426 S.E.2d 704 (1993).

Effect of Reconciliation on Property Settlements. — A single act of sexual intercourse between a husband and wife constitutes a reconciliation and terminates alimony obligations. However, property settlements may be executed before, during or after marriage and are not necessarily terminated by reconciliation. Love v. Mewborn, 79 N.C. App. 465, 339 S.E.2d 487, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

Obligation to Make Money Payments Held Not Terminated on Renewal of Sexual Relations. — The trial court's finding of fact that property settlement and alimony payments were mutually dependent supported its conclusion that the husband's obligation to make money payments denominated as "alimony" did not terminate upon renewal of sexual relations. Love v. Mewborn, 79 N.C. App. 465, 339 S.E.2d 487, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

A premarital agreement concerning alimony is void as against public policy. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Invalidity of alimony provision in a premarital agreement did not affect the property provisions of the agreement. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Lack of Acknowledgment in Premarital Agreement. — The validity of a premarital agreement is not affected by the lack of acknowledgment. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Stipulation That Equal Division of Marital Property Is Equitable. — Where the parties stipulate that an equal division of the marital property is equitable, it is not only unnecessary but improper for the trial court to consider, in making that distribution, any of the distributional factors set forth in subsection (c) of this section. Miller v. Miller, 97 N.C. App. 77, 387 S.E.2d 181 (1990).

Error in Conclusion That Agreement Was Sufficiently Identical to Act. — Trial court erred in concluding that premarital agreement was sufficiently identical to the Equitable Distribution Act to allow the trial court to distribute the property according to the Act despite the premarital agreement, where the Act did not exist at the time of the agreement's execution, and the parties could not have intended that the Act govern their property division. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Attacking Consent Judgment. — A consent judgment incorporates the bargained agreement of the parties. Such a judgment can only be attacked on limited grounds. The party attacking the judgment must properly allege and prove that consent was not in fact given, or that it was obtained by mutual mistake or fraud. Stevenson v. Stevenson, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

Contract Principles Apply to Consent Judgments. — A contract may be avoided based on mutual mistake where the mistake is common to both parties and because of it each has done what neither intended. A unilateral mistake, unaccompanied by fraud, imposition, or like circumstances, is not sufficient to avoid a contract. These contract principles apply to consent judgments. Stevenson v. Stevenson, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

Consent Judgment Held Enforceable. — Where the agreement, in the form of a consent judgment, was altered many times by both parties, both of whom had attorneys, it should have been enforced as written. Stevenson v. Stevenson, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

Consent Order Precluded Consideration of Appreciation in Value of Property. — Trial court did not err in failing to classify, value, and distribute the increase in value of the parties' condominium in a divorce case from the date of separation to the date of distribution under circumstances in which a consent order entered into by the parties stated that it was a "final" distribution and provided a value of a condominium for purposes of equitable distribution; the consent order precluded further valuation and precluded any consideration of the appreciation of the condominium as divisible property. Wirth v. Wirth, — N.C. App. —, 668 S.E.2d 603, 2008 N.C. App. LEXIS 2023 (2008).

Consent Order Precluded Distribution of Interest Earned on Proceeds of Sale of Marital Home. — Trial court properly refused to classify, value, and distribute the interest earned on the proceeds from the sale of the parties' former marital residence under circumstances in which the parties' consent order provided a specific formula by which the net proceeds were to be distributed to the wife; once distributed, the property and the proceeds from its sale became wife's separate property. Wirth v. Wirth, — N.C. App. —, 668 S.E.2d 603, 2008 N.C. App. LEXIS 2023 (2008).

Right to Present Evidence on Issue of Separability. — On wife's motion for increase in alimony payments, where consent order entered into between husband and wife contained support provisions and property settlement provisions, an evidentiary hearing was required to determine the intent of the parties regarding whether the provisions of the agreement were separable or integrated, and it was error for the trial court to refuse to allow husband to present evidence on this issue. Lemons v. Lemons, 103 N.C. App. 492, 406 S.E.2d 8 (1991), decided under law in effect in 1978 at time of consent decree.

Summary Judgment Held Improper. — Summary judgment was improper where there was a genuine issue of material fact as to whether defendant disclosed all material facts pertaining to separation agreement. Harroff v. Harroff, 100 N.C. App. 686, 398 S.E.2d 340 (1990), discretionary review denied, 328 N.C. 330, 402 S.E.2d 833 (1991).

Plaintiff's affidavit stated she was forced to sign separation agreement under duress and coercion, and defendant denied allegation; therefore, taking plaintiff's affidavit as true, there was a genuine issue of material fact on question of duress and coercion concerning the separation agreement, and grant of summary judgment was error. Stegall v. Stegall, 100 N.C. App. 398, 397 S.E.2d 306 (1990), cert. denied, 328 N.C. 274, 400 S.E.2d 461 (1991).

Award of 401(k) Plan. — Trial court's judgment and orders awarding defendant post-separation gains and losses on her portion of 401(k) plan held consistent with both the parties' agreement and the law of this state. Allen v. Allen, 118 N.C. App. 455, 455 S.E.2d 440 (1995).

Consent Order Was Not A Conveyance. — Dismissal of assignee's motion to subject real estate to execution sale was reversed as the assignee's judgment lien attached to a husband's undivided interest in property formerly held as a tenancy by the entirety upon the date of his divorce, when the property was converted by law to a tenancy in common, and when he conveyed his interest to his former wife, she took title subject to the judgment lien; a consent order providing for a future transfer of the property was not a conveyance as it provided for a future transfer of the property, did not provide a legal description or state the location of the property, and was not filed with the register of deeds. Martin v. Roberts, 177 N.C. App. 415, 628 S.E.2d 812, 2006 N.C. App. LEXIS 964 (2006).

Failure to Consider Property Agreement Improper. — Because a husband neither disputed a property contract nor brought any new claim of his own, it would not have been appropriate for the wife to specifically plead an affirmative defense under G.S. 1A-1, N.C. R. Civ. P. 8(c); accordingly, the property contract was improperly disregarded by the trial court. Street v. Street, 191 N.C. App. 815, 664 S.E.2d 69, 2008 N.C. App. LEXIS 1488 (2008).

VI. ALIMONY AND CHILD SUPPORT.

Purpose of alimony pendente lite is to give dependent spouse immediate support and allow her to maintain her action. Giving supporting spouse credit for equitable distribution purposes for various payments made as part of alimony pendente lite would defeat the purpose of alimony pendente lite by penalizing the dependent spouse in the final distribution of the marital assets. Morris v. Morris, 90 N.C. App. 94, 367 S.E.2d 408, overruled in part on other grounds, Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

No Application Where No Existing Alimony Order. — G.S. 50-20(f) had no application because there was no existing alimony order to modify until the effective date of the alimony order; therefore, the ex-husband's request that the trial court take judicial notice of the equitable distribution order before the entry of the alimony order was ineffectual. Rhew v. Felton, 178 N.C. App. 475, 631 S.E.2d 859, 2006 N.C. App. LEXIS 1560, appeal dismissed, review denied, 636 S.E.2d 810 (2006).

When Contingent Fee Agreement Is Enforceable. — A contingent-fee arrangement covering services rendered in an equitable distribution action is fully enforceable as long as it does not provide compensation to the attorney for securing the divorce. In re Cooper, 81 N.C. App. 27, 344 S.E.2d 27 (1986).

Contingent Fee Agreement for Equita-

ble Distribution Must Be Separate from Fee Agreement for Divorce. — If an attorney represents a client in both a divorce proceeding and an equitable distribution proceeding, and the client wishes to have a contingent fee contract in the equitable distribution proceeding, the parties must execute a separate agreement to provide for a fee in the divorce action that is not contingent upon the securing of the divorce. In re Cooper, 81 N.C. App. 27, 344 S.E.2d 27 (1986).

Contingent fee contract in which the fee was contingent with respect to both divorce and equitable distribution actions was void as against public policy, even though the uncontested divorce involved relatively minimal time compared with the time the attorney spent on the equitable distribution claim; and the attorney could not recover either under the contract itself or in quantum meruit for services rendered pursuant to the contract. In re Cooper, 81 N.C. App. 27, 344 S.E.2d 27 (1986).

Equitable distribution in this State is accomplished without regard to alimony previously awarded; the amount of alimony previously awarded may be modified or vacated by the court after the marital property is equitably distributed. In re Cooper, 81 N.C. App. 27, 344 S.E.2d 27 (1986).

Equitable Distribution to Be Decided Before Permanent Alimony. — When both permanent alimony and equitable distribution are requested, the equitable distribution should be decided first. Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Where alimony, child support, and equitable distribution of marital property are requested, the equitable distribution of the property must be decided first. Soares v. Soares, 86 N.C. App. 369, 357 S.E.2d 418 (1987).

Where equitable distribution order took into consideration fatally defective order for temporary alimony, the court vacated the order for equitable distribution and remanded the cause to the district court. Haywood v. Haywood, 95 N.C. App. 426, 382 S.E.2d 798, cert. denied, 325 N.C. 706, 388 S.E.2d 454 (1989).

Modification of child support must be vacated and remanded where it is part of equitable distribution judgment and thus appears to have been decided and entered at the same time as equitable distribution, rather than after equitable distribution as required by subsection (f) of this section. Dorton v. Dorton, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

Agreement Speaking to Equitable Distribution Did Not Waive Alimony Rights. — Defendant's execution of a separation agreement which stated that it was executed with "the express understanding" and "in full satisfaction of all obligations" did not constitute an express waiver of her alimony rights within the meaning of G.S. 52-10.1 or 50-16.6 where the preamble to the agreement referred to this section on equitable distribution, thus excluding issues of spousal support. Napier v. Napier, 135 N.C. App. 364, 520 S.E.2d 312 (1999).

Reconsideration of Alimony or Child Support After Equitable Distribution. — Section 50-20 (f) obviously contemplates that a child support order may precede an equitable distribution order. No child support order is ever final and delaying the child support order in lengthy case until after the equitable distribution issue was decided would have prolonged an already long-pending case. The trial court's decision to enter child support order prior to a determination of the equitable distribution issue was proper under the statute. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

If alimony and child support have not been previously awarded, equitable distribution must be made first; but if alimony or child support has already been awarded, the awards must be reconsidered upon request after the marital property has been equitably distributed. This order of events is required, no doubt, because of the obvious relationship that exists between the property that one has and his or her need for support and the ability to furnish it. Capps v. Capps, 69 N.C. App. 755, 318 S.E.2d 346 (1984).

Even assuming arguendo that the parties' settlement agreement in a divorce was an equitable distribution, a prior child support award, following an equitable distribution, need only be reconsidered upon the request of a party pursuant to G.S. 50-20(f); the father made no such request, and,consequently, the trial court was not required to recalculate his child support obligation in light of any equitable distribution. Diehl v. Diehl, 177 N.C. App. 642, 630 S.E.2d 25, 2006 N.C. App. LEXIS 1180 (2006).

Equitable Distribution Judgment May Not Offset Child Support. — Defendant was not entitled to a "credit" against his future child support payments for the $12,435.50 he paid over and above his court-ordered obligation or for the $500.00 plaintiff owed him as a result of an equitable distribution judgment; child support obligations may not be offset by other obligations. Brinkley v. Brinkley, 135 N.C. App. 608, 522 S.E.2d 90, 1999 N.C. App. LEXIS 1187 (1999).

The phrase "children of both parties" The phrase "children of both parties" clearly includes any child, legitimate or illegitimate. Pott v. Pott, 126 N.C. App. 285, 484 S.E.2d 822 (1997).

Where child was not the biological child of the plaintiff and was not adopted by her, the plaintiff had no legal obligation to

provide for the medical care unless she specifically agreed to do so; therefore, child's medical bills were not marital debts. Crisp v. Crisp, 126 N.C. App. 625, 486 S.E.2d 485 (1997), cert. granted, 347 N.C. 264, 493 S.E.2d 744 (1997), aff'd in part, cert. dismissed in part, 347 N.C. 659, 496 S.E.2d 379 (1998).

VII. TRANSFER OF TITLE.

Authority to Order Conveyance of Title. — Courts have within their powers in equity the authority to compel one person to convey title to property to another person when justice requires it, as is best demonstrated by the courts' use of the equitable remedy of constructive trust. As is indicated by subsection (g), the legislature recognized this power of the courts to order the transfer of real property under appropriate circumstances. Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260, cert. denied, 313 N.C. 612, 330 S.E.2d 616 (1985).

The court has the authority, within its power in equity, to compel one former spouse to convey title to property to the other former spouse when justice requires. Geer v. Geer, 84 N.C. App. 471, 353 S.E.2d 427 (1987).

Release of Obligations. — Where husband was required by court order to make monthly payments for the mortgages on the parties' house and aluminum siding, fact that he agreed in his complaint for absolute divorce to transfer title to the property to wife and delivered deed to the property to wife, which deed contained an assumption clause purporting to indemnify defendant from any liability for the mortgages, this did not constitute sufficient evidence that wife agreed to assume the mortgages and relieve husband of his obligations. Marrow v. Marrow, 118 N.C. App. 332, 454 S.E.2d 853 (1995).

VIII. FINDINGS OF COURT.

Written Findings of Facts Required in Any Order for Equitable Distribution. — The plain language of subsection (j) mandates that written findings of facts be made in any order for the equitable distribution of marital property made pursuant to this section. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Written findings of fact are required in every case in which a distribution of marital property is ordered under the Equitable Distribution Act, even when marital property is equally divided. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Written findings of fact are required in every case in which a distribution of marital property is ordered under the Equitable Distribution Act, not merely when property is divided unequally. Chandler v. Chandler, 108 N.C. App. 66, 422 S.E.2d 587 (1992).

When Factors in Subsection (c) Must Be Addressed. — If evidence of one or more of the factors listed in subsection (c) is presented, the findings must reflect that the trial judge considered those factors, whether the judge ultimately orders an equal or an unequal distribution. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

Trial court's general statement that it "considered the other statutory distributional factors" made no specific reference to the factors under G.S. 50-20(c), regarding distribution of property, making it impossible for an appellate court to determine if it found and relied on any other statutory factors, and its findings on the statutory factors it expressly considered lacked sufficient detail, as the court did not value the marital debts it mentioned, nor did it find whether the husband's cars were liquid or nonliquid assets, despite the requirement of G.S. 50-20(c)(9) that the court consider the liquid or nonliquid character of all marital property and divisible property. Embler v. Embler, 159 N.C. App. 186, 582 S.E.2d 628, 2003 N.C. App. LEXIS 1421 (2003).

Judge Must Make Findings as to Each Statutory Factor. — When a party presents evidence which would allow the trial court to determine that an equal distribution of the marital assets would be inequitable, the trial court must then consider all of the distributional factors listed in subsection (c), and must make sufficient findings as to each statutory factor on which evidence was offered; therefore, where the trial court's order explicitly stated that it considered only one factor in determining how the marital assets should be divided, was error. Locklear v. Locklear, 92 N.C. App. 299, 374 S.E.2d 406 (1988), cert. granted, 324 N.C. 336, 378 S.E.2d 794 (1989).

Findings Must Include Ultimate Facts. — The trial court's findings were insufficient where the trial court stated that it considered all statutory factors and specifically listed some of those factors but did not include ultimate facts considered in applying those factors; for example, the trial court did not make any findings regarding the actual income and liabilities of the parties, the amount of plaintiff's contribution of separate funds to the marital home, and what the tax consequences to the parties would be, nor did it determine whether plaintiff's contentions that she "helped the career potential of the defendant" were accurate and, if so, the extent of plaintiff's contribution. Rosario v. Rosario, 139 N.C. App. 258, 533 S.E.2d 274, 2000 N.C. App. LEXIS 907 (2000).

Findings Must Support Award. — In all equitable distribution cases, findings of fact must support the determination that the marital property has been equitably divided. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

Specific Statement That Distribution Is Equitable Is Not Required. — Once the trial court orders a distribution, it has held sub silentio that such distribution is fair and equitable. A specific statement that the distribution ordered is equitable is not required. White v. White, 312 N.C. 770, 324 S.E.2d 829 (1985).

But Reasons for Unequal Division Should Be Stated in Order. — If, in a particular case, the court concludes, after its careful and clearly articulated consideration of all of the statutory factors and of any nonstatutory factor raised by the evidence which is reasonably related to the rights to, interest in, and need for the marital property, that an equal division is not equitable, the trial court may properly order an unequal division, but should state in its order the basis and reasons for its division. Alexander v. Alexander, 68 N.C. App. 548, 315 S.E.2d 772 (1984); Weaver v. Weaver, 72 N.C. App. 409, 324 S.E.2d 915 (1985), overruled in part on other grounds, Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

As Should Findings of Fact Supporting Unequal Division. — The trial court should clearly set forth in its order findings of fact based on the evidence which support its conclusion that an equal division is not equitable. Alexander v. Alexander, 68 N.C. App. 548, 315 S.E.2d 772 (1984); Weaver v. Weaver, 72 N.C. App. 409, 324 S.E.2d 915 (1985); Little v. Little, 74 N.C. App. 12, 327 S.E.2d 283 (1985), overruled in part on other grounds, Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

In making its determination, the court must consider the factors listed in subsection (c) and set forth findings of fact in its judgment reflecting its consideration of the relevant factors. Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260, cert. denied, 313 N.C. 612, 330 S.E.2d 616 (1985).

If, in a particular case, the trial court concludes, after its consideration of all the statutory factors and any nonstatutory factors raised by the evidence which are reasonably related to the rights to, interest in, and need for the marital property, that an equal division is not equitable, the court may properly order an unequal division; in this case, it should clearly set forth in its order findings of fact based on the evidence which support its conclusion that an equal division is not equitable. Smith v. Smith, 71 N.C. App. 242, 322 S.E.2d 393 (1984), modified and aff'd, 314 N.C. 80, 331 S.E.2d 682 (1985).

When a party has met its burden of proof and the court has concluded that an equal distribution would not be equitable, the court must make written findings, based upon relevant statutory and nonstatutory factors, which support its conclusion that an equal distribution is not equitable. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

Where the trial court made numerous findings concerning the distributional factors upon which the parties presented evidence, there was no abuse of discretion in the trial court's distribution of property; the trial court complied with the mandate in G.S. 50-20(c) to consider factors and make findings in detail, and although the ex-wife presented evidence that may have permitted contrary findings, the trial court's findings were supported by competent evidence and were sufficient to support the conclusion that an unequal distribution in the ex-husband's favor was equitable. Britt v. Britt, 168 N.C. App. 198, 606 S.E.2d 910, 2005 N.C. App. LEXIS 170 (2005).

Trial court failed to make sufficient specific findings of fact it was required to make regarding each factor specified in G.S. 50-20(c) on which the parties offered evidence when it ordered the husband to pay a distributive award, as it did not point to a source of funds from which the husband could pay this obligation even though the husband had no obvious liquid assets. Embler v. Embler, 159 N.C. App. 186, 582 S.E.2d 628, 2003 N.C. App. LEXIS 1421 (2003).

Findings as to Increase in Value of Separate Property During Marriage. — A trial court's order which did not disclose the steps by which the trial court arrived at its conclusion that the entire increase in value of separate property was marital property, left the Court of Appeals unable to determine whether the trial court correctly applied the "source of funds" theory to the facts; therefore, the order was reversed and remanded for appropriate findings of fact from the evidence previously submitted. Ciobanu v. Ciobanu, 104 N.C. App. 461, 409 S.E.2d 749 (1991).

Findings as to Closely Held Corporation. —A mere recitation of the factors the trial court considered in its valuation of the corporation is not sufficient; the trial court must also indicate the value it attaches to each of the enumerated factors. Locklear v. Locklear, 92 N.C. App. 299, 374 S.E.2d 406 (1988).

Findings as to Stock. — Because competent evidence was presented in equitable distribution action to support the finding that shares of stock acquired by appellee during marriage and prior to separation were a gift from his father and thus separate property, the finding was not disturbed on appeal. Godley v. Godley, 110 N.C. App. 99, 429 S.E.2d 382 (1993).

Findings as to Evidence of Criminal Activity. — Trial court did not abuse its discretion in admitting evidence of a former husband's criminal activity because the majority of the trial court's findings of fact concentrated on the extent and nature of the damage the husband's actions inflicted on the marital home; the trial court referred to the husband's treatment of his former wife only as necessary to explain the sequence of events. Troutman v. Troutman, — N.C. App. —, 667 S.E.2d 506, 2008 N.C. App. LEXIS 1803 (2008).

Impracticality of In Kind Distribution. — Adequate findings did not support a judgment equitably distributing three retirement plans, where the judgment contained no finding of fact, supported by evidence in the record, that an in kind distribution would be impractical, nor did it support a finding that the parties had stipulated to distribution in the manner directed by the court. Heath v. Heath, 132 N.C. App. 36, 509 S.E.2d 804 (1999).

Where the parties stipulated to an equal division of the marital property, which was equivalent to a stipulation that an equal division of the marital property was equitable, the trial court properly refused to make separate findings of fact regarding the post-separation appreciation of the marital home, its post-separation occupancy by the plaintiff, and the tax savings allegedly realized by the plaintiff because of the post-separation occupancy of the house. Christensen v. Christensen, 101 N.C. App. 47, 398 S.E.2d 634 (1990).

Trial Court Made Inadequate Findings Concerning How to Divide Marital Estate and Tax Consequences of the Division. — When a trial court found that a marital estate should be divided without a qualified domestic relations order (QDRO), it inadequately made no findings as to how this should be accomplished or the tax consequences to the husband if he was required to dip into his retirement, despite the requirement of G.S. 50-20(c)(11) that the tax consequences to each party be considered. Embler v. Embler, 159 N.C. App. 186, 582 S.E.2d 628, 2003 N.C. App. LEXIS 1421 (2003).

Liquidity or Nonliquidity of Assets Never Put In Dispute. — Former husband's claim that a trial court failed to make findings of fact pursuant to G.S. 50-20(j) as to the liquidity of certain assets was overruled because the husband made no showing that the liquid or nonliquid nature of the assets at issue was ever brought up at trial; the husband pointed only to the wife's testimony that she had made withdrawals from an IRA out of necessity, and then he made the broad statement that the nature of assets held in savings accounts, checking accounts,]and actual checks were liquid in nature. Troutman v. Troutman, — N.C. App. —, 667 S.E.2d 506, 2008 N.C. App. LEXIS 1803 (2008).

Failure to Enter Finding That Defendant Did Not Rebut Presumption Was Harmless Error. — Where there was no evidence in the record to support a finding that certain real property was to remain the separate property of the husband, the failure of the trial court to enter a finding that defendant did not rebut the marital presumption by clear, cogent and convincing evidence was harmless. Furthermore, there was no "intention" in the deed to the parties as tenants by the entirety that the property was to remain defendant's separate property. Therefore, the trial judge correctly included the property among the marital assets. Taylor v. Taylor, 92 N.C. App. 413, 374 S.E.2d 644 (1988).

Findings Sufficient to Support Equitable Distribution Award. — Trial court's equitable distribution award was proper under circumstances in which the trial court classified the husband's post-separation payment, from his separate funds, of a mortgage on marital property as divisible property, and found that, based on the wife's unrepaid loan of $178,710 to the marital business from her separate funds, she was entitled to an award of $178,700 more than that of the husband; the trial court correctly granted the husband credit for his payment by subtracting $75,644 from the marital estate and subtracting $75,644 from his award to give him sole credit for satisfying the marital debt. The trial court made sufficient findings to consider the wife's loan as a distributional factor and reflecting its distribution decision. McNeely v. McNeely, — N.C. App. —, 673 S.E.2d 778, 2009 N.C. App. LEXIS 247 (2009).

IX. RIGHTS CREATED BY SUBSECTION (K).

Legislature's intent in subsection (k) was to create a right to equitable distribution of the marital property, which had not existed up to that time, and to make that right vest at the time of filing for divorce (now at the time of separation). Subsection (k) did not create any vested rights in particular marital property; it created a right to the equitable distribution of that property, whatever a court should determine that property is. Wilson v. Wilson, 73 N.C. App. 96, 325 S.E.2d 668, cert. denied, 314 N.C. 121, 332 S.E.2d 490 (1985).

Subsection (k) did not create substantive rights in any party to particular marital property which that party argues comes within the meaning of that acquired during the course of the marriage. Wilson v. Wilson, 73 N.C. App. 96, 325 S.E.2d 668, cert. denied, 314 N.C. 121, 332 S.E.2d 490 (1985).

The right to equitable distribution is an inchoate right exercisable only in a divorce action; thus, absent a consent judgment, the right to equitable property distribution could not be effectuated during the one-year separation period that necessarily precedes a filing for absolute divorce; however, this does not mean that a claim for equitable distribution cannot be made during that period. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

The vested right of equitable distribution does not create a property right in marital property, nor does the fact of separation create a lien on specific marital property in favor of the spouse. Rather, it only creates a right to an equitable distribution of that property, whatever a court should determine that property is. Perlow v. Perlow, 128 Bankr. 412 (E.D.N.C. 1991).

Subjection of Each Spouse's Interest to Claims of Creditors. — Upon divorce, each former spouse's undivided one-half interest becomes subject to the claims of his or her individual creditors. Union Grove Mill and Mfg. Co. v. Faw, 103 N.C. App. 166, 404 S.E.2d 508 (1991).

Attachment of Lien Against Spouse upon Conversion to Tenancy in Common. — When property is held by married persons as tenants by the entireties, a lien of judgment effective against only one spouse does not attach to the property until the property is converted into another form of estate. One such type of conversion occurs upon divorce, where property held as a tenancy by the entirety is converted into property held as a tenancy in common, and each former spouse thereafter holds an undivided one-half interest in the subject property. Union Grove Mill and Mfg. Co. v. Faw, 103 N.C. App. 166, 404 S.E.2d 508 (1991).

Insurance Policies. — At the time of separation there were no vested rights under insurance policy on the life of party's son. The rights only vested at his death, and until then plaintiff, as owner of the policy, could have cancelled the policy or changed the beneficiary. At the time of separation, the cash value of the insurance policies was marital property, since the premiums to that point had been paid for with marital assets. The premiums after separation were paid for with plaintiff's assets and therefore the proceeds from the insurance policy were separate property of plaintiff. Foster v. Foster, 90 N.C. App. 265, 368 S.E.2d 26 (1988), cert. denied, 324 N.C. 245, 376 S.E.2d 739 (1989).

X. DISCRETION OF TRIAL COURT AND APPEALLATE REVIEW.

Trial Court Has Broad Discretion. — The legislature clearly intended to vest trial courts with discretion in distributing marital property under this section, but guided always by the public policy expressed therein favoring an equal division. The legislative intent to vest our trial courts with such broad discretion is emphasized by the inclusion of the catchall factor codified in subdivision (c)(12). White v. White, 312 N.C. 770, 324 S.E.2d 829 (1985).

The trial court has broad discretion in the division of marital property. Hartman v. Hartman, 82 N.C. App. 167, 346 S.E.2d 196 (1986), aff'd, 319 N.C. 396, 354 S.E.2d 239 (1987).

But Court's Discretion Is Not Unlimited. — The courts do not have unlimited discretion in the division of marital property. They are limited by the presumption of equal division and by the requirement of subsection (j) of this section that they justify their distribution of property with written findings of fact. Furthermore, the exercise of discretion implies conscientious judgment arrived at in accordance with established rules, and not arbitrary action. White v. White, 64 N.C. App. 432, 308 S.E.2d 68 (1983), modified and aff'd, 312 N.C. 770, 324 S.E.2d 829 (1985).

The trial judge's discretion is to be upheld unless it fails to comply with the requirements of the statute. Wieneck-Adams v. Adams, 104 N.C. App. 621, 410 S.E.2d 525 (1991), aff'd, 331 N.C. 688, 417 S.E.2d 449 (1992).

Standard of Review. — Where defendant's argument on appeal was that he had brought forth enough evidence at the equitable distribution hearing to have allowed the trial judge to identify certain personal and real property as being marital property in part and defendant's separate property in part, the standard of review on appeal would be limited to the question of whether any competent evidence in the record sustains the court's findings. Taylor v. Taylor, 92 N.C. App. 413, 374 S.E.2d 644 (1988).

Trial court orders for equitable distribution are accorded substantial deference by appellate courts and appellate review is limited to a determination of whether there was a clear abuse of discretion. Hartsell v. Hartsell, 189 N.C. App. 65, 657 S.E.2d 724, 2008 N.C. App. LEXIS 428 (2008).

Judgment Not Disturbed on Appeal Absent Abuse of Discretion. — The division of marital property is a matter within the sound discretion of the trial court, and its judgment should not be disturbed on review unless it is shown that the division made was an abuse of discretion. White v. White, 64 N.C. App. 432, 308 S.E.2d 68 (1983), modified and aff'd, 312 N.C. 770, 324 S.E.2d 829 (1985); Johnson v. Johnson, 78 N.C. App. 787, 338 S.E.2d 567 (1986).

When evidence concerning one or more of the factors in subsection (c) of this section tending to show that an equal division of the marital property would not be equitable is admitted, the court must balance that evidence with the other evidence presented, keeping in mind the legislative policy strongly favoring an equal division, and must determine what constitutes an equitable division in that particular case. The balance struck by the court in weighing such evidence will not be disturbed absent a clear showing of abuse of discretion. Bradley v. Bradley, 78 N.C. App. 150, 336 S.E.2d 658 (1985).

Appellate review of equitable distribution awards is limited to a determination of whether there has been a clear abuse of discretion. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

The trial court's rulings in equitable distribution cases receive great deference and may be upset only if they are so arbitrary that they could not have been the result of a reasoned decision. Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

Findings of fact by the trial court are upheld on appeal as long as they are supported by competent evidence. Gum v. Gum, 107 N.C. App. 734, 421 S.E.2d 788 (1992).

Trial court did not abuse its discretion by awarding plaintiff 50 percent of the marital portion of defendant's pension. Judkins v. Judkins, 113 N.C. App. 734, 441 S.E.2d 139, cert. denied, 336 N.C. 781, 447 S.E.2d 424 (1994).

Unequal Distribution. — Although there is a presumption that an equal division of marital property is equitable, so long as the trial court considers all the distributional factors in subsection (c) and makes sufficient findings as to each statutory factor on which evidence is offered, the finding of a single distributional factor by the trial court may support an unequal division. Judkins v. Judkins, 113 N.C. App. 734, 441 S.E.2d 139, cert. denied, 336 N.C. 781, 447 S.E.2d 424 (1994).

Or Miscarriage of Justice. — A proper order concluding that an equal division is not equitable should not be disturbed on appeal unless the appellate court, upon consideration of the cold record, can determine that the division ordered by the trial court has resulted in an obvious miscarriage of justice. Alexander v. Alexander, 68 N.C. App. 548, 315 S.E.2d 772 (1984).

Nor Will Trial Court's Findings Be Disturbed Absent Abuse. — The trial court's findings in support of an equitable but unequal division will not be disturbed on appeal unless there was a clear abuse of discretion. Weaver v. Weaver, 72 N.C. App. 409, 324 S.E.2d 915 (1985).

Where the trial court made numerous findings concerning the distributional factors upon which the parties presented evidence, there was no abuse of discretion in the trial court's distribution of property; the trial court complied with the mandate in G.S. 50-20(c) to consider factors and make findings in detail, and although the ex-wife presented evidence that may have permitted contrary findings, the trial court's findings were supported by competent evidence and were sufficient to support the conclusion that an unequal distribution in the ex-husband's favor was equitable. Britt v. Britt, 168 N.C. App. 198, 606 S.E.2d 910, 2005 N.C. App. LEXIS 170 (2005).

Only when evidence fails to show any rational basis for the distribution ordered by the court will its determination be upset on appeal. Nix v. Nix, 80 N.C. App. 110, 341 S.E.2d 116 (1986).

Equitable distribution order should not be disturbed unless the appellate court, upon consideration of the cold record, can determine that the division ordered has resulted in an obvious miscarriage of justice. Morris v. Morris, 90 N.C. App. 94, 367 S.E.2d 408, overruled in part on other grounds, Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

In complex litigation involving equitable distribution, appellate court will not remand judgment for obviously insignificant errors. Mishler v. Mishler, 90 N.C. App. 72, 367 S.E.2d 385, cert. denied, 323 N.C. 174, 373 S.E.2d 111 (1988).

Formal errors in an equitable distribution judgment do not require reversal, particularly where the record reflects a conscientious effort by the trial judge to deal with complicated and extensive evidence. Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

Abuse of discretion occurs when the trial court has failed to consider proper factors or has made a mistake or error with respect to the facts upon which the division was made, or when the division itself was, under the circumstances, either excessive or inadequate. White v. White, 64 N.C. App. 432, 308 S.E.2d 68 (1983), modified and aff'd, 312 N.C. 770, 324 S.E.2d 829 (1985).

Awards Payable in Lump Sum or Over Time. — It is within the trial court's sound discretion to determine whether the distributive award is to be made payable as a lump sum or over a fixed period of time. Atkins v. Atkins, 102 N.C. App. 199, 401 S.E.2d 784 (1991).

Payment of Interest. — The decision of whether to order the payment of interest on a distributive award is one that lies within the discretion of the trial judge. Mrozek v. Mrozek, 129 N.C. App. 43, 496 S.E.2d 836 (1998).

As to the proper standard of review of equitable distribution awards where evidence was admitted tending to show that an equal distribution would not be equitable, see White v. White, 312 N.C. 770, 324 S.E.2d 829 (1985).

Inadequate Findings by Trial Court Precluded Appellate Review. — Where, among other things, the classification of certain property as marital was erroneous, tainting the findings and conclusions regarding valuation and distribution, and the method of valuing the marital portion of the home was inadequate to support the award to the wife, the findings and conclusions of the trial court were insufficient to allow appellate review. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

Trial court's conclusion that equal division of marital property would not be equitable was not supported by its findings of fact, where the court failed to make specific findings with regard to a number of factors listed under subsection (c) of this section, and the case would be remanded for further proceedings. Alexander v. Alexander, 68 N.C. App. 548, 315 S.E.2d 772 (1984).

A ruling resulting in an unequal division of marital property will be upset only if it is manifestly unsupported by reason. Upchurch v. Upchurch, 128 N.C. App. 461, 495 S.E.2d 738 (1998), cert. denied, 348 N.C. 291, 501 S.E.2d 925 (1998).

Trial court did not have authority to reaffirm divorce decree and reserve for future resolution the issue of equitable distribution; since the trial court did not set aside the divorce, but rather, attempted to nullify the consequences of defendant's failure to assert her claim for equitable distribution prior to the entry of judgment of divorce, the order failed. Even if the court had effectively set aside, briefly, the divorce decree itself and then immediately reinstated the divorce decree with a reservation of an equitable distribution claim, the reservation of the equitable distribution claim would have been a legal nullity because plaintiff voluntarily dismissed his equitable distribution claim and defendant did not, during the time the divorce was arguably set aside, file an answer, counterclaim, or separate action requesting equitable distribution. Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991).

Authority of Court. — Where neither party made application or stated a claim for equitable distribution prior to the judgment of absolute divorce, the trial court lacked the authority to enter such a judgment. Stirewalt v. Stirewalt, 114 N.C. App. 107, 440 S.E.2d 854 (1994).

Trial court did not err in order purging defendant of contempt for failure to comply with equitable distribution judgment, by awarding the plaintiff the present value of the stock which had been assigned to her when the initial judgment had been entered. It was proper for the trial court to require the defendant to compensate the plaintiff for the stock splits and the dividends which she would have received had defendant not been recalcitrant in carrying out the trial court's orders. Conrad v. Conrad, 82 N.C. App. 758, 348 S.E.2d 349 (1986).

Interim order regarding the nature of insurance proceeds did not affect a substantial right as plaintiff's rights would be adequately protected by an appeal timely taken from the final equitable distribution judgment Hunter v. Hunter, 126 N.C. App. 705, 486 S.E.2d 244 (1997).

Immediate Appeal Contrary to Public Policy. — Permitting an immediate appeal from an interim equitable distribution order would be contrary to the policy of this state discouraging fragmentary appeals. Hunter v. Hunter, 126 N.C. App. 705, 486 S.E.2d 244 (1997).

XI. ATTORNEYS' FEES.

Court Had Jurisdiction. — Trial court was not without jurisdiction at the time it entered its subsection (i) order and it therefore had jurisdiction to award attorney's fees under that section. McKissick v. McKissick, 129 N.C. App. 252, 497 S.E.2d 711 (1998).

When Contingent Fee Agreement Is Enforceable. — A contingent fee arrangement covering services rendered in an equitable distribution action is fully enforceable as long as it does not provide compensation to the attorney for securing the divorce. In re Cooper, 81 N.C. App. 27, 344 S.E.2d 27 (1986).

Contingent Fee Agreement for Equitable Distribution Must Be Separate from Fee Agreement for Divorce. — If an attorney represents a client in both a divorce proceeding and an equitable distribution proceeding, and the client wishes to have a contingent fee contract in the equitable distribution proceeding, the parties must execute a separate agreement to provide for a fee in the divorce action that is not contingent upon the securing of the divorce. In re Cooper, 81 N.C. App. 27, 344 S.E.2d 27 (1986).

Contingent fee contract in which the fee was contingent with respect to both divorce and equitable distribution actions was void as against public policy, even though the uncontested divorce involved relatively minimal time compared with the time the attorney spent on the equitable distribution claim; and the attorney could not recover either under the contract itself or in quantum meruit for services rendered pursuant to the contract. In re Cooper, 81 N.C. App. 27, 344 S.E.2d 27 (1986).

No Abuse of Discretion In Failing to Further Reduce Former Husband's Pension Value. — Former husband failed to demonstrate that the trial court abused its discretion in not further reducing his pension value to account for contingencies of the type discussed in Step five of Bishop because the husband pointed to no evidence in the record suggesting the possibility of any contingencies that could affect the value of his pension; since the husband was fully vested in his pension, the possibility of termination was immaterial, and the husband made no showing or argument that a risk of insolvency existed for the Teachers' and State Employees' Retirement System pension plan. Cochran v. Cochran, — N.C. App. —, 679 S.E.2d 469, 2009 N.C. App. LEXIS 1161 (July 21, 2009).

§ 50-20.1. Pension and retirement benefits.

(a) The award of vested pension, retirement, or other deferred compensation benefits may be made payable:

(1) As a lump sum by agreement;
(2) Over a period of time in fixed amounts by agreement;
(3) By appropriate domestic relations order as a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits; or
(4) By awarding a larger portion of other assets to the party not receiving the benefits and a smaller share of other assets to the party entitled to receive the benefits.

(b) The award of nonvested pension, retirement, or other deferred compensation benefits may be made payable:

(1) As a lump sum by agreement;
(2) Over a period of time in fixed amounts by agreement; or
(3) By appropriate domestic relations order as a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits.

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, the court shall not require the administrator of the fund or plan involved to make any payments until the party against whom the award is made actually begins to receive the benefits unless the plan permits an earlier distribution.

(d) The award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested and nonvested pension, retirement, or deferred compensation benefit, to the total amount of time of employment. The award shall be based on the vested and nonvested accrued benefit, as provided by the plan or fund, calculated as of the date of separation, and shall not include contributions, years of service, or compensation which may accrue after the date of separation. The award shall include gains and losses on the prorated portion of the benefit vested at the date of separation.

(e) No award shall exceed fifty percent (50%) of the benefits the person against whom the award is made is entitled to receive as vested and nonvested pension, retirement, or other deferred compensation benefits, except that an award may exceed fifty percent (50%) if (i) other assets subject to equitable distribution are insufficient; or (ii) there is difficulty in distributing any asset or any interest in a business, corporation, or profession; or (iii) it is economically desirable for one party to retain an asset or interest that is intact and free from any claim or interference by the other party; or (iv) more than one pension or retirement system or deferred compensation plan or fund is involved, but the benefits award may not exceed fifty percent (50%) of the total benefits of all the plans added together; or (v) both parties consent. In no event shall an award exceed fifty percent (50%) if a plan prohibits an award in excess of fifty percent (50%).

(f) In the event the person receiving the award dies, the unpaid balance, if any, of the award shall pass to the beneficiaries of the recipient by will, if any, or by intestate succession, or by beneficiary designation with the plan consistent with the terms of the plan unless the plan prohibits such designation. In the event the person against whom the award is made dies, the award to the recipient shall remain payable to the extent permitted by the pension or retirement system or deferred compensation plan or fund involved.

(g) The court may require distribution of the award by means of a qualified domestic relations order, or as defined in section 414(p) of the Internal Revenue Code of 1986, or by other appropriate order. To facilitate the calculating and payment of distributive awards, the administrator of the system, plan, or fund may be ordered to certify the total contributions, years of service, and pension, retirement, or other deferred compensation benefits payable.

(h) This section and G.S. 50-21 shall apply to all pension, retirement, and other deferred compensation plans and funds, including vested and nonvested military pensions eligible under the federal Uniform Services Former Spouses Protection Act, and including funds administered by the State pursuant to Articles 84 through 88 of Chapter 58 and Chapters 120, 127A, 128, 135, 143, 143B, and 147 of the General Statutes, to the extent of a member's accrued benefit at the date of separation, as determined by the court. (1997-212, s. 1.)

CASE NOTES

Railroad Retirement Benefits Under a Separation Agreement. — Trial court properly granted summary judgment in favor of ex-wife in her suit to enforce a separation agreement, and did not err in entering an order awarding the ex-wife 29.5 percent of the ex-husband's divisible railroad retirement benefits. Gilmore v. Garner, 157 N.C. App. 664, 580 S.E.2d 15, 2003 N.C. App. LEXIS 942 (2003).

Entitlement to Unvested Stock at the Time of Separation. — Where the wife, pursuant to entering an employment agreement prior to the parties' separation, received 10,000 shares of the employer's stock after the parties' separation, which were later exchanged with the stock of the corporation that purchased the employer and was sold for net proceeds of $82,637, the trial court did not err in valuing the property pursuant to G.S. 50-21(b), which occurred after 20 years of marriage; it was reasonable for the trial court to infer that the wife's employment with the employer resulted from experience that the wife gained while working, for 20 years, for the company from which the employer spun off and that, pursuant to G.S. 50-20.1(d), all of the shares were subject to distribution in the divorce. Ubertaccio v. Ubertaccio, 161 N.C. App. 352, 588 S.E.2d 905, 2003 N.C. App. LEXIS 2197 (2003), aff'd, 359 N.C. 175, 604 S.E.2d 912 (2004).

Defined Contribution Pension Plans. — Trial court properly applied a coverture fraction to the husband's defined contribution pension plan as required by G.S. 50-20.1; husband's argument that the statute only applied to defined benefit plans was rejected. Robertson v. Robertson, 167 N.C. App. 567, 605 S.E.2d 667, 2004 N.C. App. LEXIS 2332 (2004).

Valuation of Military Pension Plan. — Court properly attempted, pursuant to G.S. 50-20.1(b)(3), to award a wife a prorated portion of her husband's military pension, one-half of the marital portion of each of defendant's pension payments, to be paid by defendant at the time he began receiving benefits; however, the trial court failed to determine that defendant's military pension was a defined benefit retirement plan and failed to value it. Cunningham v. Cunningham, 171 N.C. App. 550, 615 S.E.2d 675, 2005 N.C. App. LEXIS 1371 (2005).

Military Retirement Benefits Under Separation Agreement. — Because the parties' separation agreement offered no specific language referring to an alternate means of distribution of the ex-husband's military retirement pay, the trial court correctly applied the provisions related to distribution of retirement benefits found in G.S. 50-20.1(d). Brenenstuhl v. Brenenstuhl, 169 N.C. App. 433, 610 S.E.2d 301, 2005 N.C. App. LEXIS 603 (2005).

Immediate Distribution Proper. — Trial court did not err in making an immediate distribution of a former husband's pension benefits because the husband was fully vested and eligible for early retirement; the trial court awarded the husband all of his pension benefits and then awarded the former wife a larger portion of the remaining assets, precisely as permitted by G.S. 50-20.1(a). Cochran v. Cochran, — N.C. App. —, 679 S.E.2d 469, 2009 N.C. App. LEXIS 1161 (July 21, 2009).

Valuation of Defined Benefit Plan. — Trial court did not clearly comply with the third and fourth steps of Bishop in reducing a former husband's pension benefits to present value because its finding of fact as to the actuarial present value of the defined benefit plan did not specifically state whether the present value was being determined as of the earliest retirement date or date of separation; because the cost of living adjustment was not a contribution to the plan or compensation being paid after the date of separation but was instead a gain on the benefit vested at the time of separation, the trial court was required to take it into account under G.S. 50-20.1(d). Cochran v. Cochran, — N.C. App. —, 679 S.E.2d 469, 2009 N.C. App. LEXIS 1161 (July 21, 2009).

Cited in Patterson ex rel. Jordan v. Patterson, 137 N.C. App. 653, 529 S.E.2d 484, 2000 N.C. App. LEXIS 505 (2000).

§ 50-21. Procedures in actions for equitable distribution of property; sanctions for purposeful and prejudicial delay.

(a) At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed and adjudicated, either as a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes, or as a motion in the cause as provided by G.S. 50-11(e) or (f). Within 90 days after service of a claim for equitable distribution, the party who first asserts the claim shall prepare and serve upon the opposing party an equitable distribution inventory affidavit listing all property claimed by the party to be marital property and all property claimed by the party to be separate property, and the estimated date-of-separation fair market value of each item of marital and separate property. Within 30 days after service of the inventory affidavit, the party upon whom service is made shall prepare and serve an inventory affidavit upon the other party. The inventory affidavits prepared and served pursuant to this subsection shall be subject to amendment and shall not be binding at trial as to completeness or value. The court may extend the time limits in this subsection for good cause shown. The affidavits are subject to the requirements of G.S. 1A-1, Rule 11, and are deemed to be in the nature of answers to interrogatories propounded to the parties. Any party failing to supply the information required by this subsection in the affidavit is subject to G.S. 1A-1, Rules 26, 33, and 37. During the pendency of the action for equitable distribution, discovery may proceed, and the court shall enter temporary orders as appropriate and necessary for the purpose of preventing the disappearance, waste, or destruction of marital or separate property or to secure the possession thereof.

Real or personal property located outside of North Carolina is subject to equitable distribution in accordance with the provisions of G.S. 50-20, and the court may include in its order appropriate provisions to ensure compliance with the order of equitable distribution.

(b) For purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties, and evidence of preseparation and postseparation occurrences or values is competent as corroborative evidence of the value of marital property as of the date of the separation of the parties. Divisible property and divisible debt shall be valued as of the date of distribution.

(c) Nothing in G.S. 50-20 or this section shall restrict or extend the right to trial by jury as provided by the Constitution of North Carolina.

(d) Within 120 days after the filing of the initial pleading or motion in the cause for equitable distribution, the party first serving the pleading or application shall apply to the court to conduct a scheduling and discovery conference. If that party fails to make application, then the other party may do so. At the conference the court shall determine a schedule of discovery as well as consider and rule upon any motions for appointment of expert witnesses, or other applications, including applications to determine the date of separation, and shall set a date for the disclosure of expert witnesses and a date on or before which an initial pretrial conference shall be held.

At the initial pretrial conference the court shall make inquiry as to the status of the case and shall enter a date for the completion of discovery, the completion of a mediated settlement conference, if applicable, and the filing and service of motions, and shall determine a date on or after which a final pretrial conference shall be held and a date on or after which the case shall proceed to trial.

The final pretrial conference shall be conducted pursuant to the Rules of Civil Procedure and the General Rules of Practice in the applicable district or superior court, adopted pursuant to G.S. 7A-34. The court shall rule upon any matters reasonably necessary to effect a fair and prompt disposition of the case in the interests of justice.

(e) Upon motion of either party or upon the court's own initiative, the court shall impose an appropriate sanction on a party when the court finds that:

(1) The party has willfully obstructed or unreasonably delayed, or has attempted to obstruct or unreasonably delay, discovery proceedings, including failure to make discovery pursuant to G.S. 1A-1, Rule 37, or has willfully obstructed or unreasonably delayed or attempted to obstruct or unreasonably delay any pending equitable distribution proceeding, and

(2) The willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party.

Delay consented to by the parties is not grounds for sanctions. The sanction may include an order to pay the other party the amount of the reasonable expenses and damages incurred because of the willful obstruction or unreasonable delay, including a reasonable attorneys' fee, and including appointment by the court, at the offending party's expense, of an accountant, appraiser, or other expert whose services the court finds are necessary to secure in order for the discovery or other equitable distribution proceeding to be timely conducted. (1981, c. 815, s. 6; 1983, c. 671, s. 1; 1985, c. 689, s. 21; 1987, c. 844, s. 1; 1991, c. 610, s. 2; 1991 (Reg. Sess., 1992), c. 910, s. 1; 1993, c. 209, s. 1; 1995, c. 244, s. 1; c. 245, s. 1; 1997-302, s. 2; 2001-364, s. 1.)

Legal Periodicals. — For comment on resulting trusts in entireties property when the wife furnishes purchase money, see 17 Wake Forest L. Rev. 415 (1981).

For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

For note, "North Carolina's Equitable Distribution Statute: Recent Developments," see 64 N.C.L. Rev. 1395 (1986).

For note, "Branch Banking & Trust Co. v. Wright — Creditors' Rights to Entireties Property Awarded to Nondebtor Spouse Upon Divorce," see 64 N.C.L. Rev. 1471 (1986).

For article, "The Partnership Ideal: The Development of Equitable Distribution in North Carolina," see 65 N.C.L. Rev. 195 (1987).

Semantics as Jurisprudence: The Elevation of Form Over Substance in the Treatment of Separation Agreements in North Carolina, 69 N.C.L. Rev. 319 (1991).

For 1997 legislative survey, see 20 Campbell L. Rev. 459.

For recent development, "Death and the Partnership Principle: Interpreting Recent Abatement Amendments to North Carolina's Equitable Distribution Act," see 80 N.C.L. Rev. 1089 (2002).

CASE NOTES

Editor's Note. — *Some of the cases below were decided prior to the rewriting of this section by Session Laws 1987, c. 844, which provides for entry of a consent judgment of equitable distribution prior or subsequent to entry of a divorce judgment, and for institution of an action of equitable distribution prior to entry of a divorce judgment.*

Public policy of this State is that equitable distribution of property shall follow decree of absolute divorce. Hendrix v. Hendrix, 67 N.C. App. 354, 313 S.E.2d 25 (1984).

Equitable distribution, when properly demanded, must be granted upon the divorce decree being entered; and if alimony and child support has not been previously awarded, equitable distribution must be made first; but if alimony or child support has already been awarded, the awards must be reconsidered upon request after the marital property has been equitably distributed. This order of events is required, no doubt, because of the obvious relationship that exists between the property that one has and his or her need for support and the ability to furnish it. Capps v. Capps, 69

N.C. App. 755, 318 S.E.2d 346 (1984). But see now subsection (a) of this section.

It is North Carolina's public policy that an equitable distribution of property shall follow a decree of absolute divorce. However, a resort to the equitable distribution law is not the only recognized way for married people to dispose of their marital property. An alternative is in G.S. 50-20(d). Case v. Case, 73 N.C. App. 76, 325 S.E.2d 661, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985). And see now subsection (a) of this section.

The plain language of subsection (a) of this section clearly provides that the equitable distribution of marital property must follow a decree of absolute divorce; however, the distribution proceedings may be instituted as a cross action or in a suit altogether separate from the divorce action. This section does not require that the distribution hearing must be held immediately following entry of the absolute divorce. Sharp v. Sharp, 84 N.C. App. 128, 351 S.E.2d 799 (1987). And see now subsection (a) of this section.

No Right to Jury Trial in Equitable Distribution Action. — No right to bring an action for equitable distribution of marital property existed prior to the adoption of the equitable distribution statutes, G.S. 50-20 and this section, and the language of the statutes themselves create no new right to trial by jury; therefore, there is no right to trial by jury for such an action under the Constitution of North Carolina. Kiser v. Kiser, 325 N.C. 502, 385 S.E.2d 487 (1989).

Discretion of Trial Court. — The trial court retains the discretion to choose the appropriate method of compensating the spouse for his post-separation payment of marital debt. Loving v. Loving, 118 N.C. App. 501, 455 S.E.2d 885 (1995).

Judgment effectuating a property distribution pursuant to an agreement that was not signed by both spouses was a court-ordered equitable distribution granted before absolute divorce, and as such was expressly prohibited by subsection (a) of this section. Collar v. Collar, 86 N.C. App. 105, 356 S.E.2d 407 (1987).

Jurisdiction over Out-of-State Property. — Subsection (a) of this section simply authorizes jurisdiction over the property of the defendant located outside North Carolina once due process concerns are satisfied. Carroll v. Carroll, 88 N.C. App. 453, 363 S.E.2d 872 (1988).

Alternative Procedures for Making Application for Distribution. — Although subsection (a) of this section sets out the procedure for making application for the distribution of property, it is not the only recognized way for married people to dispose of their marital property. An alternative is found in G.S. 50-20(d). Hendrix v. Hendrix, 67 N.C. App. 354, 313 S.E.2d 25 (1984).

Pleadings. — A plaintiff in a divorce action may admit to a claim for equitable distribution in a reply, and join in the claims for an equitable distribution of the marital property through a reply pleading. The defendant is precluded, by principles of equitable estoppel, from defeating plaintiff's right to equitable distribution by submitting to a voluntary dismissal of his counterclaim. Hunt v. Hunt, 117 N.C. App. 280, 450 S.E.2d 558 (1994).

Wife sufficiently preserved her claim to an equitable distribution of marital property under G.S. 50-11(e) when her answer to her husband's complaint for divorce requested and reserved a right to equitable distribution, because the remedy of equitable distribution in a divorce case only applied to marital assets, and G.S. 50-21(a) gave a party asserting a claim for such redress 90 days to provide specific information about the property claimed to be subject to equitable distribution; so, to constitute a valid equitable distribution claim, the wife's counterclaim for equitable distribution did not have to state that it applied to the parties' marital assets or property, and the husband was put on notice that the wife asked the court to equitably distribute the parties' marital and divisible property. Coleman v. Coleman, 182 N.C. App. 25, 641 S.E.2d 332, 2007 N.C. App. LEXIS 475 (2007).

In divorce proceedings, a former wife was not entitled to compel an equitable distribution affidavit from the former husband because the wife failed to properly file her equitable distribution claim pursuant to G.S. 50-21(a) as a separate action, cross-action, or motion in the cause within six months after the husband dismissed his own equitable distribution claim as required by G.S. 50-11(e) and (f); an oral motion by the wife for such a claim did not constitute the required motion. Webb v. Webb, 188 N.C. App. 621, 656 S.E.2d 334, 2008 N.C. App. LEXIS 203 (2008).

Bankruptcy. — Following the parties' separation, a spouse's right to equitable distribution does not create any vested rights in particular marital property, but rather creates in each spouse an unliquidated, unsecured, contingent claim as defined by federal law which may be discharged in bankruptcy. Justice v. Justice, 123 N.C. App. 733, 475 S.E.2d 225 (1996), aff'd, 346 N.C. 176, 484 S.E.2d 551 (1997).

Wife, separated from her debtor husband, was entitled to relief from the automatic stay, 11 U.S.C.S. § 362, to liquidate her right to an equitable distribution against debtor because she held an unsecured claim against debtor's bankruptcy estate, the matter was one controlled by state law, and relief would not unduly delay the administration of debtor's estate. In re Linville, — Bankr. —, 2005 Bankr. LEXIS 1115 (Bankr. M.D.N.C. Feb. 1, 2005).

Equitable distribution reflects the idea that marriage is a partnership enterprise to which both spouses make vital contributions and which entitles the homemaker spouse to a share of the property acquired during the relationship. White v. White, 312 N.C. 770, 324 S.E.2d 829 (1985).

Equitable distribution is not automatic. A party seeking equitable distribution must specifically apply for it, either by way of cross-action in an action brought for absolute divorce or as a separate action. Hagler v. Hagler, 319 N.C. 287, 354 S.E.2d 228 (1987).

Where death ends all chance for divorce, any equitable distribution action then pending must abate; the 1995 amendment to this section did not change the relationship between equitable distribution and divorce. Instead, the amendment continued the legislative trend for equitable distribution to occur at any time prior to or after an absolute divorce. Brown v. Brown, 353 N.C. 220, 539 S.E.2d 621, 2000 N.C. LEXIS 904 (2000).

Trial Court Must Make Written Findings. — When determining equitable distribution, the trial court must make written findings characterizing postseparation appreciation of marital assets as either passive or active. Smith v. Smith, 336 N.C. 575, 444 S.E.2d 420 (1994).

The trial court's error in failing to make specific findings of fact as to each factor under this section did not prejudice the wife, where she asked for and received an equal distribution of marital assets. Crutchfield v. Crutchfield, 132 N.C. App. 193, 511 S.E.2d 31 (1999).

Formerly No Authority to Enter Order of Equitable Distribution Preceding Divorce. — Prior to the 1987 amendment to this section, although the trial court had jurisdiction over the parties and their property, it was without authority to enter an order of equitable distribution of the marital property preceding an absolute divorce, notwithstanding the parties' consent. McKenzie v. McKenzie, 75 N.C. App. 188, 330 S.E.2d 270 (1985).

Evidence of Divorce Required. — An order of equitable distribution must be supported by a finding of fact, based on competent evidence, that a judgment of absolute divorce has been entered by a court of competent jurisdiction. McIver v. McIver, 77 N.C. App. 232, 334 S.E.2d 454 (1985). But see now subsection (a) of this section.

Separate Trials for Divorce and Distribution. — The trial court's order granting the plaintiff's motion for separate trials of his claim for absolute divorce and the defendant's claim for equitable distribution of the marital property did not constitute an abuse of discretion, nor did it prejudice the defendant's substantial rights. Sharp v. Sharp, 84 N.C. App. 128, 351 S.E.2d 799 (1987).

When Equitable Distribution Becomes Operative. — By the terms of subsection (a), equitable distribution becomes operative only after a husband and wife have separated and a claim for equitable distribution has been filed. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Husband's argument that one must be a party to an existing divorce action before an equitable distribution claim may be asserted had no merit under subsection (a) of this section as it existed in 1981, and would have been summarily dismissed under the 1987 amended version. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

The classification, valuation, and distribution of the marital debt is required without regard to whether the debt may be liquidated after the date of separation and before the trial; just as with assets, the question is whether the debt was acquired during the marriage and before the date of separation and in existence on the date of separation. Loving v. Loving, 118 N.C. App. 501, 455 S.E.2d 885 (1995).

Inventory Affidavit. — Where the husband was given a copy of expert opinion of business valuation before trial, the wife was not limited to her inventory affidavit relating to the value of the business and was free to present the expert's testimony. Franks v. Franks, 153 N.C. App. 793, 571 S.E.2d 276, 2002 N.C. App. LEXIS 1252 (2002).

Marital Property Valued at Net Value. — Net value, rather than fair market value, is the proper measure for valuing marital property for equitable distribution. Little v. Little, 74 N.C. App. 12, 327 S.E.2d 283 (1985).

Marital Property Is Valued as of the Date of the Parties' Separation. — This valuation date is used to determine the equitable distributive share of each party. However, where there is evidence of active or passive appreciation of the marital assets after that date, the court must consider such appreciation as a factor under G.S. 50-20(c)(11a) or (12), respectively. Mishler v. Mishler, 90 N.C. App. 72, 367 S.E.2d 385, cert. denied, 323 N.C. 174, 373 S.E.2d 111 (1988).

In an action for equitable distribution of marital property, the trial court was required to value the marital property as of the date of separation. Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

Trial court's finding pursuant to G.S. 50-21(b) that the pickup truck had a value on the date of separation of $ 4,860.00 was supported by competent evidence. Warren v. Warren, 175 N.C.

App. 509, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

Since the trial court was required by G.S. 50-21(b) to find the value of the IRA as of the date of separation, the court did not err by doing so. The husband's evidence was more properly considered as a distributional factor under G.S. 50-20(c). Warren v. Warren, 175 N.C. App. 509, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

Trial court's valuation of vested and nonvested stock options using the "intrinsic value method," was not error under G.S. 50-21(b). Fountain v. Fountain, 148 N.C. App. 329, 559 S.E.2d 25, 2002 N.C. App. LEXIS 36 (2002).

Valuation of Unvested Stock. — Where the wife, pursuant to entering an employment agreement prior to the parties' separation, received 10,000 shares of the employer's stock after the parties' separation, which were later exchanged with the stock of the corporation that purchased the employer and was sold for net proceeds of $82,637, the trial court did not err in valuing the property pursuant to G.S. 50-21(b), which occurred after 20 years of marriage; it was reasonable for the trial court to infer that the wife's employment with the employer resulted from experience that the wife gained while working, for 20 years, for the company from which the employer spun off and that, pursuant to G.S. 50-20.1(d), all of the shares were subject to distribution in the divorce. Ubertaccio v. Ubertaccio, 161 N.C. App. 352, 588 S.E.2d 905, 2003 N.C. App. LEXIS 2197 (2003), aff'd, 359 N.C. 175, 604 S.E.2d 912 (2004).

Presumption that a gift to the other spouse was intended applies only when a spouse uses separate property to acquire other property which is titled in the entireties, or when a spouse directs a title of his separate property be placed in the entireties. Loving v. Loving, 118 N.C. App. 501, 455 S.E.2d 885 (1995).

Effect of Obligation to Build Road on Fair Market Value. — In making a determination as to the fair market value of property the trial court must ascertain the price a willing buyer would pay to purchase the land on the open market from a willing seller as of the date of the parties' separation. Thus, the value, if any, of the obligation to build an access road on the property is intrinsic to the fair market price and should have been included in the trial court's fair market valuation of the real property. Carlson v. Carlson, 127 N.C. App. 33, 487 S.E.2d 784 (1997), cert. denied, 347 N.C. 396, 494 S.E.2d 407 (1997).

Date of Valuation. — When a divorce is granted on the ground of a year's separation, the trial court is to determine the net market value of the marital assets as of the date of separation in order to effect an equitable distribution of these assets. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

Trial court committed error in valuing stock as of the date of trial, as opposed to the date of separation. Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

Value of property at the time of separation is especially important when an appreciation or diminution in the value of the property has taken place since separation, such as the incurring or removing of encumbrances by one spouse. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

Even if property division was made on the basis of 1983 values, rather than values in 1972, when the parties separated, that division would merely reflect the 50% of the marital property that plaintiff wife was entitled to at separation plus 50% of any appreciation after separation, which would be her separate property, where defendant administrator did not show that the property's appreciation was due to deceased husband's contributions, monetary or otherwise. The plaintiff thus would receive the same amount of property regardless of whether the marital property was considered at its 1972 value or its 1983 value. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

Where plaintiff and defendant were divorced on the ground of one year separation, defendant's vested military pension and retirement benefits would be valued as of the date of separation. Seifert v. Seifert, 82 N.C. App. 329, 346 S.E.2d 504 (1986), aff'd, 319 N.C. 367, 354 S.E.2d 506 (1987).

Trial court is required to consider only evidence of the value of the marital property as of the date of separation, thus rendering evidence of post-separation occurrences incompetent for the purpose of valuing marital property. Consequently, a trial court is under a duty to exclude such incompetent evidence from its consideration, and its failure to do so is reviewable by the appellate court even in the absence of an objection to the evidence at trial. Christensen v. Christensen, 101 N.C. App. 47, 398 S.E.2d 634 (1990).

Where parties are divorced on the ground of one year's separation, the district court must value husband's military pension, as marital property, as of the date of separation. Lewis v. Lewis, 83 N.C. App. 438, 350 S.E.2d 587 (1986).

The spouse not receiving the distribution of the marital debt who makes some payment on the marital debt after the date of separation and before the equitable distribution trial is entitled to either (1) a reimbursement from the other spouse for the amount of the payment, (2) a credit to his share of the equitable distribution award in an amount equal to the payment, or (3) an upward adjustment in his percentage of the distribution of the marital properties. Loving v. Loving, 118 N.C. App. 501, 455 S.E.2d 885 (1995).

Legal Malpractice Claim Failed as Client Did Not Value Marital Estate. — Client's legal malpractice action failed as even assuming an attorney negligently failed to advise the client or to value the client's estate properly under G.S. 50-20(e) and G.S. 50-21(b), the client made no forecast of the value of the marital estate as of the date of separation and therefore as to the value of the client's equitable distribution claim; thus, the client failed to show that any negligence by the attorney proximately caused damage to the client. Young v. Gum, 185 N.C. App. 642, 649 S.E.2d 469, 2007 N.C. App. LEXIS 1951 (2007).

Payment on Debt Before Distribution. — Where the marital debt which was distributed to plaintiff and valued at $9,000 on the date of separation had a value of zero on the date of distribution, because it had been fully paid by the defendant, failure of the trial court to consider this fact as a distributional factor in making its distribution was reversible error. Loving v. Loving, 118 N.C. App. 501, 455 S.E.2d 885 (1995).

Valuation of Pension and Retirement Benefits. — For case discussing the relative advantages and disadvantages of the present discounted value method and the deferred distribution method in evaluating and distributing pension and retirement benefits, see Seifert v. Seifert, 82 N.C. App. 329, 346 S.E.2d 504 (1986), aff'd, 319 N.C. 367, 354 S.E.2d 506 (1987).

Where an expert at trial testified that the "before tax" value of the pension plans was $157,242.81 as of the date of separation, the trial court erred in concluding that the net present value of the pensions as of the date of separation was $93,084.60. Wilkins v. Wilkins, 111 N.C. App. 541, 432 S.E.2d 891 (1993).

The subjective opinions of the owner of property as to its value are admissible and competent. Patterson v. Patterson, 81 N.C. App. 255, 343 S.E.2d 595 (1986).

Treatment of Entireties Property. — Under subsection (a) of this section, which prior to the rewriting of this section in 1987 stated that "equitable distribution of property shall follow a decree of absolute divorce", the estate of a tenancy in common of necessity intervened between absolute divorce and an award of title pursuant to equitable distribution when property was held by the entireties, whether or not the divorce and the equitable distribution occurred in a single proceeding. Branch Banking & Trust Co. v. Wright, 74 N.C. App. 550, 328 S.E.2d 840, appeal withdrawn, 318 N.C. 505, 353 S.E.2d 225 (1985).

Deed of Trust Executed Without Wife's Consent Attached to Husband's Interest. — When defendants were divorced the tenancy by the entirety in which their marital home was held became a tenancy in common, and the lien of deed of trust executed by husband without wife's consent attached to defendant husband's one-half undivided interest in the property. Thus when the marital home was distributed pursuant to G.S. 50-20 defendant wife took title in fee simple absolute subject to plaintiff bank's deed of trust on defendant husband's one-half undivided interest. Branch Banking & Trust Co. v. Wright, 74 N.C. App. 550, 328 S.E.2d 840, appeal withdrawn, 318 N.C. 505, 353 S.E.2d 225 (1985).

Effect of Findings. — The trial court's findings concerning valuation, as are all factual findings in an equitable distribution order, are binding on appellate courts when supported by competent evidence. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985), rev'd in part on other grounds, 318 N.C. 404, 348 S.E.2d 593 (1986).

Refusal to Consider Evidence of Husband's Conversion of Property after Separation Was Error. — The trial court erred in refusing to consider evidence concerning the husband's conversion of property (i.e., shares of stock) after the parties' separation. The ruling was error regardless of whether the property was originally obtained with marital or separate funds. Mauser v. Mauser, 75 N.C. App. 115, 330 S.E.2d 63 (1985).

Application of Equitable Distribution Held Not Retroactive When Pension Benefits Had Accrued Prior to Adoption. — Although the defendant's right to his pension benefits had accrued fully prior to the adoption of the Equitable Distribution Act and the August 1, 1983 amendment to G.S. 50-20 subjecting his pension to equitable distribution, the act and amendment did not affect his property interests until the plaintiff's claim for equitable distribution was filed on May 14, 1984, well after both the act and the amendment became effective. This was not a retroactive application of the act or of the amendment. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Sanctions for Marital Misconduct That Has No Economic Impact on Marital Estate. — Marital misconduct that has no resulting economic impact on the marital estate may nonetheless have other consequences; for instance, the spouse can be sanctioned for the willful obstruction of an equitable distribution proceeding, directed to pay for costs incurred for the return of the other spouse's separate property, or be subject to an inspection for the purpose of inventory and valuation. Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

Sanctions for Willful Obstruction and Unreasonable Delay. — Whether to impose sanctions and which sanctions to impose under this section are decisions vested in the trial court and reviewable on appeal for abuse of discretion, and in applying this standard the appellate court will uphold a trial court's order of sanctions unless it is manifestly unsupported by reason. Crutchfield v. Crutchfield, 132 N.C. App. 193, 511 S.E.2d 31 (1999).

Evidence that the wife willfully obstructed or attempted to obstruct or unreasonably delay discovery proceedings and equitable distribution proceedings, which caused prejudice to the husband, supported the imposition of sanctions requiring the wife to pay $1,500 of the husband's attorney fees. Crutchfield v. Crutchfield, 132 N.C. App. 193, 511 S.E.2d 31 (1999).

Trial court erred when it sanctioned the husband under G.S. 50-21(e), finding that the husband's refusal to accept the wife's valuation of the business resulted in a willful obstruction of the case where the trial court summarily recast the improper assessment of expert witness costs as a sanction against the husband, where the husband was given no notice that he would be subject to sanctions, and in fact, the notice sent to the husband was misleading. Zaliagiris v. Zaliagiris, 164 N.C. App. 602, 596 S.E.2d 285, 2004 N.C. App. LEXIS 1041 (2004), cert. denied, 359 N.C. 643, 617 S.E.2d 662 (2005).

Trial court did not err in awarding attorney's fees to a wife in a dissolution proceeding because the trial court's findings of fact were supported by competent evidence detailing the wife's efforts to seek attachment of the husband's wages and the husband's failure to appear at any hearing in the matter, including court-ordered mediation. Dalgewicz v. Dalgewicz, 167 N.C. App. 412, 606 S.E.2d 164, 2004 N.C. App. LEXIS 2375 (2004).

Wife's due process rights were violated when sanctions were imposed for the wife's willful obstruction and unreasonable delay of equitable distribution hearing because the wife did not receive notice required by G.S. 50-21(e); the husband did not make a written request for sanctions and the language cited by the husband as allegedly giving the wife notice appeared in the equitable distribution order a distributional factor, and not as grounds for sanctions. Megremis v. Megremis, 179 N.C. App. 174, 633 S.E.2d 117, 2006 N.C. App. LEXIS 1828 (2006).

Preservation for Appellate Review. — Husband's claim that he did not receive proper notice that he was subject to attorneys fees as sanctions in his divorce case was not raised in his written closing argument, and he thus failed to preserve this issue for appellate review. Wirth v. Wirth, — N.C. App. —, 668 S.E.2d 603, 2008 N.C. App. LEXIS 2023 (2008).

Applied in Crumbley v. Crumbley, 70 N.C. App. 143, 318 S.E.2d 525 (1984); Lofton v. Lofton, 71 N.C. App. 635, 322 S.E.2d 654 (1984); Weaver v. Weaver, 72 N.C. App. 409, 324 S.E.2d 915 (1985); Dusenberry v. Dusenberry, 73 N.C. App. 177, 326 S.E.2d 65 (1985); Seifert v. Seifert, 319 N.C. 367, 354 S.E.2d 506 (1987); Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993).

Cited in Alexander v. Alexander, 68 N.C. App. 548, 315 S.E.2d 772 (1984); Smith v. Smith, 71 N.C. App. 242, 322 S.E.2d 393 (1984); Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266 (1985); Dewey v. Dewey, 77 N.C. App. 787, 336 S.E.2d 451 (1985); Camp v. Camp, 75 N.C. App. 498, 331 S.E.2d 163 (1985); Gebb v. Gebb, 77 N.C. App. 309, 335 S.E.2d 221 (1985); Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1986); In re Cooper, 81 N.C. App. 27, 344 S.E.2d 27 (1986); Patton v. Patton, 318 N.C. 404, 348 S.E.2d 593 (1986); North Carolina Baptist Hosps. v. Harris, 319 N.C. 347, 354 S.E.2d 471 (1987); Collar v. Collar, 86 N.C. App. 109, 356 S.E.2d 405 (1987); Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987); Caldwell v. Caldwell, 93 N.C. App. 740, 379 S.E.2d 271 (1989); Trogdon v. Trogdon, 97 N.C. App. 330, 388 S.E.2d 212 (1990); Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991); State v. Morris, 103 N.C. App. 246, 405 S.E.2d 351 (1991); Forsyth Mem. Hosp. v. Chisholm, 342 N.C. 616, 467 S.E.2d 88 (1996); Atkinson v. Atkinson, 132 N.C. App. 82, 510 S.E.2d 178 (1999); Khajanchi v. Khajanchi, 140 N.C. App. 552, 537 S.E.2d 845, 2000 N.C. App. LEXIS 1245 (2000).

OPINIONS OF ATTORNEY GENERAL

Statutory Requirement. — The requirement that an equitable distribution of property must follow a decree of absolute divorce is statutory and not constitutional. See opinion of Attorney General to The Honorable Henson P. Barnes, North Carolina Senate, 57 N.C.A.G. 30 (1987). And see now subsection (a) of this section.

§ 50-22. Action on behalf of an incompetent.

A duly appointed attorney-in-fact who has the power to sue and defend civil actions on behalf of an incompetent spouse and who has been appointed pursuant to a durable power of attorney executed in accordance with Chapter 32A of the General Statutes, a guardian appointed in accordance with Chapter 35A of the General Statutes, or a guardian ad litem appointed in accordance with G.S. 1A-1, Rules 17 and 25(b), may commence, defend, maintain, arbitrate, mediate, or settle any action authorized by this Chapter on behalf of an incompetent spouse. However, only a competent spouse may commence an action for absolute divorce. (1991, c. 610, s. 1; 2009-224, s. 1.)

Effect of Amendments. — Session Laws 2009-224, s. 1, effective June 30, 2009, rewrote the section.

§§ 50-23 through 50-29: Reserved for future codification purposes.

ARTICLE 2.

Expedited Process for Child Support Cases.

§ 50-30. Findings; policy; and purpose.

(a) Findings. — The General Assembly makes the following findings:

(1) There is a strong public interest in providing fair, efficient, and swift judicial processes for establishing and enforcing child support obligations. Children are entitled to support from their parents, and court assistance is often required for the establishment and enforcement of parental support obligations. Children who do not receive support from their parents often become financially dependent on the State.

(2) The State shall have laws that meet the federal requirements on expedited processes for obtaining and enforcing child support orders for purposes of federal reimbursement under Title IV-D of the Social Security Act, 42 U.S.C. § 66(a)(2). The Secretary of the United States Department of Health and Human Services may waive the expedited process requirement with respect to one or more district court district as defined in G.S. 7A-133 on the basis of the effectiveness and timeliness of support order issuance and enforcement within the district.

(3) The State has a strong financial interest in complying with the expedited process requirement, and other requirements, of Title IV-D of the Social Security Act, but the State would incur substantial expense in creating statewide an expedited child support process as defined by federal law.

(4) The State's judicial system is largely capable of processing child support cases in a timely and efficient manner and has a strong commitment to an expeditious system.

(5) The substantial expense the State would incur in creating a new system for obtaining and enforcing child support orders would be reduced and better spent by improving the present system.

(b) Purpose and Policy. — It is the policy of this State to ensure, to the maximum extent possible, that child support obligations are established and enforced fairly, efficiently, and swiftly through the judicial system by means that make the best use of the State's resources. It is the purpose of this Article to facilitate this policy. The Administrative Office of the Courts and judicial officials in each district court district as defined in G.S. 7A-133 shall make a diligent effort to ensure that child support cases, from the time of filing to the time of disposition, are handled fairly, efficiently, and swiftly. The Administrative Office of the Courts and the State Department of Health and Human

Services shall work together to improve procedures for the handling of child support cases in which the State or county has an interest, including all cases that qualify in any respect for federal reimbursement under Title IV-D of the Social Security Act. (1985 (Reg. Sess., 1986), c. 993, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 86; 1997-443, s. 11A.18.)

Legal Periodicals. — For note, "Legislating Responsibility: North Carolina's New Child Support Enforcement Acts," see 65 N.C.L. Rev. 1354 (1987).

§ 50-31. Definitions.

As used in this Article, unless the context clearly requires otherwise:

(1) "Child support case" means the part of any civil or criminal action or proceeding, whether intrastate or interstate, that involves a claim for the establishment or enforcement of a child support obligation.

(2) "Dispose" or "disposition" of a child support case means the entry of an order in a child support case that:

  a. Dismisses the claim for establishment or enforcement of the child support obligation; or

  b. Establishes a child support obligation, either temporary or permanent, and directs how that obligation is to be satisfied; or

  c. Orders a particular child support enforcement remedy.

(3) "Expedited process" means a procedure for having child support orders established and enforced by a magistrate or clerk who has been designated as a child support hearing officer pursuant to this Article.

(4) "Federal expedited process requirement" means the provision in Title IV, Part D of the Social Security Act, 42 U.S.C. § 666(a)(2), that requires as a condition of the receipt of federal funds that a state have laws that require the use of federally defined expedited processes for obtaining and enforcing child support orders.

(5) "Filing" means the date the defendant is served with a pleading that seeks establishment or enforcement of a child support obligation, or the date written notice or a pleading is sent to a party seeking establishment or enforcement of a child support obligation.

(6) "Hearing officer" or "child support hearing officer" means a clerk or assistant clerk of superior court or a magistrate who has been designated pursuant to this Article to hear and enter orders in child support cases.

(7) "Initiating party" means the party, the attorney for a party, a child support enforcement agency established pursuant to Title IV, Part D of the Social Security Act, or the clerk of superior court who initiates an action, proceeding, or procedure as allowed or required by law for the establishment or enforcement of a child support obligation. (1985 (Reg. Sess., 1986), c. 993, s. 1; 1987, c. 346.)

§ 50-32. Disposition of cases within 60 days; extension.

Except where paternity is at issue, in all child support cases the district court judge shall dispose of the case from filing to disposition within 60 days, except that this period may be extended for a maximum of 30 days by order of the court if:

(1) Either party or his attorney cannot be present for the hearing; or

(2) The parties have consented to an extension. (1985 (Reg. Sess., 1986), c. 993, s. 1.)

CASE NOTES

Hearing Scheduled on Regular Domestic Calendar Instead of Expedited Calendar. — In an action for modification of child custody order seeking child support, where the trial judge scheduled a hearing on the regular domestic calendar instead of the expedited calendar for domestic court cases, the defendant was not prejudiced by the court's placement of this case as the case was continued within the 60 day requirement of this section. Payne v. Payne, 91 N.C. App. 71, 370 S.E.2d 428 (1988).

§ 50-33. Waiver of expedited process requirement.

(a) State to Seek Waiver. — The State Department of Health and Human Services, with the assistance of the Administrative Office of the Courts, shall vigorously pursue application to the United States Department of Health and Human Services for waivers of the federal expedited process requirement.

(b) Districts That Do Not Qualify. — In any district court district as defined in G.S. 7A-133 that does not qualify for a waiver of the federal expedited process requirement, an expedited process shall be established as provided in G.S. 50-34. (1985 (Reg. Sess., 1986), c. 993, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 87; 1997-443, s. 11A.19.)

§ 50-34. Establishment of an expedited process.

(a) Districts Required to Have Expedited Process. — In any district court district as defined in G.S. 7A-133 that is required by G.S. 50-33(b) to establish an expedited child support process, the Director of the Administrative Office of the Courts shall notify the chief district court judge and the clerk or clerks of superior court in the district in writing of the requirement. The Director of the Administrative Office of the Courts, the chief district court judge, and the clerk or clerks of superior court in the district shall implement an expedited child support process as provided in this section.

(b) Procedure for Establishing Expedited Process. — When a district court district as defined in G.S. 7A-133 is required to implement an expedited process, the Director of the Administrative Office of the Courts, the chief district judge, and the clerk of superior court in an affected county shall determine by agreement whether the child support hearing officer or officers for that county shall be one or more clerks or one or more magistrates. If such agreement has not been reached within 15 days after the notice required by subsection (a) when implementation is required, the Director of the Administrative Office of the Courts shall make the decision. If it is decided that the hearing officer or officers for a county shall be magistrates, the chief district judge, the clerk of superior court, and the Director of the Administrative Office of the Courts shall ensure his or their qualification for the position. If it is decided that the hearing officer or officers for a county shall be the clerk or assistant clerks, the clerk of superior court in the county shall designate the person or persons to serve as hearing officer, and the chief district judge, the clerk of superior court, and the Director of the Administrative Office of the Courts shall ensure his or their qualification for the position.

(c) Public To Be Informed. — When an expedited process is to be implemented in a county or district court district as defined in G.S. 7A-133, the chief district court judge, the clerk or clerks of superior court in affected counties in the district, and the Administrative Office of the Courts shall take steps to ensure that attorneys, the general public, and parties to pending child support cases in the county or district are informed of the change in procedures and helped to understand and use the new system effectively. (1985 (Reg. Sess., 1986), c. 993, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 88.)

§ 50-35. Authority and duties of a child support hearing officer.

A child support hearing officer who is properly qualified and designated under this Article has the following authority and responsibilities in all child support cases:

(1) To conduct hearings and to ensure that the parties' due process rights are protected;
(2) To take testimony and establish a record;
(3) To evaluate evidence and make decisions regarding the establishment or enforcement of child support orders;
(4) To accept and approve voluntary acknowledgements of support liability and stipulated agreements setting the amount of support obligations;
(5) To accept and approve voluntary acknowledgements and affirmations of paternity;
(6) Except as otherwise provided in this Article, to enter child support orders that have the same force and effect as orders entered by a district court judge;
(7) To enter temporary child support orders pending the resolution of unusual or complicated issues by a district court judge;
(8) To enter default orders; and
(9) To subpoena witnesses and documents. (1985 (Reg. Sess., 1986), c. 993, s. 1.)

§ 50-36. Child support procedures in districts with expedited process.

(a) Scheduling of Cases. — The procedures of this section shall apply to all child support cases in any district court district as defined in G.S. 7A-133 or county in which an expedited process has been established. All claims for the establishment or enforcement of a child support obligation, whether the claim is made in a separate action or as part of a divorce or any other action, shall be scheduled for hearing before the child support hearing officer. The initiating party shall send a notice of the date, time, and place of the hearing to all other parties. Service of process shall be made and notices given as provided by G.S. 1A-1, Rules of Civil Procedure.

(b) Place of Hearing. — The hearing before the child support hearing officer need not take place in a courtroom, but shall be conducted in an appropriate judicial setting.

(c) Hearing Procedures. — The hearing of a case before a child support officer is without a jury. The rules of evidence applicable in the trial of civil actions generally are observed; however, the hearing officer may require the parties to produce and may consider financial affidavits, State and federal tax returns, and other financial or employment records. Except as otherwise provided in this Article, the hearing officer shall determine the parties' child support rights and obligations and enter an appropriate order based on the evidence and the child support laws of the State. All parties shall be provided with a copy of the order.

(d) Record of Proceeding. — The record of a proceeding before a child support hearing officer shall consist of the pleadings filed in the child support case, documentation of proper service or notice or waiver, and a copy of the hearing officer's order. No verbatim recording or transcript shall be required or provided at State expense.

(e) Transfer to District Court Judge. — Upon his own motion or upon motion of any party, the hearing officer shall transfer a case for hearing before a district court judge when the case involves:

(1) A contested paternity action;
(2) A custody dispute;
(3) Contested visitation rights;
(4) The ownership, possession, or transfer of an interest in property to satisfy a child support obligation; or
(5) Other complex issues.

Upon ordering such a transfer, except in cases of contested paternity, the hearing officer shall also enter a temporary order that provides for the payment of a money amount or otherwise addresses the child's need for support pending the resolution of the case by the district court judge. The chief district court judge shall establish a procedure for such transferred cases to be given priority for hearing before a district court judge. (1985 (Reg. Sess., 1986), c. 993, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 89.)

CASE NOTES

Hearing Scheduled on Regular Calendar Instead of Expedited Calendar. — In an action for modification of child custody order seeking child support, where the trial judge scheduled a hearing on the regular domestic calendar instead of the expedited calendar for domestic court cases, the defendant was not prejudiced by the court's placement of this case as the case was continued within the 60 day requirement of this section. Payne v. Payne, 91 N.C. App. 71, 370 S.E.2d 428 (1988).

§ 50-37. Enforcement authority of child support hearing officer; contempt.

When a child support case is before a child support hearing officer for enforcement of a child support order, the hearing officer has the same authority that a district court judge would have, except in cases of contempt. Orders that commit a party to jail for civil or criminal contempt for the nonpayment of child support, or for otherwise failing to comply with a child support order, may be entered only by a district court judge. When it appears to a hearing officer that there is probable cause for finding such contempt in a case before the child support hearing officer and that no other enforcement remedy would be effective or sufficient, the hearing officer shall enter an order finding probable cause and referring the case for hearing before a district court judge. The order may indicate the amount of payment the responsible parent may make, or other action he may take, or both, to comply with the child support order. If proof of compliance is made to the hearing officer within a time specified in the order, the hearing officer may cancel the referral of the contempt case to district court. Except as specifically limited by this section, a clerk or magistrate acting as a child support hearing officer retains all of the contempt powers he or she otherwise has by virtue of being a clerk or magistrate. (1985 (Reg. Sess., 1986), c. 993, s. 1.)

§ 50-38. Appeal from orders of the child support hearing officer.

(a) Appeal; Hearing De Novo. — Any party may appeal an order of a child support hearing officer for a hearing de novo before a district court judge by giving notice of appeal at the hearing or in writing within 10 days after entry of judgment. Upon appeal noted, the clerk of superior court shall place the case on the civil issue docket of the district court. The chief district court judge shall establish a procedure for such transferred cases to be given priority for hearing before a district court judge. Unless appealed from, the order of the hearing officer is final.

(b) Order Not Stayed Pending Appeal. — Appeal from an order of a child support hearing officer does not stay the execution or enforcement of the order unless, on application of the appellant, a district court judge orders such a stay. (1985 (Reg. Sess., 1986), c. 993, s. 1.)

§ 50-39. Qualifications of child support hearing officer.

(a) Qualifications. — A clerk or assistant clerk of superior court or a magistrate, to be designated and serve as a child support hearing officer, shall satisfy each of the following qualifications:

(1) Be at least 21 years of age and not older than 70 years of age, and have a high school degree or its equivalent.

(2) Be qualified by training and temperament to be effective in relating to parties in child support cases and in conducting hearings fairly and efficiently.

(3) Be certified by the Administrative Office of the Courts as having completed the training required by subsection (b).

(4) Establish that he has one of the following qualifications;

a. Election or appointment as the clerk of superior court; or

b. Three years experience as an assistant clerk of superior court working in child support or related matters; or

c. Six years experience as an assistant clerk of superior court; or

d. Four years experience as a magistrate whose duties have included, in substantial part, the disposition of civil matters; or

e. Pursuant to G.S. 7A-171.1, five to seven years eligibility for pay as a magistrate; or

f. Three years experience working in the field of child support enforcement or a related field.

(b) Training Required. — Before a clerk or assistant clerk or a magistrate may conduct hearings as a child support hearing officer he must satisfactorily complete a course of instruction in the conduct of such hearings established by the Administrative Office of the Courts. The Administrative Office of the Courts shall establish a course in the conduct of such hearings. The Administrative Office of the Courts may contract with qualified educational organizations to conduct the course of instruction and must reimburse the clerks or magistrates attending for travel and subsistence incurred in taking such training. (1985 (Reg. Sess., 1986), c. 993, s. 1.)

§ 50-40: Reserved for future codification purposes.

ARTICLE 3.

Family Law Arbitration Act.

§ 50-41. Purpose; short title.

(a) It is the policy of this State to allow, by agreement of all parties, the arbitration of all issues arising from a marital separation or divorce, except for the divorce itself, while preserving a right of modification based on substantial change of circumstances related to alimony, child custody, and child support. Pursuant to this policy, the purpose of this Article is to provide for arbitration as an efficient and speedy means of resolving these disputes, consistent with Chapters 50, 50A, 50B, 51, 52, 52B, and 52C of the General Statutes and similar legislation, to provide default rules for the conduct of arbitration proceedings, and to assure access to the courts of this State for proceedings ancillary to this arbitration.

(b) This Article may be cited as the North Carolina Family Law Arbitration Act. (1999-185, s. 1.)

Legal Periodicals. — For legislative survey on family and juvenile law, see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

Cited in Pataky v. Pataky, 160 N.C. App. 289, 585 S.E.2d 404, 2003 N.C. App. LEXIS 1797 (2003).

§ 50-42. Arbitration agreements made valid, irrevocable, and enforceable.

(a) During, or after marriage, parties may agree in writing to submit to arbitration any controversy, except for the divorce itself, arising out of the marital relationship. Before marriage, parties may agree in writing to submit to arbitration any controversy, except for child support, child custody, or the divorce itself, arising out of the marital relationship. This agreement is valid, enforceable, and irrevocable except with both parties' consent, without regard to the justiciable character of the controversy and without regard to whether litigation is pending as to the controversy.

(b) This Article does not apply to an agreement to arbitrate in which a provision stipulates that this Article does not apply or to any arbitration or award under an agreement in which a provision stipulates that this Article does not apply. (1999-185, s. 1.)

§ 50-42.1. Nonwaivable provisions.

(a) Except as otherwise provided in subsections (b) and (c) of this section or in this Article, a party to an agreement to arbitrate or an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this Article to the extent provided by law. Any waiver or agreement must be in writing.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) Waive or agree to vary the effect of the requirements of G.S. 50-42, 50-49(a), (b), or (c), 50-58, or 50-59.

(2) Agree to unreasonably restrict the right to notice of the initiation of an arbitration proceeding under G.S. 50-42.2(a) or (b).

(3) Agree to unreasonably restrict the right to disclosure of any facts by a neutral arbitrator under G.S. 50-45.1.

(c) Except as otherwise provided in this Article, a party to an agreement to arbitrate or an arbitration proceeding may not waive, or the parties shall not vary the effect of, the requirements of this section or G.S. 50-43, 50-45(f), 50-52 through 50-57, or 50-60 through 50-62.

(d) Any waiver contrary to this section shall not be effective but shall not have the effect of voiding the agreement to arbitrate. (2005-187, s. 1.)

§ 50-42.2. Notice.

(a) A person initiates an arbitration proceeding by giving written notice to the other parties to the agreement to arbitrate in the manner in which the parties have agreed or, in the absence of agreement, by certified or registered mail, return receipt requested, or by service as authorized for the commencement of a civil action under the North Carolina Rules of Civil Procedure.

(b) Unless a person objects to the lack or insufficiency of notice not later than the beginning of the hearing, the person's appearance at the hearing waives the objection.

(c) Except as otherwise provided in this Article, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in the ordinary course of business, regardless of whether the person acquires knowledge of the notice.

(d) A person has notice if the person has knowledge of the notice or has received notice.

(e) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business or at another location held out by the person as a place of delivery of communications. (2005-187, s. 1.)

§ 50-43. Proceedings to compel or stay arbitration.

(a) On a party's application showing an agreement under G.S. 50-42 and an opposing party's refusal to arbitrate, the court shall order the parties to proceed with the arbitration. If an opposing party denies existence of an agreement to arbitrate, the court shall proceed summarily to determine whether a valid agreement exists and shall order arbitration if it finds for the moving party; otherwise, the application shall be denied.

(b) Upon the application of a party, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. This issue, when in substantial and bona fide dispute, shall be immediately and summarily tried and the court shall order a stay if it finds for the moving party. If the court finds for the opposing party, the court shall order the parties to go to arbitration. An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable. If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court unless the court otherwise orders.

(c) If an issue referable to arbitration under an alleged agreement is involved in an action or proceeding pending in a court of competent jurisdiction, the application shall be made in that court. Otherwise, the application may be made in any court of competent jurisdiction.

(d) The court shall order a stay in any action or proceeding involving an issue subject to arbitration if an order or an application for arbitration has been made under this section. If the issue is severable, the stay may be with respect to that specific issue only. When the application is made in an action or proceeding, the order compelling arbitration shall include a stay of the court action or proceeding.

(e) An order for arbitration shall not be refused and a stay of arbitration shall not be granted on the ground that the claim in issue lacks merit or because grounds for the claim have not been shown. (1999-185, s. 1; 2005-187, s. 2.)

Editor's Note. — Session Laws 2005-187, s. 20, which amended subsection (b), provides: "This act becomes effective October 1, 2005, and applies to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies."

§ 50-44. Interim relief and interim measures.

(a) In the case of an arbitration where arbitrators have not yet been appointed, or where the arbitrators are unavailable, a party may seek interim relief directly from a court as provided in subsection (c) of this section. Enforcement shall be granted as provided by the law applicable to the type of interim relief sought.

(b) In all other cases a party shall seek interim measures as described in subsection (d) of this section from the arbitrators. A party has no right to seek interim relief from a court, except that a party to an arbitration governed by this Article may request from the court enforcement of the arbitrators' order granting interim measures and review or modification of any interim measures governing child support or child custody.

(c) In connection with an agreement to arbitrate or a pending arbitration, the court may grant under subsection (a) of this section any of the following:

(1) An order of attachment or garnishment;
(2) A temporary restraining order or preliminary injunction;
(3) An order for claim and delivery;
(4) Appointment of a receiver;
(5) Delivery of money or other property into court;
(6) Notice of lis pendens;
(7) Any relief permitted by G.S. 7B-502, 7B-1902, 50-13.5(d), 50-16.2A, 50-20(h), 50-20(i), or 50-20(i1); or Chapter 50A, Chapter 50B, or Chapter 52C of the General Statutes;
(8) Any relief permitted by federal law or treaties to which the United States is a party; or
(9) Any other order necessary to ensure preservation or availability of assets or documents, the destruction or absence of which would likely prejudice the conduct or effectiveness of the arbitration.

(d) The arbitrators may, at a party's request, order any party to take any interim measures of protection that the arbitrators consider necessary in respect to the subject matter of the dispute, including interim measures analogous to interim relief specified in subsection (c) of this section. The arbitrators may require any party to provide appropriate security, including security for costs as provided in G.S. 50-51, in connection with interim measures.

(e) In considering a request for interim relief or enforcement of interim relief, any finding of fact of the arbitrators in the proceeding shall be binding on the court, including any finding regarding the probable validity of the claim that is the subject of the interim relief sought or granted, except that the court may review any findings of fact or modify any interim measures governing child support or child custody.

(f) Where the arbitrators have not ruled on an objection to their jurisdiction, the findings of the arbitrators shall not be binding on the court until the court has made an independent finding as to the arbitrators' jurisdiction. If the court rules that the arbitrators do not have jurisdiction, the application for interim relief shall be denied.

(g) Availability of interim relief or interim measures under this section may be limited by the parties' prior written agreement, except for relief pursuant to G.S. 7B-502, 7B-1902, 50-13.5(d), 50-20(h), 50B-3, Chapter 52C of the General Statutes; federal law; or treaties to which the United States is a party, whose purpose is to provide immediate, emergency relief or protection.

(h) Arbitrators who have cause to suspect that any child is abused or neglected shall report the case of that child to the director of the department of social services of the county where the child resides or, if the child resides out-of-state, of the county where the arbitration is conducted.

(i) A party seeking interim measures, or any other proceeding before the arbitrators, shall proceed in accordance with the agreement to arbitrate. If the agreement to arbitrate does not provide for a method of seeking interim measures, or for other proceedings before the arbitrators, the party shall request interim measures or a hearing by notifying the arbitrators and all other parties of the request. The arbitrators shall notify the parties of the date, time, and place of the hearing.

(j) A party does not waive the right to arbitrate by proceeding under this section. (1999-185, s. 1; 2005-187, s. 3.)

Editor's Note. — Session Laws 2005-187, s. 20, which added subsection (j), provides: "This act becomes effective October 1, 2005, and applies to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies."

§ 50-45. Appointment of arbitrators; rules for conducting the arbitration.

(a) Unless the parties otherwise agree in writing, a single arbitrator shall be chosen by the parties to arbitrate all matters in dispute.

(b) If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. The agreement may provide for appointing one or more arbitrators. Upon the application of a party, the court shall appoint arbitrators in any of the following situations:

(1) The method agreed upon by the parties in the arbitration agreement fails or for any reason cannot be followed.
(2) An arbitrator who has already been appointed fails or is unable to act, and a successor has not been chosen by the parties.
(3) The parties cannot agree on an arbitrator.

(c) Arbitrators appointed by the court have all the powers of those arbitrators specifically named in the agreement. In appointing arbitrators, a court shall consult with prospective arbitrators as to their availability and shall refer to each of the following:

(1) The positions and desires of the parties.
(2) The issues in dispute.
(3) The skill, substantive training, and experience of prospective arbitrators in those issues, including their skill, substantive training, and experience in family law issues.
(4) The availability of prospective arbitrators.

(d) The parties may agree in writing to employ an established arbitration institution to conduct the arbitration. If the agreement does not provide a method for appointment of arbitrators and the parties cannot agree on an arbitrator, the court may appoint an established arbitration institution the court considers qualified in family law arbitration to conduct the arbitration.

(e) The parties may agree in writing on rules for conducting the arbitration. If the parties cannot agree on rules for conducting the arbitration, the arbitrators shall select the rules for conducting the arbitration after hearing all parties and taking particular reference to model rules developed by arbitration institutions or similar sources. If the arbitrators cannot decide on rules for conducting the arbitration, upon application by a party, the court may order use of rules for conducting the arbitration, taking particular reference to model rules developed by arbitration institutions or similar sources.

(f) Arbitrators and established arbitration institutions, whether chosen by the parties or appointed by the court, have the same immunity as judges from civil liability for their conduct in the arbitration.

(g) "Arbitration institution" means any neutral, independent organization, association, agency, board, or commission that initiates, sponsors, or administers arbitration proceedings, including involvement in appointment of arbitrators.

(h) The court may award costs under G.S. 50-51(f) in connection with applications and other proceedings under this section. (1999-185, s. 1; 2005-187, s. 4.)

Editor's Note. — Session Laws 2005-187, s. 20, which amended this section, provides: "This act becomes effective October 1, 2005, and applies to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies."

§ 50-45.1. Disclosure by arbitrator.

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) A financial or personal interest in the outcome of the arbitration proceeding.

(2) An existing or past relationship with any of the parties to the agreement to arbitrate or to the arbitration proceeding, their counsel or representatives, a witness, or other arbitrators.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment that a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) of this section to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be grounds for vacating an award made by the arbitrator under G.S. 50-54(a)(2).

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b) of this section, upon timely objection by a party, the court may vacate an award pursuant to G.S. 50-54(a)(2).

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under G.S. 50-54(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration institution or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on those grounds pursuant to G.S. 50-54(a)(2). (2005-187, s. 5.)

Editor's Note. — Session Laws 2005-187, s. 20, made this section effective October 1, 2005, and applicable to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies.

§ 50-46. Majority action by arbitrators.

The arbitrators' powers shall be exercised by a majority unless otherwise provided by the parties' written arbitration agreement or this Article. (1999-185, s. 1; 2005-187, s. 6.)

Editor's Note. — Session Laws 2005-187, s. 20, which amended this section, provides: "This act becomes effective October 1, 2005, and applies to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies."

§ 50-47. Hearing.

Unless otherwise provided by the parties' written agreement:

(1) The arbitrators shall appoint a time and place for the hearing and notify the parties or their counsel by personal service or by registered or certified mail, return receipt requested, not less than five days before the hearing. Appearance of a party at the hearing waives any claim of deficiency of notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause shown, or upon their own motion, may postpone the hearing to a time not later than the date fixed by the written agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. Upon application of a party, the court may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(2) The parties are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(3) All the arbitrators shall conduct the hearing, but a majority may determine any question and may render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

(4) Upon request of any party or at the election of any arbitrator, the arbitrators shall cause to be made a record of testimony and evidence introduced at the hearing. The arbitrators shall decide how the cost of the record will be apportioned. (1999-185, s. 1; 2005-187, s. 7.)

Editor's Note. — Session Laws 2005-187, s. 20, which amended this section, provides: "This act becomes effective October 1, 2005, and applies to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies."

§ 50-48. Representation by attorney.

A party has the right to be represented by counsel at any proceeding or hearing under this Article. A waiver of representation prior to a proceeding or hearing is ineffective. (1999-185, s. 1.)

§ 50-49. Witnesses; subpoenas; depositions; court assistance.

(a) The arbitrators have the power to administer oaths and may issue subpoenas for attendance of witnesses and for production of books, records, documents, and other evidence. Subpoenas issued by the arbitrators shall be served and, upon application to the court by a party or the arbitrators, enforced in the manner provided by law for service and enforcement of subpoenas in a civil action.

(b) On the application of a party and for use as evidence, the arbitrators may permit depositions to be taken in the manner and upon the terms the arbitrators designate.

(c) All provisions of law compelling a person under subpoena to testify apply.

(d) The arbitrators or a party with the approval of the arbitrators may request assistance from the court in obtaining discovery and taking evidence, in which event the Rules of Civil Procedure under Chapter 1A of the General Statutes and Chapters 50, 50A, 52B, and 52C of the General Statutes apply. The court may execute the request within its competence and according to its rules on discovery and evidence and may impose sanctions for failure to comply with its orders.

(e) A subpoena may be issued as provided by G.S. 8-59, in which case the witness compensation provisions of G.S. 6-51, 6-53, and 7A-314 shall apply. (1999-185, s. 1.)

§ 50-50: Repealed by Session Laws 2005-187, s. 8, effective October 1, 2005.

§ 50-50.1. Consolidation.

(a) Except as otherwise provided in subsection (c) of this section, upon motion of a party to an agreement or arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if all of the following apply:

(1) There are separate agreements to arbitrate or separate arbitration proceedings between the same parties or one of them is a party to a separate agreement to arbitrate or a separate arbitration with a third party.

(2) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions.

(3) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings.

(4) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) The court shall not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation. (2005-187, s. 9.)

Effect of Amendments. — Session Laws 2005-187, s. 20, made this section effective October 1, 2005, and applicable to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies.

§ 50-51. Award; costs.

(a) The award shall be in writing, dated and signed by the arbitrators joining in the award, with a statement of the place where the arbitration was conducted and the place where the award was made. Where there is more than one arbitrator, the signatures of a majority of the arbitrators suffice, but the reason for any omitted signature shall be stated. The arbitrators shall deliver a copy of the award to each party personally or by registered or certified mail, return receipt requested, or as provided in the parties' written agreement.

Time of delivery shall be computed from the date of personal delivery or date of mailing.

(b) Unless the parties otherwise agree in writing, the award shall state the reasons upon which it is based.

(c) Unless the parties otherwise agree in writing, the arbitrators may award interest as provided by law.

(d) The arbitrators in their discretion may award specific performance to a party requesting an award of specific performance when that would be an appropriate remedy.

(e) Unless the parties otherwise agree in writing, the arbitrators may not award punitive damages. If arbitrators award punitive damages, they shall state the award in a record and shall specify facts justifying the award and the amount of the award attributable to punitive damages.

(f) Costs:

(1) Unless the parties otherwise agree in writing, awarding of costs of an arbitration shall be in the arbitrators' discretion.

(2) In making an award of costs, the arbitrators may include any or all of the following as costs:

a. Fees and expenses of the arbitrators, expert witnesses, and translators;

b. Fees and expenses of counsel, to the extent allowed by law unless the parties otherwise agree in writing, and of an institution supervising the arbitration, if any;

c. Any other expenses incurred in connection with the arbitration proceedings;

d. Sanctions awarded by the arbitrators or the court, including those provided by N.C.R. Civ. P. 11 and 37; and

e. Costs allowed by Chapters 6 and 7A of the General Statutes.

(3) In making an award of costs, the arbitrators shall specify each of the following:

a. The party entitled to costs;

b. The party who shall pay costs;

c. The amount of costs or method of determining that amount; and

d. The manner in which costs shall be paid.

(g) An award shall be made within the time fixed by the agreement. If no time is fixed by the agreement, the award shall be made within the time the court orders on a party's application. The parties may extend the time in writing either before or after the expiration of this time. A party waives objection that an award was not made within the time required unless that party notifies the arbitrators of his or her objection prior to delivery of the award to that party. (1999-185, s. 1; 2005-187, s. 10.)

Editor's Note. — Session Laws 2005-187, s. 20, which amended this section, provides: "This act becomes effective October 1, 2005, and applies to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies."

§ 50-52. Change of award by arbitrators.

(a) On a party's application to the arbitrators or, if an application to the court is pending under G.S. 50-53 through G.S. 50-56, on submission to the arbitrators by the court under the conditions ordered by the court, the arbitrators may modify or correct the award for any of the following reasons:

(1) Upon grounds stated in G.S. 50-55(a)(1) and (a)(3).

(2) If the arbitrators have not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding.

(3) To clarify the award.

(b) The application shall be made within 20 days after delivery of the award to the opposing party. The application must include a statement that the opposing party must serve any objections to the application within 10 days from notice. An award modified or corrected under this section is subject to the provisions of G.S. 50-51(a) through G.S. 50-51(f) and G.S. 50-53 through G.S. 50-56. (1999-185, s. 1; 2005-187, s. 11.)

Editor's Note. — Session Laws 2005-187, s. 20, which rewrote this section, provides: "This act becomes effective October 1, 2005, and applies to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies."

§ 50-53. Confirmation of award.

(a) Unless the parties otherwise agree in writing that part or all of an award shall not be confirmed by the court, upon a party's application, the court shall confirm an award, except when within time limits imposed under G.S. 50-54 through G.S. 50-56 grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in G.S. 50-54 through G.S. 50-56.

(b) The court may award costs, as provided in G.S. 50-51(f), of the application and subsequent proceedings. (1999-185, s. 1; 2003-61, s. 1; 2005-187, s. 12.)

Editor's Note. — Session Laws 2005-187, s. 20, which rewrote this section, provides: "This act becomes effective October 1, 2005, and applies to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies."

§ 50-54. Vacating an award.

(a) Upon a party's application, the court shall vacate an award for any of the following reasons:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing the rights of a party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon a showing of sufficient cause for the postponement, refused to hear evidence material to the controversy, or otherwise conducted the hearing contrary to the provisions of G.S. 50-47;

(5) There was no arbitration agreement, the issue was not adversely determined in proceedings under G.S. 50-43, and the party did not participate in the arbitration hearing without raising the objection. The fact that the relief awarded either could not or would not be granted by a court is not a ground for vacating or refusing to confirm the award;

(6) The court determines that the award for child support or child custody is not in the best interest of the child. The burden of proof at a hearing under this subdivision is on the party seeking to vacate the arbitrator's award;

(7) The award included punitive damages, and the court determines that the award for punitive damages is clearly erroneous; or

(8) If the parties contract in an arbitration agreement for judicial review of errors of law in the award, the court shall vacate the award if the

arbitrators have committed an error of law prejudicing a party's rights.

(b) An application under this section shall be made within 90 days after delivery of a copy of the award to the applicant. If the application is predicated on corruption, fraud, or other undue means, it shall be made within 90 days after these grounds are known or should have been known.

(c) In vacating an award on grounds other than stated in subdivision (5) of subsection (a) of this section, the court may order a rehearing before arbitrators chosen as provided in the agreement, or in the absence of a provision regarding the appointment of arbitrators, by the court in accordance with G.S. 50-45, except in the case of a vacated award for child support or child custody in which case the court may proceed to hear and determine all such issues. The time within which the agreement requires an award to be made applies to the rehearing and commences from the date of the order.

(d) The court shall confirm the award and may award costs of the application and subsequent proceedings under G.S. 50-51(f) if an application to vacate is denied, no motion to modify or correct the award is pending, and the parties have not agreed in writing that the award shall not be confirmed under G.S. 50-53. (1999-185, s. 1; 2005-187, s. 13.)

Editor's Note. — Session Laws 2005-187, s. 20, which rewrote subsection (d), provides: "This act becomes effective October 1, 2005, and applies to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies."

§ 50-55. Modification or correction of award.

(a) Upon application made within 90 days after delivery of a copy of an award to an applicant, the court shall modify or correct the award where at least one of the following occurs:

(1) There is an evident miscalculation of figures or an evident mistake in the description of a person, thing, or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them, and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify or correct the award to effect its intent and shall confirm the award as modified or corrected. Otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

(d) The court may award costs, as provided in G.S. 50-51(f), of the application and subsequent proceedings. (1999-185, s. 1.)

§ 50-56. Modification of award for alimony, postseparation support, child support, or child custody based on substantial change of circumstances.

(a) A court or the arbitrators may modify an award for postseparation support, alimony, child support, or child custody under conditions stated in G.S. 50-13.7 and G.S. 50-16.9 as provided in subsections (b) through (f) of this section.

(b) Unless the parties have agreed in writing that an award for postseparation support or alimony shall be nonmodifiable, an award by arbitrators for postseparation support or alimony under G.S. 50-16.2A, 50-16.3A, 50-16.4, or 50-16.7 may be modified if a court order for alimony or postseparation support could be modified under G.S. 50-16.9.

(c) An award by arbitrators for child support or child custody may be modified if a court order for child support or child custody could be modified under G.S. 50-13.7.

(d) If an award for modifiable postseparation support or alimony, or an award for child support or child custody, has not been confirmed under G.S. 50-53, upon the parties' written agreement these matters may be submitted to arbitrators chosen by the parties under G.S. 50-45. G.S. 50-52 through G.S. 50-56 shall apply to this modified award.

(e) If an award for modifiable postseparation support or alimony, or an award for child support or child custody has been confirmed pursuant to G.S. 50-53, upon the parties' agreement in writing and joint motion, the court may remit these matters to arbitrators chosen by the parties as provided in G.S. 50-45, in which case G.S. 50-52 through G.S. 50-56 apply to this modified award.

(f) Except as otherwise provided in this section, the provisions of G.S. 50-55 apply to modifications or corrections of awards for postseparation support, alimony, child support, or child custody. (1999-185, s. 1; 2005-187, s. 14.)

Editor's Note. — Session Laws 2005-187, s. 20, which amended this section, provides: "This act becomes effective October 1, 2005, and applies to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies."

§ 50-57. Orders or judgments on award.

(a) Upon granting an order confirming, modifying, or correcting an award, an order or judgment shall be entered in conformity with the order and docketed and enforced as any other order or judgment. The court may award costs, as provided in G.S. 50-51(f), of the application and of proceedings subsequent to the application and disbursements.

(b) Notwithstanding G.S. 7A-109, 7A-276.1, or 132-1 or similar law, the court, in its discretion, may order that any arbitration award or order or any judgment or court order entered as a court order or judgment under this Article, or any part of the arbitration award or order or judgment or court order, be sealed, to be opened only upon order of the court upon good cause shown. Upon good cause shown, the court may order resealing of the opened arbitration awards or orders or judgments or court orders. The court, in its discretion, may order that any arbitration award or order or any judgment or court order entered as a court order or judgment under this Article, or any part of the arbitration award or order or judgment or court order, be redacted, the redactions to be opened only upon order of the court upon good cause shown. Upon good cause shown, the court may order redaction of the previously redacted arbitration awards or orders or judgments or court orders opened under the court's order. (1999-185, s. 1; 2005-187, s. 15.)

Editor's Note. — Session Laws 2005-187, s. 20, which added subsection (b), provides: "This act becomes effective October 1, 2005, and applies to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies."

§ 50-58. Applications to the court.

Except as otherwise provided, an application to a court under this Article shall be by motion and shall be heard in the manner and upon notice provided by law or rule of court for making and hearing motions in civil actions. Unless the parties otherwise agree in writing, notice of an initial application for an order shall be served in the manner provided by law for service of summons in civil actions. (1999-185, s. 1; 2005-187, s. 16.)

Editor's Note. — Session Laws 2005-187, s. 20, which amended this section, provides: "This act becomes effective October 1, 2005, and applies to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies."

§ 50-59. Court; jurisdiction; other definitions.

(a) The term "court" means a court of competent jurisdiction of this State. Making an agreement in this State described in G.S. 50-42 or any agreement providing for arbitration in this State or under its laws confers jurisdiction on the court to enforce the agreement under this Article and to enter judgment on an award under the agreement.

(b) The term "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency or instrumentality, public corporation, or any other legal or commercial entity. (1999-185, s. 1; 2005-187, s. 17.)

Editor's Note. — Session Laws 2005-187, s. 20, which added subsection (b), provides: "This act becomes effective October 1, 2005, and applies to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies."

§ 50-60. Appeals.

(a) An appeal may be based on failure to comply with the procedural aspects of this Article. An appeal may be taken from any of the following:

(1) An order denying an application to compel arbitration made under G.S. 50-43;
(2) An order granting an application to stay arbitration made under G.S. 50-43(b);
(3) An order confirming or denying confirmation of an award;
(4) An order modifying or correcting an award;
(5) An order vacating an award without directing a rehearing; or
(6) A judgment entered pursuant to provisions of this Article.

(b) Unless the parties contract in an arbitration agreement for judicial review of errors of law as provided in G.S. 50-54(a), a party may not appeal on the basis that the arbitrator failed to apply correctly the law under Chapters 50, 50A, 52B, or 52C of the General Statutes.

(c) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action. (1999-185, s. 1.)

§ 50-61. Article not retroactive.

This Article applies to agreements made on or after October 1, 1999, unless parties by separate written agreement after that date state that this Article shall apply to agreements dated before October 1, 1999. (1999-185, s. 1; 2005-187, s. 18.)

Editor's Note. — Session Laws 2005-187, s. 20, which amended this section, provides: "This act becomes effective October 1, 2005, and applies to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies."

§ 50-62. Construction; uniformity of interpretation.

(a) Certain provisions of this Article have been adapted from the Uniform Arbitration Act formerly in force in this State, the Revised Uniform Arbitration Act in force in this State, the North Carolina International Commercial Arbitration and Conciliation Act, and Chapters 50, 50A, 50B, 51, 52, and 52C of the General Statutes. This Article shall be construed to effect its general purpose to make uniform provisions of these Acts and Chapters 50, 50A, 50B, 51, 52, 52B, and 52C of the General Statutes.

(b) The provisions of this Article governing the legal effect, validity, or enforceability of electronic records or electronic signatures, or of contracts performed with the use of these records or signatures, conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., or as otherwise authorized by federal or State law governing these electronic records or electronic signatures. (1999-185, s. 1; 2005-187, s. 19.)

Editor's Note. — Session Laws 2005-187, s. 20, which amended subsection (a) and added subsection (b), provides: "This act becomes effective October 1, 2005, and applies to agreements made on or after that date. This act also applies to agreements to arbitrate made before October 1, 2005, if all parties to the agreement or to the arbitration proceeding agree that this act applies."

§§ 50-63 through 50-69: Reserved for future codification purposes.

Article 4.

Collaborative Law Proceedings.

§ 50-70. Collaborative law.

As an alternative to judicial disposition of issues arising in a civil action under this Article, except for a claim for absolute divorce, on a written agreement of the parties and their attorneys, a civil action may be conducted under collaborative law procedures as set forth in this Article. (2003-371, s. 1.)

Legal Periodicals. — For comment, "Putting 'Counselor' Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes," see 84 N.C. L. Rev. 979 (2006).

§ 50-71. Definitions.

As used in this article, the following terms mean:

(1) Collaborative law. — A procedure in which a husband and wife who are separated and are seeking a divorce, or are contemplating separation and divorce, and their attorneys agree to use their best efforts and make a good faith attempt to resolve their disputes arising from the marital relationship on an agreed basis. The procedure shall include an agreement by the parties to attempt to resolve their disputes without having to resort to judicial intervention, except to have the court approve the settlement agreement and sign the orders required by law to effectuate the agreement of the parties as the court deems appropriate. The procedure shall also include an agreement where the parties' attorneys agree not to serve as litigation counsel, except to ask the court to approve the settlement agreement.

(2) Collaborative law agreement. — A written agreement, signed by a husband and wife and their attorneys, that contains an acknowledgement by the parties to attempt to resolve the disputes arising from their marriage in accordance with collaborative law procedures.

(3) Collaborative law procedures. — The process for attempting to resolve disputes arising from a marriage as set forth in this Article.

(4) Collaborative law settlement agreement. — An agreement entered into between a husband and wife as a result of collaborative law procedures that resolves the disputes arising from the marriage of the husband and wife.

(5) Third-party expert. — A person, other than the parties to a collaborative law agreement, hired pursuant to a collaborative law agreement to assist the parties in the resolution of their disputes. (2003-371, s. 1.)

§ 50-72. Agreement requirements.

A collaborative law agreement must be in writing, signed by all the parties to the agreement and their attorneys, and must include provisions for the withdrawal of all attorneys involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute. (2003-371, s. 1.)

§ 50-73. Tolling of time periods.

A validly executed collaborative law agreement shall toll all legal time periods applicable to legal rights and issues under law between the parties for the amount of time the collaborative law agreement remains in effect. This section applies to any applicable statutes of limitations, filing deadlines, or other time limitations imposed by law or court rule, including setting a hearing or trial in the case, imposing discovery deadlines, and requiring compliance with scheduling orders. (2003-371, s. 1.)

§ 50-74. Notice of collaborative law agreement.

(a) No notice shall be given to the court of any collaborative law agreement entered into prior to the filing of a civil action under this Article.

(b) If a civil action is pending, a notice of a collaborative law agreement, signed by the parties and their attorneys, shall be filed with the court. After the filing of a notice of a collaborative law agreement, the court shall take no action in the case, including dismissal, unless the court is notified in writing that the parties have done one of the following:

(1) Failed to reach a collaborative law settlement agreement.

(2) Both voluntarily dismissed the action.

(3) Asked the court to enter a judgment or order to make the collaborative law settlement agreement an act of the court in accordance with G.S. 50-75. (2003-371, s. 1.)

§ 50-75. Judgment on collaborative law settlement agreement.

A party is entitled to an entry of judgment or order to effectuate the terms of a collaborative law settlement agreement if the agreement is signed by each party to the agreement. (2003-371, s. 1.)

§ 50-76. Failure to reach settlement; disposition by court; duty of attorney to withdraw.

(a) If the parties fail to reach a settlement and no civil action has been filed, either party may file a civil action, unless the collaborative law agreement first provides for the use of arbitration or alternative dispute resolution.

(b) If a civil action is pending and the collaborative law procedures do not result in a collaborative law settlement agreement, upon notice to the court, the court may enter orders as appropriate, free of the restrictions of G.S. 50-74(b).

(c) If a civil action is filed or set for trial pursuant to subsection (a) or (b) of this section, the attorneys representing the parties in the collaborative law proceedings may not represent either party in any further civil proceedings and shall withdraw as attorney for either party. (2003-371, s. 1.)

§ 50-77. Privileged and inadmissible evidence.

(a) All statements, communications, and work product made or arising from a collaborative law procedure are confidential and are inadmissible in any court proceeding. Work product includes any written or verbal communications or analysis of any third-party experts used in the collaborative law procedure.

(b) All communications and work product of any attorney or third-party expert hired for purposes of participating in a collaborative law procedure shall be privileged and inadmissible in any court proceeding, except by agreement of the parties. (2003-371, s. 1.)

§ 50-78. Alternate dispute resolution permitted.

Nothing in this Article shall be construed to prohibit the parties from using, by mutual agreement, other forms of alternate dispute resolution, including mediation or binding arbitration, to reach a settlement on any of the issues included in the collaborative law agreement. The parties' attorneys for the collaborative law proceeding may also serve as counsel for any form of alternate dispute resolution pursued as part of the collaborative law agreement. (2003-371, s. 1.)

§ 50-79. Collaborative law procedures surviving death.

Consistent with G.S. 50-20(l), the personal representative of the estate of a deceased spouse may continue a collaborative law procedure with respect to equitable distribution that has been initiated by a collaborative law agreement prior to death, notwithstanding the death of one of the spouses. The provisions of G.S. 50-73 shall apply to time limits applicable under G.S. 50-20(l) for collaborative law procedures continued pursuant to this section. (2003-371, s. 1.)

§§ 50-80 through 50-89: Reserved for future codification purposes.

ARTICLE 5.

Parenting Coordinator.

§ 50-90. Definitions.

As used in this Article, the following terms mean:

(1) High-conflict case. — A child custody action involving minor children brought under Article 1 of this Chapter where the parties demonstrate an ongoing pattern of any of the following:

a. Excessive litigation.
b. Anger and distrust.
c. Verbal abuse.
d. Physical aggression or threats of physical aggression.
e. Difficulty communicating about and cooperating in the care of the minor children.
f. Conditions that in the discretion of the court warrant the appointment of a parenting coordinator.

(2) Minor child. — A person who is less than 18 years of age and who is not married or legally emancipated.

(3) Parenting coordinator. — An impartial person who meets the qualifications of G.S. 50-93. (2005-228, s. 1.)

CASE NOTES

Necessary Findings. — Trial court erred in appointing a parenting coordinator without making the necessary specific findings. Hall v. Hall, 188 N.C. App. 527, 655 S.E.2d 901, 2008 N.C. App. LEXIS 202 (2008).

§ 50-91. Appointment of parenting coordinator.

(a) The court may appoint a parenting coordinator at any time during the proceedings of a child custody action involving minor children brought under Article 1 of this Chapter if all parties consent to the appointment. The parties may agree to limit the parenting coordinator's decision-making authority to specific issues or areas.

(b) The court may appoint a parenting coordinator without the consent of the parties upon entry of a custody order other than an ex parte order, or upon entry of a parenting plan only if the court also makes specific findings that the action is a high-conflict case, that the appointment of the parenting coordinator is in the best interests of any minor child in the case, and that the parties are able to pay for the cost of the parenting coordinator.

(c) The order appointing a parenting coordinator shall specify the issues the parenting coordinator is directed to assist the parties in resolving and deciding. The order may also incorporate any agreement regarding the role of the parenting coordinator made by the parties under subsection (a) of this section. The court shall give a copy of the appointment order to the parties prior to the appointment conference. Notwithstanding the appointment of a parenting coordinator, the court shall retain exclusive jurisdiction to determine fundamental issues of custody, visitation, and support, and the authority to exercise management and control of the case.

(d) The court shall select a parenting coordinator from a list maintained by the district court. Prior to the appointment conference, the court must complete and give to the parenting coordinator a referral form listing contact information for the parties and their attorneys, the court's findings in support of the appointment, and any agreement by the parties. (2005-228, s. 1.)

CASE NOTES

Necessary Findings. — Trial court erred in appointing a parenting coordinator without making the necessary specific findings. Hall v. Hall, 188 N.C. App. 527, 655 S.E.2d 901, 2008 N.C. App. LEXIS 202 (2008).

Appointment Proper. — Trial court permissibly appointed a parenting coordinator after finding that the case involved a high degree of conflict, the parties were able to pay for a coordinator, and such appointment was in the best interest of the child. Jackson v. Jackson, — N.C. App. —, 665 S.E.2d 545, 2008 N.C. App. LEXIS 1631 (2008).

§ 50-92. Authority of parenting coordinator.

(a) The authority of a parenting coordinator shall be specified in the court order appointing the parenting coordinator and shall be limited to matters that will aid the parties:
(1) Identify disputed issues.
(2) Reduce misunderstandings.
(3) Clarify priorities.
(4) Explore possibilities for compromise.
(5) Develop methods of collaboration in parenting.
(6) Comply with the court's order of custody, visitation, or guardianship.

(b) Notwithstanding subsection (a) of this section, the court may authorize a parenting coordinator to decide issues regarding the implementation of the parenting plan that are not specifically governed by the court order and which the parties are unable to resolve. The parties must comply with the parenting coordinator's decision until the court reviews the decision. The parenting coordinator, any party, or the attorney for any party may request an expedited hearing to review a parenting coordinator's decision. Only the judge presiding over the case may subpoena the parenting coordinator to appear and testify at the hearing.

(c) The parenting coordinator shall not provide any professional services or counseling to either parent or any of the minor children. The parenting coordinator shall refer financial issues to the parties' attorneys. (2005-228, s. 1.)

§ 50-93. Qualifications.

(a) To be eligible to be included on the district court's list of parenting coordinators, a person must meet all of the following requirements:
(1) Hold a masters or doctorate degree in psychology, law, social work, counseling, medicine, or a related subject area.
(2) Have at least five years of related professional post-degree experience.
(3) Hold a current license in the parenting coordinator's area of practice, if applicable.
(4) Participate in 24 hours of training in topics related to the developmental stages of children, the dynamics of high-conflict families, the stages and effects of divorce, problem solving techniques, mediation, and legal issues.

(b) In order to remain eligible as a parenting coordinator, the person must also attend parenting coordinator seminars that provide continuing education, group discussion, and peer review and support. (2005-228, s. 1.)

§ 50-94. Appointment conference.

(a) The parties, their attorneys, and the proposed parenting coordinator must all attend the appointment conference.

(b) At the time of the appointment conference, the court shall do all of the following:
(1) Explain to the parties the parenting coordinator's role, authority, and responsibilities as specified in the appointment order and any agreement entered into by the parties.
(2) Determine the information each party must provide to the parenting coordinator.
(3) Determine financial arrangements for the parenting coordinator's fee to be paid by each party and authorize the parenting coordinator to charge any party separately for individual contacts made necessary by that party's behavior.

(4) Inform the parties, their attorneys, and the parenting coordinator of the rules regarding communications among them and with the court.
(5) Enter the appointment order.

(c) The parenting coordinator and any guardians ad litem shall bring to the appointment conference all necessary releases, contracts, and consents. The parenting coordinator must also schedule the first sessions with the parties. (2005-228, s. 1.)

CASE NOTES

Cited in McKyer v. McKyer, 182 N.C. App. 456, 642 S.E.2d 527, 2007 N.C. App. LEXIS 648 (2007).

§ 50-95. Fees.

(a) The parenting coordinator shall be entitled to reasonable compensation from the parties for services rendered and to a reasonable retainer. The parenting coordinator may request a hearing in the event of a fee dispute.

(b) The court may make the appointment of a parenting coordinator contingent upon the parties' payment of a specific fee to the parenting coordinator. The parenting coordinator shall not begin any duties until the fee has been paid. (2005-228, s. 1.)

§ 50-96. Meetings and communications.

Meetings between the parenting coordinator and the parties may be informal and ex parte. Communications between the parties and the parenting coordinator are not confidential. The parenting coordinator and the court shall not engage in any ex parte communications. (2005-228, s. 1.)

§ 50-97. Reports.

(a) The parenting coordinator shall promptly provide written notification to the court, the parties, and attorneys for the parties if the parenting coordinator makes any of the following determinations:
(1) The existing custody order is not in the best interests of the child.
(2) The parenting coordinator is not qualified to address or resolve certain issues in the case.

(b) The court shall schedule a hearing and review the matter no later than two weeks following receipt of the report. The parenting coordinator shall remain involved in the case until the hearing.

(c) If the parties agree to any fundamental change in the child custody order, the parenting coordinator shall send the agreement to the parties' attorneys for preparation of a consent order. (2005-228, s. 1.)

§ 50-98. Parenting coordinator records.

(a) The parenting coordinator shall provide the following to the attorneys for the parties and to the parties:
(1) A written summary of the developments in the case following each meeting with the parties.
(2) Copies of any other written communications.

(b) The parenting coordinator shall maintain records of each meeting. These records may only be subpoenaed by order of the judge presiding over the case. The court must review the records in camera and may release the records to the parties and their attorneys only if the court determines release of the information contained in the records will assist the parties with the presentation of their case at trial. (2005-228, s. 1.)

§ 50-99. Modification or termination of parenting coordinator appointment.

(a) For good cause shown, the court may terminate or modify the parenting coordinator appointment upon motion of either party at the request of the parenting coordinator, upon the agreement of the parties and the parenting coordinator, or by the court on its own motion. Good cause includes any of the following:

(1) Lack of reasonable progress over a significant period of time despite the best efforts of the parties and the parenting coordinator.
(2) A determination that the parties no longer need the assistance of a parenting coordinator.
(3) Impairment on the part of a party that significantly interferes with the party's participation in the process.
(4) The parenting coordinator is unable or unwilling to continue to serve.

(b) If the parties agreed to the appointment of the parenting coordinator under G.S. 50-91(a), the court may terminate or modify the appointment according to that agreement or according to a subsequent agreement by the parties. (2005-228, s. 1.)

§ 50-100. Parenting coordinator immunity.

A parenting coordinator shall not be liable for damages for acts or omissions of ordinary negligence arising out of that person's duties and responsibilities as a parenting coordinator. This section does not apply to actions arising out of the operation of a motor vehicle. (2005-228, s. 1.)

Chapter 50A.

Uniform Child-Custody Jurisdiction and Enforcement Act.

Article 1.

Uniform Child Custody Jurisdiction Act.

Sec.
50A-1 through 50A-25. [Repealed.]

Article 2.

Uniform Child-Custody Jurisdiction and Enforcement Act.

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50A-201. Initial child-custody jurisdiction.
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Sec.
50A-205. Notice; opportunity to be heard; joinder.
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50A-309. Service of petition and order.
50A-310. Hearing and order.
50A-311. Warrant to take physical custody of child.
50A-312. Costs, fees, and expenses.
50A-313. Recognition and enforcement.
50A-314. Appeals.
50A-315. Role of prosecutor or public official.
50A-316. Role of law enforcement.
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ARTICLE 1.

Uniform Child Custody Jurisdiction Act.

§§ 50A-1 through 50A-25: Repealed by Session Laws 1999-223, s. 1(b), effective October 1, 1999, and applicable to causes of action arising on or after that date.

Cross References. — See now the Uniform Child-Custody Jurisdiction and Enforcement Act, G.S. 50A-101 et seq.

Editor's Note. — Session Laws 1999-223, s. 1(a), effective October 1, 1999, designated G.S. 50A-1 through 50A-25, which were repealed by s. 1(b), as Article 1 of Chapter 50A.

ARTICLE 2.

Uniform Child-Custody Jurisdiction and Enforcement Act.

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Part 1. General Provisions.

§ 50A-101. Short title.

This Article may be cited as the Uniform Child-Custody Jurisdiction and Enforcement Act. (1979, c. 110, s. 1; 1999-223, s. 3.)

OFFICIAL COMMENT

Section 1 of the UCCJA [former G.S. 50A-1] was a statement of the purposes of the Act. Although extensively cited by courts, it was eliminated because Uniform Acts no longer contain such a section. Nonetheless, this Act should be interpreted according to its purposes which are to:

(1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;

(2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;

(3) Discourage the use of the interstate system for continuing controversies over child custody;

(4) Deter abductions of children;

(5) Avoid relitigation of custody decisions of other States in this State;

(6) Facilitate the enforcement of custody decrees of other States.

Editor's Note. — Session Laws 1999-223 repealed G.S. 50A-1 to 50A-25, the Uniform Child Custody Jurisdiction Act, and added G.S. 50A-101 et seq., the Uniform Child-Custody Jurisdiction and Enforcement Act. Where applicable, the historical citations and case notes under the former sections have been transferred to the corresponding new sections.

Session Laws 2003-381, s. 2(a)-(c), provides: "The Administrative Office of the Courts, in consultation with the Department of Health and Human Services, shall establish a pilot program in the Twelfth Judicial District that addresses the issue of conflicting child custody orders. To the extent that this act or the program established pursuant to it conflicts with any State law, the program supersedes that law. However, the Department of Health and Human Services shall ensure that federal funding is not jeopardized.

"Under this program, when a court obtains jurisdiction over a juvenile as the result of a petition alleging that the juvenile is abused, neglected, or dependent:

"(1) The court in the juvenile proceeding may stay any other civil action in this State in which the custody of the juvenile is an issue.

"(2) If an order entered in the juvenile proceeding and an order entered in another civil custody action conflict, the order in the juvenile proceeding controls as long as the court continues to retain jurisdiction in the juvenile proceeding.

"(3) The court in the juvenile proceeding may order that any civil action or claim for custody filed in the pilot judicial district be consolidated with the juvenile proceeding.

"(4) If a civil action or claim for custody has been filed in a district other than the pilot judicial district, then the court in the juvenile proceeding may, after consulting with the court in the other district, order that the civil action or claim for custody be transferred to the pilot judicial district or may order a change of venue in the juvenile proceeding and transfer the juvenile proceeding to the other district.

"(5) The court may establish a mechanism for determining the legal status of a juvenile after jurisdiction of the juvenile court terminates, including a determination as to who has custody of the juvenile and under what circumstances custody may subsequently be changed.

"The Administrative Office of the Courts shall evaluate the pilot program and report its findings and recommendations to the 2005 General Assembly prior to its convening."

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For survey of 1981 family law, see 60 N.C.L. Rev. 1379 (1982).

For comment discussing the Uniform Child Custody Jurisdiction Act in North Carolina, see 4 Campbell L. Rev. 371 (1982).

For legislative survey on family and juvenile law, see 22 Campbell L. Rev. 253 (2000).

For case note, "Nunn v. Allen, Living Separate and Apart in North Carolina, Separation Agreements, Sex, the Meaning of Unmarried, and Liability of Third Parties," 25 N.C. Cent. L.J. 242 (2003).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former G.S. 50A-1.*

Legislative Intent. — The former Uniform Child Custody Jurisdiction Act was intended to prevent forum shopping for the convenience of competing parents to the detriment of the real interest of the child. Holland v. Holland, 56 N.C. App. 96, 286 S.E.2d 895 (1982).

Purpose. — The former Uniform Child Custody Jurisdiction Act sought to prevent parents from forum shopping their child custody disputes and to assure that these disputes were litigated in the state with which the child and the child's family had the closest connection. In re Van Kooten, 126 N.C. App. 764, 487 S.E.2d 160 (1997), appeal dismissed, 347 N.C. 576, 502 S.E.2d 618 (1998).

Uniform Child-Custody Jurisdiction and Enforcement Act, G.S. 50A-101 et seq., provides a uniform set of jurisdictional rules and guidelines for the national enforcement of child-custody orders. In re Q.V., 164 N.C. App. 737, 596 S.E.2d 867, 2004 N.C. App. LEXIS 1140 (2004).

What Law Governs. — The issue of a state court's jurisdiction over child custody matters is governed by the Uniform Child Custody Jurisdiction Act (see now G.S. 50A-101 et seq.) and the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A. Schrock v. Schrock, 89 N.C. App. 308, 365 S.E.2d 657 (1988).

Applicability of Chapter to Permanent Custody Situations. — The jurisdictional prerequisites of the former Uniform Child Custody Jurisdiction Act (UCCJA) only governed in permanent custody situations. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Chapter 50B is not designed to establish alternative grounds for jurisdiction over custody disputes apart from those set forth in this Chapter. Danna v. Danna, 88 N.C. App. 680, 364 S.E.2d 694, cert. denied, 322 N.C. 479, 370 S.E.2d 221 (1988).

Whenever the relief sought under Chapter 50B is a determination of custody or visitation rights, the existence of subject matter jurisdiction over the action is governed by this Chapter (see now Article 2 of this Chapter), just as it is in any other custody dispute. Danna v. Danna, 88 N.C. App. 680, 364 S.E.2d 694, cert. denied, 322 N.C. 479, 370 S.E.2d 221 (1988).

Only by making recognition and enforcement mandatory can purposes of this Chapter (see now Article 2 of this Chapter) be realized. Williams v. Richardson, 53 N.C. App. 663, 281 S.E.2d 777 (1981), cert. denied, 304 N.C. 733, 288 S.E.2d 382 (1982).

The question of subject matter jurisdiction could be raised at any point in a proceeding under the former Uniform Child Custody Jurisdiction Act, and such jurisdiction could not be conferred by waiver, estoppel or consent. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

The district courts of this State possess general subject matter jurisdiction over child custody disputes. Such matters are in no wise reserved by the Constitution or laws of North Carolina to the exclusive consideration of another tribunal. Therefore, the real question under the former Uniform Child Custody Jurisdiction Act was whether jurisdiction was properly exercised according to the statutory requirements in a particular case. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

Trial Court Lacked Subject Matter Jurisdiction. — Although the general requirement for jurisdiction was satisfied as the children who were the subject of a petition to terminate their mother's parental rights resided in North Carolina when the petition was filed, the trial court's order denying the mother's motion to dismiss was vacated as the trial court lacked subject matter jurisdiction under the North Carolina Uniform Child-Custody Jurisdiction and Enforcement Act, NC. Gen. Stat. § 50A-101 et seq. In re N.R.M., 165 N.C. App. 294, 598 S.E.2d 147, 2004 N.C. App. LEXIS 1163 (2004).

Full Faith and Credit Properly Refused. — Refusal of North Carolina court to give full faith and credit to a Michigan custody award was not improper, where Michigan's exercise of jurisdiction was not consistent with the Parental Kidnapping Act, 28 U.S.C. § 1738A, and the former Uniform Child Custody Jurisdiction Act. Schrock v. Schrock, 89 N.C. App. 308, 365 S.E.2d 657 (1988).

Power to Award Custody to Foster Parents. — Having acquired subject matter jurisdiction, trial court, guided by the best interests of the child, had broad dispositional powers, including the power to award legal custody of child to its foster parents. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

No Attorney Fees After Contempt Motion. — Father's request for attorney fees was properly denied as a mother had filed a motion for contempt; she did not seek the expedited enforcement of a child custody determination, seek to register an out-of-state order, or otherwise utilize the remedies set forth in Part 3 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and thus Part 3 of the UCCJEA was not implicated and G.S. 50A-312 did not apply. Creighton v. Lazell-Frankel, 178 N.C. App. 227, 630 S.E.2d 738, 2006 N.C. App. LEXIS 1314 (2006).

Evidence was insufficient to determine that it was in the child's best interest to have another state assume jurisdiction. Watkins v. Watkins, 120 N.C. App. 475, 462 S.E.2d 687 (1995), appeal dismissed, 343 N.C. 128, 468 S.E.2d 795 (1996).

Cited in Ruth v. Ruth, 158 N.C. App. 123, 579 S.E.2d 909, 2003 N.C. App. LEXIS 948 (2003); In re H.L.A.D., 184 N.C. App. 381, 646 S.E.2d 425, 2007 N.C. App. LEXIS 1482 (2007).

§ 50A-102. Definitions.

In this Article:

(1) "Abandoned" means left without provision for reasonable and necessary care or supervision.

(2) "Child" means an individual who has not attained 18 years of age.

(3) "Child-custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.

(4) "Child-custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under Part 3 of this Article.

(5) "Commencement" means the filing of the first pleading in a proceeding.

(6) "Court" means an entity authorized under the law of a state to establish, enforce, or modify a child-custody determination.

(7) "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

(8) "Initial determination" means the first child-custody determination concerning a particular child.

(9) "Issuing court" means the court that makes a child-custody determination for which enforcement is sought under this Article.

(10) "Issuing state" means the state in which a child-custody determination is made.

(11) "Modification" means a child-custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.

(12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(13) "Person acting as a parent" means a person, other than a parent, who:

a. Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child-custody proceeding; and

b. Has been awarded legal custody by a court or claims a right to legal custody under the law of this State.

(14) "Physical custody" means the physical care and supervision of a child.

(15) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(16) "Tribe" means an Indian tribe or band, or Alaskan Native village, which is recognized by federal law or formally acknowledged by a state.

(17) "Warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child. (1979, c. 110, s. 1; 1999-223, s. 3.)

OFFICIAL COMMENT

The UCCJA did not contain a definition of "child." The definition here is taken from the PKPA.

The definition of "child-custody determination" now closely tracks the PKPA definition. It encompasses any judgment, decree or other order which provides for the custody of, or visitation with, a child, regardless of local terminology, including such labels as "managing conservatorship" or "parenting plan."

The definition of "child-custody proceeding" has been expanded from the comparable definition in the UCCJA. These listed proceedings have generally been determined to be the type of proceeding to which the UCCJA and PKPA are applicable. The list of examples removes any controversy about the types of proceedings where a custody determination can occur. Proceedings that affect access to the child are subject to this Act. The inclusion of proceedings related to protection from domestic violence is necessary because in some States domestic violence proceedings may affect custody of and visitation with a child. Juvenile delinquency or proceedings to confer contractual rights are not "custody proceedings" because they do not relate to civil aspects of access to a child. While a determination of paternity is covered under the Uniform Interstate Family Support Act, the custody and visitation aspects of paternity cases are custody proceedings. Cases involving the Hague Convention on the Civil Aspects of International Child Abduction have not been included at this point because custody of the child is not determined in a proceeding under the International Child Abductions Remedies Act. Those proceedings are specially included in the Article 3 enforcement process.

"Commencement" has been included in the definitions as a replacement for the term "pending" found in the UCCJA. Its inclusion simplifies some of the simultaneous proceedings provisions of this Act.

The definition of "home State" has been reworded slightly. No substantive change is intended from the UCCJA.

The term "issuing State" is borrowed from UIFSA. In UIFSA, it refers to the court that issued the support or parentage order. Here, it refers to the State, or the court, which made the custody determination that is sought to be enforced. It is used primarily in Article 3.

The term "person" has been added to ensure that the provisions of this Act apply when the State is the moving party in a custody proceeding or has legal custody of a child. The definition of "person" is the one that is mandated for all Uniform Acts.

The term "person acting as a parent" has been slightly redefined. It has been broadened from the definition in the UCCJA to include a person who has acted as a parent for a significant period of time prior to the filing of the custody proceeding as well as a person who currently has physical custody of the child. In addition, a person acting as a parent must either have legal custody or claim a right to legal custody under the law of this State. The reference to the law of this State means that a court determines the issue of whether someone is a "person acting as a parent" under its own law. This reaffirms the traditional view that a court in a child custody case applies its own substantive law. The court does not have to undertake a choice-of-law analysis to determine whether the individual who is claiming to be a person acting as a parent has standing to seek custody of the child.

The definition of "tribe" is the one mandated for use in Uniform Acts. Should a State choose to apply this Act to tribal adjudications, this definition should be enacted as well as the entirety of Section 104.

The term "contestant" as has been omitted from this revision. It was defined in the UCCJA

§ 2(1) [former G.S. 50A-2(1)] as "a person, including a parent, who claims a right to custody or visitation rights with respect to a child." It seems to have served little purpose over the years, and whatever function it once had has been subsumed by state laws on who has standing to seek custody of or visitation with a child. In addition UCCJA § 2(5) [former G.S. 50A-2(4)] of the which defined "decree" and "custody decree" has been eliminated as duplicative of the definition of "custody determination."

CASE NOTES

Editor's Note. *— Most of the cases cited below were decided under former G.S. 50A-2.*

Home State. — Findings held to sufficiently establish that North Carolina was the home state of child and to establish that child and at least one parent had a significant connection with North Carolina. Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

The trial court had subject matter jurisdiction over the custody of a child, where the father's former companion sought custody of the child as the child had lived with the companion in North Carolina until a month before her complaint was filed. Ellison v. Ramos, 130 N.C. App. 389, 502 S.E.2d 891 (1998), appeal dismissed, 349 N.C. 356, 517 S.E.2d 891 (1998).

In the child custody dispute where the mother lived in Maryland and the father lived in North Carolina, the North Carolina trial court had jurisdiction pursuant to G.S. 50A-201, because the children had lived in North Carolina for six months prior to the custody action being filed, and as a result, it was their home state under G.S. 50A-102(7). David v. Ferguson, 153 N.C. App. 482, 571 S.E.2d 230, 2002 N.C. App. LEXIS 1176 (2002).

Trial court properly found that it had jurisdiction to enter custody and termination orders under circumstances in which, at the time of the petition, the older child was in the custody of the department in North Carolina and had been for 18 months, the mother had earlier moved to North Carolina with the older child, at the date of the petition the mother was incarcerated in North Carolina, and the younger child had no contact with any other state; because the trial court asserted its jurisdiction in the order and the evidence supported its determination, the trial court properly exercised jurisdiction. In re T.J.D.W., 182 N.C. App. 394, 642 S.E.2d 471, 2007 N.C. App. LEXIS 672 (2007).

North Carolina was the child's home state pursuant to the Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction and Enforcement Act because the child resided with the mother for a period of more than six months immediately preceding the commencement of the custody proceeding. Williams v. Walker, 185 N.C. App. 393, 648 S.E.2d 536, 2007 N.C. App. LEXIS 1826 (2007).

Modification Decree. — North Carolina decree modifying a prior custody decree by a Virginia court was improper under the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A, where the Virginia court had continuing jurisdiction and had not declined to exercise it. Meade v. Meade, 650 F. Supp. 205 (M.D.N.C. 1986), aff'd, 812 F.2d 1473 (4th Cir. 1987).

Changed Circumstances. — Where the parties crossed out a cohabitation provision on the face of their separation memorandum, the trial court only partially discharged its duty when it found that a change of circumstances occurred when husband began cohabiting with his girlfriend but failed to determine whether plaintiff had met her burden of showing the effect, if any, such change had upon the welfare of the children. Browning v. Helff, 136 N.C. App. 420, 524 S.E.2d 95, 2000 N.C. App. LEXIS 14 (2000).

No Attorney Fees After Contempt Motion. — Father's request for attorney fees was properly denied as a mother had filed a motion for contempt; she did not seek the expedited enforcement of a child custody determination, seek to register an out-of-state order, or otherwise utilize the remedies set forth in Part 3 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and thus Part 3 of the UCCJEA was not implicated and G.S. 50A-312 did not apply. Creighton v. Lazell-Frankel, 178 N.C. App. 227, 630 S.E.2d 738, 2006 N.C. App. LEXIS 1314 (2006).

Refusal to Assert Jurisdiction Held Proper. — For case holding trial court properly declined to assert jurisdiction based upon conclusion that another state had assumed jurisdiction as the home state of the children involved in the custody matter in question, see Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Vermont family court order, which directed custody to a father was upheld, and a North Carolina court properly declined jurisdiction, where there was no question that the parties' minor children were living in Vermont for the required six months prior to the commencement of the mother's custody proceeding in North Carolina. Vermont qualified as the children's home state under North Carolina and Vermont law despite a six week absence from Vermont to North Carolina, which was deemed a temporary absence insufficient to prevent the conclusion that Vermont was the home state. Chick v. Chick, 164 N.C. App. 444, 596 S.E.2d

303, 2004 N.C. App. LEXIS 1036 (2004).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the former Uniform Child Custody Jurisdiction Act (UCCJA), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

County department of social services is a "person." — Under the definition of a "person," a state agency, such as a department of social services, may qualify as a petitioner or respondent in a proceeding to enforce a child custody determination. In re Q.V., 164 N.C. App. 737, 596 S.E.2d 867, 2004 N.C. App. LEXIS 1140 (2004).

Applied in In re N.R.M., 165 N.C. App. 294, 598 S.E.2d 147, 2004 N.C. App. LEXIS 1163 (2004); In re J.W.S., — N.C. App. —, 669 S.E.2d 850, 2008 N.C. App. LEXIS 2268 (2008).

Cited in In re Poole, 151 N.C. App. 472, 568 S.E.2d 200, 2002 N.C. App. LEXIS 775 (2002); In re M.B., 179 N.C. App. 572, 635 S.E.2d 8, 2006 N.C. App. LEXIS 1960 (2006); In re H.L.A.D., 184 N.C. App. 381, 646 S.E.2d 425, 2007 N.C. App. LEXIS 1482 (2007); In re A.R.G., 361 N.C. 392, 646 S.E.2d 349, 2007 N.C. LEXIS 597 (2007); In re M.G., 187 N.C. App. 536, 653 S.E.2d 581, 2007 N.C. App. LEXIS 2573 (2007).

§ 50A-103. Proceedings governed by other law.

This Article does not govern an adoption proceeding or a proceeding pertaining to the authorization of emergency medical care for a child. (1999-223, s. 3.)

OFFICIAL COMMENT

Two proceedings are governed by other acts. Adoption cases are excluded from this Act because adoption is a specialized area which is thoroughly covered by the Uniform Adoption Act (UAA) (1994). Most States either will adopt that Act or will adopt the jurisdictional provisions of that Act. Therefore the jurisdictional provisions governing adoption proceeding are generally found elsewhere.

However, there are likely to be a number of instances where it will be necessary to apply this Act in an adoption proceeding. For example, if a State adopts the UAA then Section 3-101 of the Act specifically refers in places to the Uniform Child Custody Jurisdiction Act which will become a reference to this Act. Second, the UAA requires that if an adoption is denied or set aside, the court is to determine the child's custody. UAA § 3-704. Those custody proceedings would be subject to this Act. See Joan Heifetz Hollinger, The Uniform Adoption Act: Reporter's Ruminations, 30 Fam.L.Q. 345 (1996).

Children that are the subject of interstate placements for adoption or foster care are governed by the Interstate Compact on the Placement of Children (ICPC). The UAA § 2-107 provides that the provisions of the compact, although not jurisdictional, supply the governing rules for all children who are subject to it. As stated in the Comments to that section: "Once a court exercises jurisdiction, the ICPC helps determine the legality of an interstate placement." For a discussion of the relationship between the UCCJA and the ICPC see J.D.S. v. Franks, 893 P.2d 732 (Ariz. 1995).

Proceedings pertaining to the authorization of emergency medical care for children are outside the scope of this Act since they are not custody determinations. All States have procedures which allow the State to temporarily supersede parental authority for purposes of emergency medical procedures. Those provisions will govern without regard to this Act.

§ 50A-104. Application to Indian tribes.

(a) A child-custody proceeding that pertains to an Indian child, as defined in the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., is not subject to this Article to the extent that it is governed by the Indian Child Welfare Act.

(b) A court of this State shall treat a tribe as if it were a state of the United States for the purpose of applying Parts 1 and 2.

(c) A child-custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this Article must be recognized and enforced under Part 3. (1999-223, s. 3.)

OFFICIAL COMMENT

This section allows States the discretion to extend the terms of this Act to Indian tribes by removing the brackets. The definition of "tribe" is found at Section 102(16). This Act does not purport to legislate custody jurisdiction for tribal courts. However, a Tribe could adopt this Act as enabling legislation by simply replacing references to "this State" with "this Tribe."

Subsection (a) is not bracketed. If the Indian Child Welfare Act requires that a case be heard in tribal court, then its provisions determine jurisdiction.

CASE NOTES

Cited in In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005).

§ 50A-105. International application of Article.

(a) A court of this State shall treat a foreign country as if it were a state of the United States for the purpose of applying Parts 1 and 2.

(b) Except as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this Article must be recognized and enforced under Part 3.

(c) A court of this State need not apply this Article if the child-custody law of a foreign country violates fundamental principles of human rights. (1979, c. 110, s. 1; 1999-223, s. 3.)

OFFICIAL COMMENT

The provisions of this Act have international application to child custody proceedings and determinations of other countries. Another country will be treated as if it were a State of the United States for purposes of applying Articles 1 and 2 of this Act. Custody determinations of other countries will be enforced if the facts of the case indicate that jurisdiction was in substantial compliance with the requirements of this Act.

In this section, the term "child-custody determination" should be interpreted to include proceedings relating to custody or analogous institutions of the other country. See generally, Article 3 of The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. 35 I.L.M. 1391 (1996).

A court of this State may refuse to apply this Act when the child custody law of the other country violates basic principles relating to the protection of human rights and fundamental freedoms. The same concept is found in of the Section 20 of the Hague Convention on the Civil Aspects of International Child Abduction (return of the child may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms). In applying subsection (c), the court's scrutiny should be on the child custody law of the foreign country and not on other aspects of the other legal system. This Act takes no position on what laws relating to child custody would violate fundamental freedoms. While the provision is a traditional one in international agreements, it is invoked only in the most egregious cases.

This section is derived from Section 23 of the UCCJA [former G.S. 50A-23.]

§ 50A-106. Effect of child-custody determination.

A child-custody determination made by a court of this State that had jurisdiction under this Article binds all persons who have been served in accordance with the laws of this State or notified in accordance with G.S. 50A-108 or who have submitted to the jurisdiction of the court and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified. (1979, c. 110, s.1; 1999-223, s. 3.)

OFFICIAL COMMENT

No substantive changes have been made to this section which was Section 12 of the UCCJA.

§ 50A-107. Priority.

If a question of existence or exercise of jurisdiction under this Article is raised in a child-custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously. (1999-223, s. 3.)

OFFICIAL COMMENT

No substantive change was made to this section which was Section 24 of the UCCJA. The section is placed toward the beginning of Article 1 to emphasize its importance.

The language change from "case" to "question" is intended to clarify that it is the jurisdictional issue which must be expedited and not the entire custody case. Whether the entire custody case should be given priority is a matter of local law.

§ 50A-108. Notice to persons outside State.

(a) Notice required for the exercise of jurisdiction when a person is outside this State may be given in a manner prescribed by the law of this State for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.

(b) Proof of service may be made in the manner prescribed by the law of this State or by the law of the state in which the service is made.

(c) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court. (1999-223, s. 3.)

OFFICIAL COMMENT

This section authorizes notice and proof of service to be made by any method allowed by either the State which issues the notice or the State where the notice is received. This eliminates the need to specify the type of notice in the Act and therefore the provisions of Section 5 of the UCCJA [former G.S. 50A-5] which specified how notice was to be accomplished were eliminated. The change reflects an approach in this Act to use local law to determine many procedural issues. Thus, service by facsimile is permissible if allowed by local rule in either State. In addition, where special service or notice rules are available for some procedures, in either jurisdiction, they could be utilized under this Act. For example, if a case involves domestic violence and the statute of either State would authorize notice to be served by a peace officer, such service could be used under this Act.

Although Section 105 requires foreign countries to be treated as States for purposes of this Act, attorneys should be cautioned about service and notice in foreign countries. Countries have their own rules on service which must usually be followed. Attorneys should consult the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 36, T.I.A.S. 6638 (1965).

CASE NOTES

Cited in Chick v. Chick, 164 N.C. App. 444, 596 S.E.2d 303, 2004 N.C. App. LEXIS 1036 (2004).

§ 50A-109. Appearance and limited immunity.

(a) A party to a child-custody proceeding, including a modification proceeding, or a petitioner or respondent in a proceeding to enforce or register a child-custody determination, is not subject to personal jurisdiction in this State for another proceeding or purpose solely by reason of having participated, or of having been physically present for the purpose of participating, in the proceeding.

(b) A person who is subject to personal jurisdiction in this State on a basis other than physical presence is not immune from service of process in this State. A party present in this State who is subject to the jurisdiction of another state is not immune from service of process allowable under the laws of that state.

(c) The immunity granted by subsection (a) does not extend to civil litigation based on acts unrelated to the participation in a proceeding under this Article committed by an individual while present in this State. (1999-223, s. 3.)

OFFICIAL COMMENT

This section establishes a general principle that participation in a custody proceeding does not, by itself, give the court jurisdiction over any issue for which personal jurisdiction over the individual is required. The term "participate" should be read broadly. For example, if jurisdiction is proper under Article 2, a respondent in an original custody determination, or a party in a modification determination, should be able to request custody without this constituting the seeking of affirmative relief that would waive personal jurisdictional objections. Once jurisdiction is proper under Article 2, a party should not be placed in the dilemma of choosing between seeking custody or protecting a right not to be subject to a monetary judgment by a court with no other relationship to the party.

This section is comparable to the immunity provision of UIFSA § 314. A party who is otherwise not subject to personal jurisdiction can appear in a custody proceeding or an enforcement action without being subject to the general jurisdiction of the State by virtue of the appearance. However, if the petitioner would otherwise be subject to the jurisdiction of the State, appearing in a custody proceeding or filing an enforcement proceeding will not provide immunity. Thus, if the non-custodial parent moves from the State that decided the custody determination, that parent is still subject to the state's jurisdiction for enforcement of child support if the child or an individual obligee continues to reside there. See UIFSA § 205. If the non-custodial parent returns to enforce the visitation aspects of the custody determination, the State can utilize any appropriate means to collect the back-due child support. However, the situation is different if both parties move from State A after the determination, with the custodial parent and the child establishing a new home State in State B, and the non-custodial parent moving to State C. The non-custodial parent is not, at this point, subject to the jurisdiction of State B for monetary matters. See *Kulko v. Superior Court*, 436 U.S. 84 (1978). If the non-custodial parent comes into State B to enforce the visitation aspects of the determination, the non-custodial parent is not subject to the jurisdiction of State B for those proceedings and issues requiring personal jurisdiction by filing the enforcement action.

A party also is immune from service of process during the time in the State for an enforcement action except for those claims for which jurisdiction could be based on contacts other than mere physical presence. Thus, when the non-custodial parent comes into State B to enforce the visitation aspects of the decree, State B cannot acquire jurisdiction over the child support aspects of the decree by serving the non-custodial parent in the State. Cf. UIFSA § 611 (personally serving the obligor in the State of the residence of the obligee is not by itself a sufficient jurisdictional basis to authorize a modification of child support). However, a party who is in this State and subject to the jurisdiction of another State may be served with process to appear in that State, if allowable under the laws of that State.

As the Comments to UIFSA § 314 note, the immunity provided by this section is limited. It does not provide immunity for civil litigation unrelated to the enforcement action. For example, a party to an enforcement action is not immune from service regarding a claim that involves an automobile accident occurring while the party is in the State.

§ 50A-110. Communication between courts.

(a) A court of this State may communicate with a court in another state concerning a proceeding arising under this Article.

(b) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

(c) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.

(d) Except as otherwise provided in subsection (c), a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.

(e) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. (1999-223, s. 3.)

OFFICIAL COMMENT

This section emphasizes the role of judicial communications. It authorizes a court to communicate concerning any proceeding arising under this Act. This includes communication with foreign tribunals and tribal courts. Communication can occur in many different ways such as by telephonic conference and by on-line or other electronic communication. The Act does not preclude any method of communication and recognizes that there will be increasing use of modern communication techniques.

Communication between courts is required under Sections 204, 206, and 306 and strongly suggested in applying Section 207. Apart from those sections, there may be less need under this Act for courts to communicate concerning jurisdiction due to the prioritization of home state jurisdiction. Communication is authorized, however, whenever the court finds it would be helpful. The court may authorize the parties to participate in the communication. However, the Act does not mandate participation. Communication between courts is often difficult to schedule and participation by the parties may be impractical. Phone calls often have to be made after-hours or whenever the schedules of judges allow.

This section does require that a record be made of the conversation and that the parties have access to that record in order to be informed of the content of the conversation. The only exception to this requirement is when the communication involves relatively inconsequential matters such as scheduling, calendars, and court records. Included within this latter type of communication would be matters of cooperation between courts under Section 112. A record includes notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum or an electronic record of the communication between the courts, or a memorandum or an electronic record made by a court after the communication.

The second sentence of subsection (b) protects the parties against unauthorized ex parte communications. The parties' participation in the communication may amount to a hearing if there is an opportunity to present facts and jurisdictional arguments. However, absent such an opportunity, the participation of the parties should not to be considered a substitute for a hearing and the parties must be given an opportunity to fairly and fully present facts and arguments on the jurisdictional issue before a determination is made. This may be done through a hearing or, if appropriate, by affidavit or memorandum. The court is expected to set forth the basis for its jurisdictional decision, including any court-to-court communication which may have been a factor in the decision.

CASE NOTES

Sufficient record of communication found. — Vermont family court order asserting jurisdiction in a divorce proceeding filed by a father and directing custody of the parties' two minor children to him that stated that it consulted with the appropriate judge presiding in the custody proceedings commenced in North Carolina by the mother and that indicated that the conversation between the two courts disclosed that the facts alleged by the parties in their respective cases were substantially similar, was a sufficient record of the communication between the two courts. Mother did not dispute the procedural history as set out in the Vermont order concerning the North Carolina proceeding and she failed to show that she was deprived of an opportunity to fairly and fully present facts and arguments on the jurisdictional issue before the North Carolina court. Chick v. Chick, 164 N.C. App. 444, 596 S.E.2d 303, 2004 N.C. App. LEXIS 1036 (2004).

Applied in In re J.W.S., — N.C. App. —, 669 S.E.2d 850, 2008 N.C. App. LEXIS 2268 (2008).

§ 50A-111. Taking testimony in another state.

(a) In addition to other procedures available to a party, a party to a child-custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this State for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(b) A court of this State may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this State shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another state to a court of this State by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission. (1979, c. 110, s. 1; 1999-223, s. 3.)

OFFICIAL COMMENT

No substantive changes have been made to subsection (a) which was Section 18 of the UCCJA [former G.S. 50A-18.]

Subsections (b) and (c) merely provide that modern modes of communication are permissible in the taking of testimony and the transmittal of documents. See UIFSA § 316.

§ 50A-112. Cooperation between courts; preservation of records.

(a) A court of this State may request the appropriate court of another state to:

(1) Hold an evidentiary hearing;
(2) Order a person to produce or give evidence pursuant to procedures of that state;
(3) Order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;
(4) Forward to the court of this State a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with the request; and
(5) Order a party to a child-custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

(b) Upon request of a court of another state, a court of this State may hold a hearing or enter an order described in subsection (a).

(c) Travel and other necessary and reasonable expenses incurred under subsections (a) and (b) may be assessed against the parties according to the law of this State.

(d) A court of this State shall preserve the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child-custody proceeding until the child attains 18 years of age. Upon appropriate request by a court or law enforcement official of another state, the court shall forward a certified copy of those records. (1979, c. 110, s. 1; 1999-223, s. 3.)

OFFICIAL COMMENT

This section is the heart of judicial cooperation provision of this Act. It provides mechanisms for courts to cooperate with each other in order to decide cases in an efficient manner without causing undue expense to the parties. Courts may request assistance from courts of other States and may assist courts of other States.

The provision on the assessment of costs for travel provided in the UCCJA § 19 [former G.S. 50A-19] has been changed. The UCCJA provided that the costs may be assessed against the parties or the State or county. Assessment of costs against a government entity in a case where the government is not involved is inappropriate and therefore that provision has been removed. In addition, if the State is involved as a party, assessment of costs and expenses against the State must be authorized by other law. It should be noted that the term "expenses" means out-of-pocket costs. Overhead costs should not be assessed as expenses.

No other substantive changes have been made. The term "social study" as used in the UCCJA was replaced with the modern term: "custody evaluation." The Act does not take a position on the admissibility of a custody evaluation that was conducted in another State. It merely authorizes a court to seek assistance of, or render assistance to, a court of another State.

This section combines the text of Sections 19-22 of the UCCJA [former G.S. 50A-19 to 50A-22.]

Part 2. Jurisdiction.

§ 50A-201. Initial child-custody jurisdiction.

(a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an initial child-custody determination only if:

(1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;

(2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:

a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or

(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

(b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination. (1979, c. 110, s. 1; 1999-223, s. 3.)

OFFICIAL COMMENT

This section provides mandatory jurisdictional rules for the original child custody proceeding. It generally continues the provisions of the UCCJA § 3 [former G.S. 50A-3.] However, there have been a number of changes to the jurisdictional bases.

1. Home State Jurisdiction. The jurisdiction of the home State has been prioritized over other jurisdictional bases. Section 3 of the UCCJA [former G.S. 50A-3] provided four independent and concurrent bases of jurisdiction. The PKPA provides that full faith and credit can only be given to an initial custody determination of a "significant connection" State when there is no home State. This Act prioritizes home state jurisdiction in the same manner as the PKPA thereby eliminating any potential conflict between the two acts.

The six-month extended home state provision of subsection (a)(1) has been modified slightly from the UCCJA. The UCCJA provided that home state jurisdiction continued for six months when the child had been removed by a person seeking the child's custody or for other reasons and a parent or a person acting as a parent continues to reside in the home State. Under this Act, it is no longer necessary to determine why the child has been removed. The only inquiry relates to the status of the person left behind. This change provides a slightly more refined home state standard than the UCCJA or the PKPA, which also requires a determination that the child has been removed "by a contestant or for other reasons." The scope of the PKPA's provision is theoretically narrower than this Act. However, the phrase "or for other reasons" covers most fact situations where the child is not in the home State and, therefore, the difference has no substantive effect.

In another sense, the six-month extended home state jurisdiction provision is this Act is narrower than the comparable provision in the PKPA. The PKPA's definition of extended home State is more expansive because it applies whenever a "contestant" remains in the home State. That class of individuals has been eliminated in this Act. This Act retains the original UCCJA classification of "parent or person acting as parent" to define who must remain for a State to exercise the six-month extended home state jurisdiction. This eliminates the undesirable jurisdictional determinations which would occur as a result of differing state substantive laws on visitation involving grandparents and others. For example, if State A's law provided that grandparents could obtain visitation with a child after the death of one of the parents, then the grandparents, who would be considered "contestants" under the PKPA, could file a proceeding within six months after the remaining parent moved and have the case heard in State A. However, if State A did not provide that grandparents could seek visitation under such circumstances, the grandparents would not be considered "contestants" and State B where the child acquired a new home State would provide the only forum. This Act bases jurisdiction on the parent and child or person acting as a parent and child relationship without regard to grandparents or other potential seekers of custody or visitation. There is no conflict with the broader provision of the PKPA. The PKPA in § (c)(1) authorizes States to narrow the scope of their jurisdiction.

2. Significant connection jurisdiction. This jurisdictional basis has been amended in four particulars from the UCCJA. First, the "best interest" language of the UCCJA has been eliminated. This phrase tended to create confusion between the jurisdictional issue and the substantive custody determination. Since the language was not necessary for the jurisdictional issue, it has been removed.

Second, the UCCJA based jurisdiction on the presence of a significant connection between the child and the child's parents or the child and at least one contestant. This Act requires that the significant connections be between the child, the child's parents or the child and a person acting as a parent.

Third, a significant connection State may assume jurisdiction only when there is no home State or when the home State decides that the significant connection State would be a more appropriate forum under Section 207 or 208. Fourth, the determination of significant connections has been changed to eliminate the language of "present or future care." The jurisdictional determination should be made by determining whether there is sufficient evidence in the State for the court to make an informed custody determination. That evidence might relate to the past as well as to the "present or future."

Emergency jurisdiction has been moved to a separate section. This is to make it clear that the power to protect a child in crisis does not include the power to enter a permanent order for that child except as provided by that section.

Paragraph (a)(3) provides for jurisdiction when all States with jurisdiction under paragraphs (a)(1) and (2) determine that this State is a more appropriate forum. The determination would have to be made by all States with jurisdiction under subsection (a)(1) and (2). Jurisdiction would not exist under this paragraph because the home State determined it is a more appropriate place to hear the case if there is another State that could exercise significant connection jurisdiction under subsection (a)(2).

Paragraph (a)(4) retains the concept of jurisdiction by necessity as found in the UCCJA and in the PKPA. This default jurisdiction only occurs if no other State would have jurisdiction under subsections (a)(1) through (a)(3).

Subsections (b) and (c) clearly State the relationship between jurisdiction under this Act and other forms of jurisdiction. Personal jurisdiction over, or the physical presence of, a parent or the child is neither necessary nor required under this Act. In other words neither minimum contacts nor service within the State is required for the court to have jurisdiction to make a custody determination. Further, the presence of minimum contacts or service within the State does not confer jurisdiction to make a custody determination. Subject to Section 204, satisfaction of the requirements of subsection (a) is mandatory.

The requirements of this section, plus the notice and hearing provisions of the Act, are all that is necessary to satisfy due process. This Act, like the UCCJA and the PKPA is based on Justice Frankfurter's concurrence in *May v. Anderson*, 345 U.S. 528 (1953). As pointed out by Professor Bodenheimer, the reporter for the UCCJA, no "workable interstate custody law could be built around [Justice] Burton's plurality opinion .... Bridgette Bodenheimer, The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws, 22 Vand.L.Rev. 1207,1233 (1969). It should also be noted that since jurisdiction to make a child custody determination is subject matter jurisdiction, an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act is ineffective.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. *— Many of the cases cited below were decided under former G.S. 50A-3.*

Applicability. — G.S. 50A-201 was inapplicable to a petition to terminate a mother's parental rights as an Arkansas court had addressed custody issues as to the children and had awarded custody to the father. In re N.R.M., 165 N.C. App. 294, 598 S.E.2d 147, 2004 N.C. App. LEXIS 1163 (2004).

Purpose. — The former Uniform Child Custody Jurisdiction Act sought to prevent parents from forum shopping their child custody disputes and to assure that these disputes were litigated in the state with which the child and the child's family had the closest connection. In re Van Kooten, 126 N.C. App. 764, 487 S.E.2d 160 (1997), appeal dismissed, 347 N.C. 576, 502 S.E.2d 618 (1998).

Courts which render a custody decree normally retain continuing jurisdiction to modify the decree under local law. Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

Once jurisdiction of the court attaches to a child custody matter, it exists for all time until the cause is fully and completely determined. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Jurisdiction over Petition Brought by DSS. — The district court had jurisdiction over the subject matter of petition filed, signed and verified by county division of social services, which alleged that child had been placed with DSS by its mother; that the putative father was unknown; that North Carolina was the home state of the child and no other state had jurisdiction over the child; and that the best interest of the child would be served if the court assumed jurisdiction over him. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Refusal to Assert Jurisdiction Held Proper. — For case holding trial court properly declined to assert jurisdiction based upon conclusion that another state had assumed jurisdiction as the home state of the children involved in the custody matter in question, see Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Although the child resided in North Carolina, the court properly declined jurisdiction because the father continued to reside in the state of the court of original jurisdiction; thus, the Florida court retained jurisdiction under the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A. In re Bean, 132 N.C. App. 363, 511 S.E.2d 683 (1999).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the former Uniform Child Custody Jurisdiction Act (UCCJA), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

Where an Indiana order, which awarded custody of child living in Indiana to mother, contained no findings of fact that Indiana was child's home state, or had been her home state within six months before the action was commenced, or that it was in her best interests for Indiana to assume jurisdiction because she had significant connection with the state, a North Carolina trial court erred in concluding that North Carolina must give full faith and credit to the Indiana orders; the Indiana court had not assumed jurisdiction over the custody determination of the child in substantial conformity with this Act. Williams v. Williams, 110 N.C. App. 406, 430 S.E.2d 277 (1993).

Personal jurisdiction over the nonresident parent is not a requirement under this Chapter. Hart v. Hart, 74 N.C. App. 1, 327 S.E.2d 631 (1985).

Bald Statement of Jurisdiction, Without Findings Supporting Assertion, Held Error. — Trial court erred in baldly stating that it had subject matter jurisdiction without making findings supporting its assertion of subject matter jurisdiction of a child custody matter under the North Carolina Uniform Child Custody Jurisdiction Act, G.S. 50A-201, or the Parental Kidnapping Prevention Act, 28 U.S.C.S. § 1738(A). In re J.B., 164 N.C. App. 394, 595 S.E.2d 794, 2004 N.C. App. LEXIS 820 (2004).

Ex Parte Order for Temporary Custody. — Once the trial court has gained jurisdiction by establishing one of the bases for jurisdiction, it may enter an ex parte order for temporary custody prior to service of process or notice, if the circumstances of the case render it appropriate. Hart v. Hart, 74 N.C. App. 1, 327 S.E.2d 631 (1985).

Exercise of Jurisdiction Where Foreign Order Is Pending or Has Been Entered. — When a North Carolina court considered jurisdiction in a custody proceeding, and a prior order was pending or had been entered by a court of another state, the North Carolina court could exercise jurisdiction if it determined (1) that the court of the other state no longer had jurisdiction and North Carolina had jurisdiction under one of the four alternatives listed in former G.S. 50A-3, or (2) the court of the other state did not exercise jurisdiction in substantial conformity with the former UCCJA and North Carolina had jurisdiction pursuant to former G.S. 50A-3. Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Former § 50A-3(a)(2) of this section essentially conferred jurisdiction where it was in the child's best interest, because the child and at least one parent had significant ties to the state, and where substantial evidence pertaining to the child's present or future well-being and activities existed within the state. Brookshire v. Brookshire, 89 N.C. App. 48, 365 S.E.2d 307 (1988).

Service of Process on Defendant in State Sufficient to Establish Jurisdiction. — The singular fact that defendant was served with process while present within this state was sufficient to establish in-personam jurisdiction over him for purposes of a child custody and support action. Brookshire v. Brookshire, 89 N.C. App. 48, 365 S.E.2d 307 (1988).

Where the record had no evidence to show a trial court had subject matter jurisdiction over a child custody dispute, the appellate court vacated the order and remanded the case for the making of appropriate findings of fact. Foley v. Foley, 156 N.C. App. 409, 576 S.E.2d 383, 2003 N.C. App. LEXIS 110 (2003).

Exercise of Jurisdiction Upheld. — Where the oldest two of the three minor children of the parties had been born in North Carolina, both plaintiff and defendant grew up in the state, both maternal and paternal grandparents of the minor children resided within the state, and plaintiff and the minor children had moved to the state from Ohio in June, 1985, with the intention of becoming permanent residents, and at the time of the entry of the order had become permanent residents of the state, the district court properly exercised subject matter jurisdiction over custody and support action. Brookshire v. Brookshire, 89 N.C. App. 48, 365 S.E.2d 307 (1988).

Where the minor child resided in North Carolina for about one year after birth, North Carolina was the only state where the parties and the minor child lived as a family unit and, although there are a number of witnesses that reside in New Hampshire, there are numerous other witnesses who reside in North Carolina, district court's order that North Carolina was the most appropriate and convenient forum was appropriate. Westneat v. Westneat, 113 N.C. App. 247, 437 S.E.2d 899 (1994).

The trial court had subject matter jurisdiction over the custody of a child, where the father's former companion sought custody of the child as the child had lived with the companion in North Carolina until a month before her complaint was filed. Ellison v. Ramos, 130 N.C. App. 389, 502 S.E.2d 891 (1998), appeal dismissed, 349 N.C. 356, 517 S.E.2d 891 (1998).

In the child custody dispute where the mother lived in Maryland and the father lived in North Carolina, the North Carolina trial court had jurisdiction pursuant to G.S. 50A-201, because the children had lived in North Carolina for six months prior to the custody action being filed, and as a result, it was their home state under G.S. 50A-102(7). David v. Ferguson, 153 N.C. App. 482, 571 S.E.2d 230, 2002 N.C. App. LEXIS 1176 (2002).

Trial court properly found that it had jurisdiction to enter custody and termination orders under circumstances in which, at the time of the petition, the older child was in the custody of the department in North Carolina and had been for 18 months, the mother had earlier moved to North Carolina with the older child, at the date of the petition the mother was incarcerated in North Carolina, and the younger child had no contact with any other state; because the trial court asserted its jurisdiction in the order and the evidence supported its determination, the trial court properly exercised jurisdiction. In re T.J.D.W., 182 N.C. App. 394, 642 S.E.2d 471, 2007 N.C. App. LEXIS 672 (2007).

North Carolina was the child's home state pursuant to the Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction and Enforcement Act because the child resided with the mother for a period of more than six months immediately preceding the commencement of the custody proceeding; therefore, North Carolina had jurisdiction to make a custody determination. Williams v. Walker, 185 N.C. App. 393, 648 S.E.2d 536, 2007 N.C. App. LEXIS 1826 (2007).

Exercise of Jurisdiction Declined. — Vermont family court order, which directed custody to a father was upheld, and a North Carolina court properly declined jurisdiction, where there was no question that the parties' minor children were living in Vermont for the required six months prior to the commencement of the mother's custody proceeding in North Carolina. Vermont qualified as the children's home state under North Carolina and Vermont law despite a six week absence from Vermont to North Carolina, which was deemed a temporary absence insufficient to prevent the conclusion that Vermont was the home state. Chick v. Chick, 164 N.C. App. 444, 596 S.E.2d 303, 2004 N.C. App. LEXIS 1036 (2004).

In an abuse and neglect action, the evidence was insufficient to support jurisdiction as to the father's biological children as neither child had lived in North Carolina for at least six months immediately before the commencement of the proceedings and no other basis for jusdiction was provided. In re M.G., 187 N.C. App. 536, 653 S.E.2d 581, 2007 N.C. App. LEXIS 2573 (2007), review granted, 666 S.E.2d 120, 2008 N.C. LEXIS 706 (N.C. 2008).

Emergency Jurisdiction. — The exercise of emergency jurisdiction confers authority to enter temporary protective orders only. In re Van Kooten, 126 N.C. App. 764, 487 S.E.2d 160 (1997), appeal dismissed, 347 N.C. 576, 502 S.E.2d 618 (1998).

The emergency conditions giving rise to jurisdiction to enter a temporary order under former G.S. 50A-3(a)(3) may exist either in this State, or in the state that entered the custody decrees. In re Van Kooten, 126 N.C. App. 764, 487 S.E.2d 160 (1997), appeal dismissed, 347 N.C. 576, 502 S.E.2d 618 (1998).

In a proceeding by the Department of Social Services seeking protective custody of a child based on evidence of sexual abuse by the father, the trial court had authority under the emergency jurisdiction provision of former G.S. 50A-3(a)(3)(ii) to enter a temporary nonsecure custody order. In re Malone, 129 N.C. App. 338, 498 S.E.2d 836 (1998).

North Carolina court had emergency jurisdiction in custody matter where defendant father's family made numerous threats to abduct children and take them to Turkey. Tataragasi v. Tataragasi, 124 N.C. App. 255, 477 S.E.2d 239 (1996).

North Carolina decree modifying a prior custody decree by a Virginia court was improper under the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A, where the Virginia court had continuing jurisdiction and had not declined to exercise it. Meade v. Meade, 650 F. Supp. 205 (M.D.N.C. 1986), aff'd, 812 F.2d 1473 (4th Cir. 1987).

When Petitions for Modification of Foreign Decree to Be Addressed to Foreign Court. — All petitions for modification of a custody decree under local law are to be addressed to the prior state if that state has sufficient contact with the case to satisfy this section. Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

Effect of Foreign Decree Not in Compliance with This Section. — Where the record does not show that a foreign court assumed jurisdiction under the standards set forth in this section, its decree is null and void. Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

Severability of Custody Action from Divorce Proceeding. — The portion of plaintiff's complaint seeking custody of his minor son constituted a separate action severable from his divorce proceeding, so that dismissal of the divorce action for lack of subject matter jurisdiction did not result in dismissal of the custody action, and the trial court was authorized to assert subject matter jurisdiction over the custody portion of the case where the child was physically within the State. Lynch v. Lynch, 302 N.C. 189, 274 S.E.2d 212, modified, 303 N.C. 367, 279 S.E.2d 840 (1981).

Physical Presence, Generally. — It is a generally accepted principle that the courts of the state in which a minor child is physically present have jurisdiction consistent with due process to adjudicate a custody dispute involving that child. Lynch v. Lynch, 302 N.C. 189, 274 S.E.2d 212, modified, 393 N.C. 367, 279 S.E.2d 840 (1981).

Proper Determination of Home State. — Mother and children had significant connection to North Carolina and there was substantial evidence in North Carolina. Therefore, North Carolina court correctly determined that North Carolina, not Georgia, was home state. Court did not err in assuming jurisdiction and modifying Georgia custody decree, even though children resided in Georgia and there was no evidence that Georgia had declined jurisdiction. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Where children had lived in North Carolina continuously from March 1987 until March 1989 when custody action was filed except for the 10-month period during which the children resided with defendant in Georgia pursuant to the Georgia temporary custody decree and the plaintiff resided in North Carolina for the entire period, the trial court correctly determined that North Carolina was the home state, thereby meeting one of the bases of jurisdiction under this section. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Home state jurisdiction existed over a county department of social service's petition to terminate parental rights to two minor children since the trial court had emergency jurisdiction to enter the initial nonsecure custody orders, the children and mother had been physically in North Carolina for two years by the time of the filing of the petition and motion for termination of parental rights, there had been no prior custody proceedings or court orders entered with regard to the children in another state, and the father's residency in another state did not change the children's home state. In re E.X.J., 191 N.C. App. 34, 662 S.E.2d 24, 2008 N.C. App. LEXIS 1172 (2008).

Where a father moved with a juvenile to North Carolina and had remained there for about four years prior to the petition alleging the juvenile was abused, neglected, and dependent, the father's travel between Texas and North Carolina over a period of about four months did not defeat a finding that North Carolina was the juvenile's "home state." In re J.W.S., — N.C. App. —, 669 S.E.2d 850, 2008 N.C. App. LEXIS 2268 (2008).

Physical Presence of Child Coupled with Emergency. — To meet the requirements of former G.S. 50A-3(a)(3)(ii) and former G.S. 50A-14(a), the following three questions must be answered affirmatively: (1) Did the foreign court lack jurisdiction under jurisdictional prerequisites similar to those of the former Uniform Child Custody Jurisdiction Act or has the foreign court declined to exercise jurisdiction to modify the decree? (2) Was the child physically present in North Carolina? (3) Did an emergency situation exist? Naputi v. Naputi, 67 N.C. App. 351, 313 S.E.2d 179 (1984).

Findings held to sufficiently establish that North Carolina was the home state of child and to establish that the child and at least one parent had a significant connection with North Carolina. Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Significant Connection. — Where children resided in North Carolina for all but ten months of the two-year period prior to this action and that plaintiff resided in North Carolina for the entire period, the children and plaintiff had a "significant connection" with North Carolina, and there was substantial evidence regarding the children's "present or future care, protection, training, and personal relationships" in North Carolina. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

In an action for child support, child support arrearages and child custody where the child and plaintiff had resided in North Carolina since 1982, it was within the best interest of the welfare of the minor child to consider North Carolina the home state of the minor child, and for the court to assume jurisdiction, since the minor child and at least one parent had significant connections with North Carolina. Shores v. Shores, 91 N.C. App. 435, 371 S.E.2d 747 (1988).

Finding that husband "is on active duty with the United States Marine Corps and is stationed at Camp Lejeune, North Carolina" is sufficient to satisfy the home state rule requirement that a parent or person acting as parent continues to live in this State. Hart v. Hart, 74 N.C. App. 1, 327 S.E.2d 631 (1985).

Fifteen-Month Residence of Child Held Sufficient for Jurisdiction. — Evidence was sufficient to support the court's exercise of jurisdiction pursuant to either former G.S. 50A-3(a)(1) or G.S. 50A-3(2) of this section, where the minor child had resided with the plaintiffs for an almost continuous 15-month period immediately preceding the commencement of the action. This was sufficient to qualify North Carolina as the minor child's home state. The child's brief visit to Texas during this time period was not sufficient to prevent such a conclusion. Plemmons v. Stiles, 65 N.C. App. 341, 309 S.E.2d 504 (1983).

Findings of Court Where Child Is Improperly Retained in This State. — Even when the district court has jurisdiction over the person of the out-of-state parent in an action to modify a foreign custody decree, it has no authority to exercise its jurisdiction without making findings of fact which support the conclusion that such exercise is required in the interest of the child, if the record shows that the parent seeking the modification has improperly retained the child. Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984).

A recitation of the trial court's order that it was in the best interest of child who was improperly retained by mother in this State that it assume jurisdiction did not comply with the stated policy of the former UCCJA or with the case law, as it did not contain specific facts. Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984).

The quality of evidence required under former § 50A-3 goes beyond the standard of more than a scintilla or any competent evidence. Holland v. Holland, 56 N.C. App. 96, 286 S.E.2d 895 (1982).

"Substantial Evidence" Required. — To be able to enter a well-founded custody order, the trial court must look beyond the declarations of competing parents, seeking to find the real circumstances of the child's welfare. The "substantial" evidence required by former G.S. 50A-3, therefore, must be such as would enable the trial court to look to sources within the State that could address each of the statutory aspects of the child's interest, care, protection, training, and personal relationships. Holland v. Holland, 56 N.C. App. 96, 286 S.E.2d 895 (1982).

Parental Rights Proceedings. — While a determination of jurisdiction over child custody matters will precede a determination of jurisdiction over parental rights, it does not supplant the parental rights proceedings; the language of [former] G.S. 7A-289.22(4) is that it shall not be "used to circumvent" Chapter 50A (see now Article 2 of this chapter), not that it shall "be in conformity with" Chapter 50A (see now Article 2 of this chapter). In re Leonard, 77 N.C. App. 439, 335 S.E.2d 73 (1985).

Temporary Nonsecure Order. — The trial court had jurisdiction to enter a temporary nonsecure custody order where there was a reasonable factual basis to believe that one child had been sexually abused and hospitalized for depression and the other child had been physically abused and was hospitalized for stress disorder. In re Van Kooten, 126 N.C. App. 764, 487 S.E.2d 160 (1997), appeal dismissed, 347 N.C. 576, 502 S.E.2d 618 (1998).

Applied in In re Humphrey, 156 N.C. App. 533, 577 S.E.2d 421, 2003 N.C. App. LEXIS 236 (2003).

Cited in In re Poole, 151 N.C. App. 472, 568 S.E.2d 200, 2002 N.C. App. LEXIS 775 (2002); David v. Ferguson, 153 N.C. App. 482, 571 S.E.2d 230, 2002 N.C. App. LEXIS 1176 (2002); In re M.B., 179 N.C. App. 572, 635 S.E.2d 8, 2006 N.C. App. LEXIS 1960 (2006); In re H.L.A.D., 184 N.C. App. 381, 646 S.E.2d 425, 2007 N.C. App. LEXIS 1482 (2007).

§ 50A-202. Exclusive, continuing jurisdiction.

(a) Except as otherwise provided in G.S. 50A-204, a court of this State which has made a child-custody determination consistent with G.S. 50A-201 or G.S. 50A-203 has exclusive, continuing jurisdiction over the determination until:

(1) A court of this State determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or

(2) A court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.

(b) A court of this State which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under G.S. 50A-201. (1999-223, s. 3.)

OFFICIAL COMMENT

This is a new section addressing continuing jurisdiction. Continuing jurisdiction was not specifically addressed in the UCCJA. Its absence caused considerable confusion, particularly because the PKPA, § 1738(d), requires other States to give Full Faith and Credit to custody determinations made by the original decree State pursuant to the decree State's continuing jurisdiction so long as that State has jurisdiction under its own law and remains the residence of the child or any contestant.

This section provides the rules of continuing jurisdiction and borrows from UIFSA as well as recent UCCJA case law. The continuing jurisdiction of the original decree State is exclusive. It continues until one of two events occurs:

1. If a parent or a person acting as a parent remains in the original decree State, continuing jurisdiction is lost when neither the child, the child and a parent, nor the child and a person acting as a parent continue to have a significant connection with the original decree State and there is no longer substantial evidence concerning the child's care, protection,

training and personal relations in that State. In other words, even if the child has acquired a new home State, the original decree State retains exclusive, continuing jurisdiction, so long as the general requisites of the "substantial connection" jurisdiction provisions of Section 201 are met. If the relationship between the child and the person remaining in the State with exclusive, continuing jurisdiction becomes so attenuated that the court could no longer find significant connections and substantial evidence, jurisdiction would no longer exist.

The use of the phrase "a court of this State" under subsection (a)(1) makes it clear that the original decree State is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction.

2. Continuing jurisdiction is lost when the child, the child's parents, and any person acting as a parent no longer reside in the original decree State. The exact language of subparagraph (a)(2) was the subject of considerable debate. Ultimately the Conference settled on the phrase that "a court of this State or a court of another State determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State" to determine when the exclusive, continuing jurisdiction of a State ended. The phrase is meant to be identical in meaning to the language of the PKPA which provides that full faith and credit is to be given to custody determinations made by a State in the exercise of its continuing jurisdiction when that "State remains the residence of. . . ." The phrase is also the equivalent of the language "continues to reside" which occurs in UIFSA § 205(a)(1) to determine the exclusive, continuing jurisdiction of the State that made a support order. The phrase "remains the residence of" in the PKPA has been the subject of conflicting case law. It is the intention of this Act that paragraph (a)(2) of this section means that the named persons no longer continue to actually live within the State. Thus, unless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents physically leave the State to live elsewhere, the exclusive, continuing jurisdiction ceases.

The phrase "do not presently reside" is not used in the sense of a technical domicile. The fact that the original determination State still considers one parent a domiciliary does not prevent it from losing exclusive, continuing jurisdiction after the child, the parents, and all persons acting as parents have moved from the State.

If the child, the parents, and all persons acting as parents have all left the State which made the custody determination prior to the commencement of the modification proceeding, considerations of waste of resources dictate that a court in State B, as well as a court in State A, can decide that State A has lost exclusive, continuing jurisdiction.

The continuing jurisdiction provisions of this section are narrower than the comparable provisions of the PKPA. That statute authorizes continuing jurisdiction so long as any "contestant" remains in the original decree State and that State continues to have jurisdiction under its own law. This Act eliminates the contestant classification. The Conference decided that a remaining grandparent or other third party who claims a right to visitation, should not suffice to confer exclusive, continuing jurisdiction on the State that made the original custody determination after the departure of the child, the parents and any person acting as a parent. The significant connection to the original decree State must relate to the child, the child and a parent, or the child and a person acting as a parent. This revision does not present a conflict with the PKPA. The PKPA's reference in § 1738(d) to § 1738(c)(1) recognizes that States may narrow the class of cases that would be subject to exclusive, continuing jurisdiction. However, during the transition from the UCCJA to this Act, some States may continue to base continuing jurisdiction on the continued presence of a contestant, such as a grandparent. The PKPA will require that such decisions be enforced. The problem will disappear as States adopt this Act to replace the UCCJA.

Jurisdiction attaches at the commencement of a proceeding. If State A had jurisdiction under this section at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the State prior to the conclusion of proceeding. State B would not have jurisdiction to hear a modification unless State A decided that State B was more appropriate under Section 207.

Exclusive, continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as parents leave the State, the non-custodial parent returns. As subsection (b) provides, once a State has lost exclusive, continuing jurisdiction, it can modify its own determination only if it has jurisdiction under the standards of Section 201. If another State acquires exclusive continuing jurisdiction under this section, then its orders cannot be modified even if this State has once again become the home State of the child.

In accordance with the majority of UCCJA case law, the State with exclusive, continuing jurisdiction may relinquish jurisdiction when it determines that another State would be a more convenient forum under the principles of Section 207.

CASE NOTES

Jurisdiction Over Action. — Trial court properly granted a mother's motion pursuant to G.S. 50-13.7 to modify a custody order and granted primary custody of the parties' two children to the mother; the trial court properly found a substantial change in circumstances based on the father's interference with the mother's relationship with the children, the trial court had jurisdiction pursuant to G.S. 50A-202(a), and the trial court properly denied the father's motions pursuant to G.S. 1A-1, Rule 59 and G.S. 1A-1, Rule 60 to stay the order and for a new trial. Senner v. Senner, 161 N.C. App. 78, 587 S.E.2d 675, 2003 N.C. App. LEXIS 1976 (2003).

North Carolina court did not have subject matter jurisdiction over the proceedings to terminate a mother's parental rights under G.S. 50A-203, although North Carolina was the home state of the children, because: (1) There was no order stating that the Arkansas court that had awarded custody of the children to the father no longer had jurisdiction; (2) The Arkansas court had entered an order directing the father to return to Arkansas after the termination proceedings were filed; and (3) The mother resided in Arkansas, so Arkansas did not lose continuing jurisdiction based on G.S. 50A-202(a)(2). In re N.R.M., 165 N.C. App. 294, 598 S.E.2d 147, 2004 N.C. App. LEXIS 1163 (2004).

Trial court did not lack subject matter jurisdiction to enter an order terminating the father's parental rights because the child and the child's custodial guardians resided in Alabama when the petition was filed because the trial court had exclusive, continuing jurisdiction pursuant to G.S. 50A-202(a), and the guardians, who had custody of the child, had standing to file the petition pursuant to G.S. 7B-1103(a)(3). In re H.L.A.D., 184 N.C. App. 381, 646 S.E.2d 425, 2007 N.C. App. LEXIS 1482 (2007).

Where a New York court granted the original order of custody of the juvenile, New York did not lose jurisdiction under G.S. 50A-202(a)(1), because New York never entered an order directed to the trial court relinquishing jurisdiction over the issue of custody of the juvenile. In re J.W.S., — N.C. App. —, 669 S.E.2d 850, 2008 N.C. App. LEXIS 2268 (2008).

Applied in Williams v. Walker, 185 N.C. App. 393, 648 S.E.2d 536, 2007 N.C. App. LEXIS 1826 (2007).

§ 50A-203. Jurisdiction to modify determination.

Except as otherwise provided in G.S. 50A-204, a court of this State may not modify a child-custody determination made by a court of another state unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) and:

(1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or

(2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state. (1979, c. 110, s. 1; 1999-223, s. 3.)

OFFICIAL COMMENT

This section complements Section 202 and is addressed to the court that is confronted with a proceeding to modify a custody determination of another State. It prohibits a court from modifying a custody determination made consistently with this Act by a court in another State unless a court of that State determines that it no longer has exclusive, continuing jurisdiction under Section 202 or that this State would be a more convenient forum under Section 207. The modification State is not authorized to determine that the original decree State has lost its jurisdiction. The only exception is when the child, the child's parents, and any person acting as a parent do not presently reside in the other State. In other words, a court of the modification State can determine that all parties have moved away from the original State. The court of the modification State must have jurisdiction under the standards of Section 201.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under former G.S. 50A-14.*

Georgia's version of the Uniform Child Custody Jurisdiction Act (UCCJA) conforms to North Carolina's version. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Physical Presence of Child Coupled with Emergency. — To meet the requirements of former G.S. 50A-14(a) and former G.S. 50A-3(a)(3)(ii), the following three questions must be answered affirmatively: (1) Did the foreign court lack jurisdiction under jurisdictional prerequisites similar to those of the Uniform Child Custody Jurisdiction Act or has the foreign court declined to exercise jurisdiction to modify the decree? (2) Was the child physically present in North Carolina? (3) Did an emergency situation exist? Naputi v. Naputi, 67 N.C. App. 351, 313 S.E.2d 179 (1984).

Proper Exercise of Jurisdiction and Modification of Custody Decree. — Mother and children had significant connection to North Carolina and there was substantial evidence in North Carolina. Therefore, North Carolina court correctly determined that North Carolina, not Georgia, was home state. Court did not err in assuming jurisdiction and modifying Georgia custody decree, even though children resided in Georgia and there was no evidence that Georgia had declined jurisdiction. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Trial court properly found that it had jurisdiction to enter custody and termination orders under circumstances in which, at the time of the petition, the older child was in the custody of the department in North Carolina and had been for 18 months, the mother had earlier moved to North Carolina with the older child, at the date of the petition the mother was incarcerated in North Carolina, and the younger child had no contact with any other state; because the trial court asserted its jurisdiction in the order and the evidence supported its determination, the trial court properly exercised jurisdiction. In re T.J.D.W., 182 N.C. App. 394, 642 S.E.2d 471, 2007 N.C. App. LEXIS 672 (2007).

North Carolina court properly asserted jurisdiction and entered an order granting the mother custody of the child after the Illinois court relinquished jurisdiction. Williams v. Walker, 185 N.C. App. 393, 648 S.E.2d 536, 2007 N.C. App. LEXIS 1826 (2007).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (U.C.C.J.A.), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

North Carolina court did not have subject matter jurisdiction over the proceedings to terminate a mother's parental rights, although North Carolina was the home state of the children, because there was nothing in the record showing that the Arkansas court, which had awarded custody to the father, had determined that a North Carolina court would be a more convenient forum under G.S. 50A-207. In re N.R.M., 165 N.C. App. 294, 598 S.E.2d 147, 2004 N.C. App. LEXIS 1163 (2004).

Because a juvenile's mother continued to live in New York, where an original order of custody was made, G.S. 50A-203(2) was not satisfied even though the father and the juvenile had left New York and moved to North Carolina. In re J.W.S., — N.C. App. —, 669 S.E.2d 850, 2008 N.C. App. LEXIS 2268 (2008).

Cited in In re Humphrey, 156 N.C. App. 533, 577 S.E.2d 421, 2003 N.C. App. LEXIS 236 (2003).

§ 50A-204. Temporary emergency jurisdiction.

(a) A court of this State has temporary emergency jurisdiction if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

(b) If there is no previous child-custody determination that is entitled to be enforced under this Article and a child-custody proceeding has not been commenced in a court of a state having jurisdiction under G.S. 50A-201 through G.S. 50A-203, a child-custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under G.S. 50A-201 through G.S. 50A-203. If a child-custody proceeding has not been or is not commenced in a court of a state having jurisdiction under G.S. 50A-201 through G.S. 50A-203, a child-custody determination made under this section becomes a final determination if it so provides, and this State becomes the home state of the child.

(c) If there is a previous child-custody determination that is entitled to be enforced under this Article, or a child-custody proceeding has been commenced in a court of a state having jurisdiction under G.S. 50A-201 through G.S. 50A-203, any order issued by a court of this State under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under G.S. 50A-201 through G.S. 50A-203. The order issued in this State remains in effect until an order is obtained from the other state within the period specified or the period expires.

(d) A court of this State which has been asked to make a child-custody determination under this section, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of a state having jurisdiction under G.S. 50A-201 through G.S. 50A-203 shall immediately communicate with the other court. A court of this State which is exercising jurisdiction pursuant to G.S. 50A-201 through G.S. 50A-203, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of another state under a statute similar to this section shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order. (1979, c. 110, s. 1; 1999-223, s. 3.)

OFFICIAL COMMENT

The provisions of this section are an elaboration of what was formerly Section 3(a)(3) of the UCCJA [former G.S. 50A-3(a)(3).] It remains, as Professor Bodenheimer's comments to that section noted, "an extraordinary jurisdiction reserved for extraordinary circumstances."

This section codifies and clarifies several aspects of what has become common practice in emergency jurisdiction cases under the UCCJA and PKPA. First, a court may take jurisdiction to protect the child even though it can claim neither home State nor significant connection jurisdiction. Second, the duties of States to recognize, enforce and not modify a custody determination of another State do not take precedence over the need to enter a temporary emergency order to protect the child.

Third, a custody determination made under the emergency jurisdiction provisions of this section is a temporary order. The purpose of the order is to protect the child until the State that has jurisdiction under Sections 201-203 enters an order.

Under certain circumstances, however, subsection (b) provides that an emergency custody determination may become a final custody determination. If there is no existing custody determination, and no custody proceeding is filed in a State with jurisdiction under Sections 201-203, an emergency custody determination made under this section becomes a final determination, if it so provides, when the State that issues the order becomes the home State of the child.

Subsection (c) is concerned with the temporary nature of the order when there exists a prior custody order that is entitled to be enforced under this Act or when a subsequent custody proceeding is filed in a State with jurisdiction under Sections 201- 203. Subsection (c) allows the temporary order to remain in effect only so long as is necessary for the person who obtained the determination under this section to present a case and obtain an order from the State with jurisdiction under Sections 201-203. That time period must be specified in the order. If there is an existing order by a State with jurisdiction under Sections 201-203, that order need not be reconfirmed. The temporary emergency determination would lapse by its own terms at the end of the specified period or when an order is obtained from the court with jurisdiction under Sections 202-203. The court with appropriate jurisdiction also may decide, under the provisions of 207, that the court that entered the emergency order is in a better position to address the safety of the person who obtained the emergency order, or the child, and decline jurisdiction under Section 207.

Any hearing in the State with jurisdiction under Sections 201-203 on the temporary emergency determination is subject to the provisions of Sections 111 and 112. These sections facilitate the presentation of testimony and evidence taken out of State. If there is a concern that the person obtaining the temporary emergency determination under this section would be in danger upon returning to the State with jurisdiction under Sections 201-203, these provisions should be used.

Subsection (d) requires communication between the court of the State that is exercising jurisdiction under this section and the court of another State that is exercising jurisdiction under Sections 201-203. The pleading rules of Section 209 apply fully to determinations made under this section. Therefore, a person seeking a temporary emergency custody determination is required to inform the court pursuant to Section 209(d) of any proceeding concerning the child that has been commenced elsewhere. The person commencing the custody proceeding under Sections 201-203 is required under Section 209(a) to inform the court about the temporary emergency proceeding. These pleading requirements are to be strictly followed so that the courts are able to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

Relationship to the PKPA. The definition of emergency has been modified to harmonize it with the PKPA. The PKPA's definition of emergency jurisdiction does not use the term "neglect." It defines an emergency as "mistreatment or abuse." Therefore "neglect" has been eliminated as a basis for the assumption of temporary emergency jurisdiction. Neglect is so elastic a concept that it could justify taking emergency jurisdiction in a wide variety of cases. Under the PKPA, if a State exercised temporary emergency jurisdiction based on a finding that the child was neglected without a finding of mistreatment or abuse, the order would not be entitled to federal enforcement in other States.

Relationship to Protective Order Proceedings. The UCCJA and the PKPA were enacted long before the advent of state procedures on the use of protective orders to alleviate problems of domestic violence. Issues of custody and visitation often arise within the context of protective order proceedings since the protective order is often invoked to keep one parent away from the other parent and the children when there is a threat of violence. This Act recognizes that a protective order proceeding will often be the procedural vehicle for invoking jurisdiction by authorizing a court to assume temporary emergency jurisdiction when the child's parent or sibling has been subjected to or threatened with mistreatment or abuse.

In order for a protective order that contains a custody determination to be enforceable in another State it must comply with the provisions of this Act and the PKPA. Although the Violence Against Women's Act (VAWA), 18 U.S.C. § 2265, does provide an independent basis for the granting of full faith and credit to protective orders, it expressly excludes "custody" orders from the definition of "protective order," 22 U.S.C. § 2266.

Many States authorize the issuance of protective orders in an emergency without notice and hearing. This Act does not address the propriety of that procedure. It is left to local law to determine the circumstances under which such an order could be issued, and the type of notice that is required, in a case without an interstate element. However, an order issued after the assumption of temporary emergency jurisdiction is entitled to interstate enforcement and nonmodification under this Act and the PKPA only if there has been notice and a reasonable opportunity to be heard as set out in Section 205. Although VAWA does require that full faith and credit be accorded to ex parte protective orders if notice will be given and there will be a reasonable opportunity to be heard, it does not include a "custody" order within the definition of "protective order."

VAWA does play an important role in determining whether an emergency exists. That Act requires a court to give full faith and credit to a protective order issued in another State if the order is made in accordance with the VAWA. This would include those findings of fact contained in the order. When a court is deciding whether an emergency exists under this section, it may not relitigate the existence of those factual findings.

CASE NOTES

Applicability. — This section was not applicable to a petition to terminate a mother's parental rights because the children had not been abandoned within the meaning of the North Carolina Uniform Child-Custody Jurisdiction and Enforcement Act and there was no indication that the children were in need of protection. In re N.R.M., 165 N.C. App. 294, 598 S.E.2d 147, 2004 N.C. App. LEXIS 1163 (2004).

Agency Had Standing Since No Other Court Had Exercised Jurisdiction. — County department of social services had standing to file a termination petition under G.S. 7B-1103(a)(3) since the record established that emergency jurisdiction under G.S. 50A-204 existed at the time the department filed its juvenile petition, as a result, the department had been awarded custody by a court of competent jurisdiction, and those orders remained in effect pursuant to G.S. 50A-204(b) because no other orders had been entered by another state with jurisdiction. In re E.X.J., 191 N.C. App. 34, 662 S.E.2d 24, 2008 N.C. App. LEXIS 1172 (2008).

Review. — Trial court properly entered a temporary custody order placing a child in the custody of a county's department of social services pursuant to its temporary emergency jurisdiction under G.S. 50A-204 where the child's father had been incarcerated and the child's mother had threatened to kill the child and throw the child out. In re M.B., 179 N.C. App. 572, 635 S.E.2d 8, 2006 N.C. App. LEXIS 1960 (2006).

Court Lacked Jurisdiction to Enter Adjudication Order. — Although the trial court did have temporary jurisdiction under G.S. 50A-204(a), to enter the nonsecure custody orders, the trial court did not have jurisdiction, exclusive or temporary, to enter the juvenile adjudication order, because there was no record evidence that the trial court ever communicated with the New York court, which had entered an original custody order as to the juvenile, as mandated by G.S. 50A-204(d) and G.S. 50A-110, to determine if the New York court opted not to exercise jurisdiction. In re J.W.S., — N.C. App. —, 669 S.E.2d 850, 2008 N.C. App. LEXIS 2268 (2008).

Cited in David v. Ferguson, 153 N.C. App. 482, 571 S.E.2d 230, 2002 N.C. App. LEXIS 1176 (2002); In re Humphrey, 156 N.C. App. 533, 577 S.E.2d 421, 2003 N.C. App. LEXIS 236 (2003); In re M.G., 187 N.C. App. 536, 653 S.E.2d 581, 2007 N.C. App. LEXIS 2573 (2007).

§ 50A-205. Notice; opportunity to be heard; joinder.

(a) Before a child-custody determination is made under this Article, notice and an opportunity to be heard in accordance with the standards of G.S. 50A-108 must be given to all persons entitled to notice under the law of this State as in child-custody proceedings between residents of this State, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child.

(b) This Article does not govern the enforceability of a child-custody determination made without notice or an opportunity to be heard.

(c) The obligation to join a party and the right to intervene as a party in a child-custody proceeding under this Article are governed by the law of this State as in child-custody proceedings between residents of this State. (1979, c. 110, s. 1; 1999-223, s. 3.)

OFFICIAL COMMENT

This section generally continues the notice provisions of the UCCJA. However, it does not attempt to dictate who is entitled to notice. Local rules vary with regard to persons entitled to seek custody of a child. Therefore, this section simply indicates that persons entitled to seek custody should receive notice but leaves the rest of the determination to local law. Parents whose parental rights have not been previously terminated and persons having physical custody of the child are specifically mentioned as persons who must be given notice. The PKPA, § 1738A(e), requires that they be given notice in order for the custody determination to be entitled to full faith and credit under that Act.

State laws also vary with regard to whether a court has the power to issue an enforceable temporary custody order without notice and hearing in a case without any interstate element. Such temporary orders may be enforceable, as against due process objections, for a short period of time if issued as a protective order or a temporary restraining order to protect a child from harm. Whether such orders are enforceable locally is beyond the scope of this Act. Subsection (b) clearly provides that the validity of such orders and the enforceability of such orders is governed by the law which authorizes them and not by this Act. An order is entitled to interstate enforcement and nonmodification under this Act only if there has been notice and an opportunity to be heard. The PKPA, § 1738A(e), also requires that a custody determination is entitled to full faith and credit only if there has been notice and an opportunity to be heard.

Rules requiring joinder of people with an interest in the custody of and visitation with a child also vary widely throughout the country. The UCCJA has a separate section on joinder of parties which has been eliminated. The issue of who is entitled to intervene and who must be joined in a custody proceeding is to be determined by local state law.

A sentence of the UCCJA § 4 which indicated that persons outside the State were to be given notice and an opportunity to be heard in accordance with the provision of that Act has been eliminated as redundant.

CASE NOTES

Adequacy of Notice. — Trial court's judgment to modify a child custody award and award sole custody of the minor children to the mother was affirmed because the father admitted that he was on actual notice that a motion to modify custody was set to be heard, but was continued to some date in the future in order to accommodate his need to find new counsel. In addition, he had actual notice of the scheduled court date for the hearing days prior to leaving for a planned vacation, but chose to proceed with the trip rather than attend the hearing; therefore, he had adequate notice of the hearing and an opportunity to be heard. Trivette v. Trivette, 162 N.C. App. 55, 590 S.E.2d 298, 2004 N.C. App. LEXIS 40 (2004).

Jurisdiction. — Because a summons was not issued to or served on the father, the trial court did not have authority to enter an order adjudicating his child to be a dependent juvenile and granting permanent legal and physical custody to relatives. In re Poole, 151 N.C. App. 472, 568 S.E.2d 200, 2002 N.C. App. LEXIS 775 (2002).

Notice Held Sufficient. — Mother had received adequate notice that the hearing would include changes to the visitation schedule since the father had moved the court for an order finding and holder the mother in contempt for her disobedience and failure to comply with the provision of prior orders entered in the case. Anderson v. Lackey, 163 N.C. App. 246, 593 S.E.2d 87, 2004 N.C. App. LEXIS 381 (2004).

Father's argument that he did not receive notice was rejected where although the county department of social services did not ultimately file a motion in the initial adjudication proceeding to terminate his rights, it had filed a separate petition to terminate those rights and properly served him with a summons, and the petition. In re E.X.J., 191 N.C. App. 34, 662 S.E.2d 24, 2008 N.C. App. LEXIS 1172 (2008).

§ 50A-206. Simultaneous proceedings.

(a) Except as otherwise provided in G.S. 50A-204, a court of this State may not exercise its jurisdiction under this Part if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this Article, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this State is a more convenient forum under G.S. 50A-207.

(b) Except as otherwise provided in G.S. 50A-204, a court of this State, before hearing a child-custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to G.S. 50A-209. If the court determines that a child-custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this Article, the court of this State shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this Article does not determine that the court of this State is a more appropriate forum, the court of this State shall dismiss the proceeding.

(c) In a proceeding to modify a child-custody determination, a court of this State shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child-custody determination has been commenced in another state, the court may:

(1) Stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement;

(2) Enjoin the parties from continuing with the proceeding for enforcement; or

(3) Proceed with the modification under conditions it considers appropriate. (1979, c. 110, s. 1; 1999-223, s. 3.)

OFFICIAL COMMENT

This section represents the remnants of the simultaneous proceedings provision of the UCCJA § 6 [former G.S. 50A-6.] The problem of simultaneous proceedings is no longer a significant issue. Most of the problems have been resolved by the prioritization of home state jurisdiction under Section 201; the exclusive, continuing jurisdiction provisions of Section 202; and the prohibitions on modification of Section 203. If there is a home State, there can be no exercise of significant connection jurisdiction in an initial child custody determination and, therefore, no simultaneous proceedings. If there is a State of exclusive, continuing jurisdiction, there cannot be another State with concurrent jurisdiction and, therefore, no simultaneous proceedings. Of course, the home State, as well as the State with exclusive, continuing jurisdiction, could defer to another State under Section 207. However, that decision is left entirely to the home State or the State with exclusive, continuing jurisdiction.

Under this Act, the simultaneous proceedings problem will arise only when there is no home State, no State with exclusive, continuing jurisdiction and more than one significant connection State. For those cases, this section retains the "first in time" rule of the UCCJA. Subsection (b) retains the UCCJA's policy favoring judicial communication. Communication between courts is required when it is determined that a proceeding has been commenced in another State.

Subsection (c) concerns the problem of simultaneous proceedings in the State with modification jurisdiction and enforcement proceedings under Article 3. This section authorizes the court with exclusive, continuing jurisdiction to stay the modification proceeding pending the outcome of the enforcement proceeding, to enjoin the parties from continuing with the enforcement proceeding, or to continue the modification proceeding under such conditions as it determines are appropriate. The court may wish to communicate with the enforcement court. However, communication is not mandatory. Although the enforcement State is required by the PKPA to enforce according to its terms a custody determination made consistently with the PKPA, that duty is subject to the decree being modified by a State with the power to do so under the PKPA. An order to enjoin the parties from enforcing the decree is the equivalent of a temporary modification by a State with the authority to do so. The concomitant provision addressed to the enforcement court is Section 306 of this Act. That section requires the enforcement court to communicate with the modification court in order to determine what action the modification court wishes the enforcement court to take.

The term "pending" that was utilized in the UCCJA section on simultaneous proceeding has been replaced. It has caused considerable confusion in the case law. It has been replaced with the term "commencement of the proceeding" as more accurately reflecting the policy behind this section. The latter term is defined in Section 102(5).

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *The cases cited below were decided under former G.S. 50A-6 and 50A-14.*

Duty to Contact State With Original Jurisdiction. — In a proceeding by the Department of Social Services seeking protective custody of a child based on evidence of sexual abuse by the father, the trial court was required to contact the appropriate Florida court to determine if that state was willing to assume jurisdiction of the case. In re Malone, 129 N.C. App. 338, 498 S.E.2d 836 (1998).

What Law Governs. — The issue of a state court's jurisdiction over child custody matters is governed by this Chapter, the former Uniform Child Custody Jurisdiction Act (see now Article 2 of this chapter), and the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A. Schrock v. Schrock, 89 N.C. App. 308, 365 S.E.2d 657 (1988); In re Bean, 132 N.C. App. 363, 511 S.E.2d 683 (1999).

When there is an action already pending in another state, trial court must answer threshold question of whether the other state was exercising jurisdiction substantially in conformity with this Chapter. Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

Full Faith and Credit Properly Refused. — Refusal of North Carolina court to give full faith and credit to a Michigan custody award was not improper, where Michigan's exercise of jurisdiction was not consistent with the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, and the former Uniform Child Custody Jurisdiction Act. Schrock v. Schrock, 89 N.C. App. 308, 365 S.E.2d 657 (1988).

Jurisdiction of Foreign Court Not Obtained in Conformity with Chapter. — California court did not obtain jurisdiction over child custody proceeding substantially in conformity with this Chapter where North Carolina rather than California was the home state of the children; there was no evidence that the children had a "significant connection" with California or that "substantial evidence" was available in California concerning the children's care; and there was significant evidence that defendant had on several occasions taken the children from North Carolina to California without plaintiff's consent. Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

Refusal to Assert Jurisdiction Held Proper. — For case holding trial court properly declined to assert jurisdiction based upon conclusion that another state had assumed jurisdiction as the home state of the children involved in the custody matter in question, see Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Although the child resided in North Carolina, the court properly declined jurisdiction because the father continued to reside in the state of the court of original jurisdiction; thus, the Florida court retained jurisdiction under the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A. In re Bean, 132 N.C. App. 363, 511 S.E.2d 683 (1999).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the former Uniform Child Custody Jurisdiction Act (U.C.C.J.A.), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

Exercise of Jurisdiction Upheld. — Trial court did not err in exercising jurisdiction in a child custody proceeding on the ground that an identical action was pending in Virginia where judgment was entered by the Virginia court three weeks before the mother commenced an action in this State, and the mother, who was the losing party in the Virginia proceeding, showed that she had no interest in appealing the Virginia judgment when she filed her action in this State. Williams v. Richardson, 53 N.C. App. 663, 281 S.E.2d 777 (1981), cert. denied, 304 N.C. 733, 288 S.E.2d 382 (1982).

District court was not precluded from exercising subject matter jurisdiction over custody and support action by former 50A-14(a) of this section, where there was no proceeding concerning the custody of the minor children pending in a court of another state when plaintiff filed her complaint. Brookshire v. Brookshire, 89 N.C. App. 48, 365 S.E.2d 307 (1988).

§ 50A-207. Inconvenient forum.

(a) A court of this State which has jurisdiction under this Article to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(b) Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
(2) The length of time the child has resided outside this State;
(3) The distance between the court in this State and the court in the state that would assume jurisdiction;
(4) The relative financial circumstances of the parties;
(5) Any agreement of the parties as to which state should assume jurisdiction;
(6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
(8) The familiarity of the court of each state with the facts and issues in the pending litigation.

(c) If a court of this State determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(d) A court of this State may decline to exercise its jurisdiction under this Article if a child-custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding. (1979, c. 110, s. 1; 1999-223, s. 3.)

OFFICIAL COMMENT

This section retains the focus of Section 7 of the UCCJA [former G.S. 50A-7.] It authorizes courts to decide that another State is in a better position to make the custody determination, taking into consideration the relative circumstances of the parties. If so, the court may defer to the other State.

The list of factors that the court may consider has been updated from the UCCJA. The list is not meant to be exclusive. Several provisions require comment. Subparagraph (1) is concerned specifically with domestic violence and other matters affecting the health and safety of the parties. For this purpose, the court should determine whether the parties are located in different States because one party is a victim of domestic violence or child abuse. If domestic violence or child abuse has occurred, this factor authorizes the court to consider which State can best protect the victim from further violence or abuse.

In applying subparagraph (3), courts should realize that distance concerns can be alleviated by applying the communication and cooperation provisions of Sections 111 and 112.

In applying subsection (7) on expeditious resolution of the controversy, the court could consider the different procedural and evidentiary laws of the two States, as well as the flexibility of the court dockets. It also should consider the ability of a court to arrive at a solution to all the legal issues surrounding the family. If one State has jurisdiction to decide both the custody and support issues, it would be desirable to determine that State to be the most convenient forum. The same is true when children of the same family live in different States. It would be inappropriate to require parents to have custody proceedings in several States when one State could resolve the custody of all the children.

Before determining whether to decline or retain jurisdiction, the court of this State may communicate, in accordance with Section 110, with a court of another State and exchange information pertinent to the assumption of jurisdiction by either court.

There are two departures from Section 7 of the UCCJA [former G.S. 50A-7.] First, the court may not simply dismiss the action. To do so would leave the case in limbo. Rather the court shall stay the case and direct the parties to file in the State that has been found to be the more convenient forum. The court is also authorized to impose any other conditions it considers appropriate. This might include the issuance of temporary custody orders during the time necessary to commence a proceeding in the designated State, dismissing the case if the custody proceeding is not commenced in the other State or resuming jurisdiction if a court of the other State refuses to take the case.

Second, UCCJA, § 7(g) [former G.S. 50A-7(g)] which allowed the court to assess fees and costs if it was a clearly inappropriate court, has been eliminated. If a court has jurisdiction under this Act, it could not be a clearly inappropriate court.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under former G.S. 50A-7.*

Without a showing that the best interests of the child would be served if another state assumed jurisdiction, North Carolina courts should not defer jurisdiction pursuant to this section. Kelly v. Kelly, 77 N.C. App. 632, 335 S.E.2d 780 (1985).

Discretion of Trial Court. — Deferring jurisdiction on inconvenient forum grounds rests in the sound discretion of the trial court. Kelly v. Kelly, 77 N.C. App. 632, 335 S.E.2d 780 (1985).

No Order Stating North Carolina Would Be A More Convenient Forum. — North Carolina court did not have subject matter jurisdiction over the proceedings to terminate a mother's parental rights under G.S. 50A-203, although North Carolina was the home state of the children, because there was nothing in the record showing that the Arkansas court, which had awarded custody to the father, had determined that a North Carolina court would be a more convenient forum. In re N.R.M., 165 N.C. App. 294, 598 S.E.2d 147, 2004 N.C. App. LEXIS 1163 (2004).

North Carolina did not have jurisdiction to rule on a petition alleging the a juvenile was abused, neglected, and dependent because an original custody order was made by a New York court, awarding custody to the mother, and there was no order from the New York court in the record showing that New York made a determination that North Carolina, where the father had taken the juvenile, was a more convenient forum. In re J.W.S., — N.C. App. —, 669 S.E.2d 850, 2008 N.C. App. LEXIS 2268 (2008).

North Carolina Properly Found to Be An Inconvenient Forum. — Trial court properly determined that North Carolina was an inconvenient forum pursuant to G.S. 50A-207 for a mother's child custody motion and transferred the matter to Ohio, as the evidence supported the court's finding that the child had adjusted to her placement with her father in Ohio, and that the majority of the evidence was located in Ohio, and the matter was still pending before the court, because an underlying dependency action vested the trial court with continuing subject matter jurisdiction until the child was 18 years of age. In re M.E., 181 N.C. App. 322, 638 S.E.2d 513, 2007 N.C. App. LEXIS 51 (2007).

Forum Appropriate. — Where the trial court made 15 detailed findings of fact including findings that support was paid by the defendant in North Carolina, three of the four parties live in Wilmington, North Carolina, and the plaintiff was moving to Virginia allegedly to go to school, these findings were sufficient to show that North Carolina was a convenient forum for the continued exercise of jurisdiction. Wilson v. Wilson, 121 N.C. App. 292, 465 S.E.2d 44 (1996).

Trial court did not abuse the court's discretion in denying a mother's motion to transfer, pursuant to G.S. 50A-207, a custody matter from North Carolina to California because the trial court's findings showed that the court considered relevant factors in determining whether jurisdiction was to be transferred and the findings were sufficient. Velasquez v. Ralls, — N.C. App. —, 665 S.E.2d 825, 2008 N.C. App. LEXIS 1611 (2008).

Cited in David v. Ferguson, 153 N.C. App. 482, 571 S.E.2d 230, 2002 N.C. App. LEXIS 1176 (2002); Foley v. Foley, 156 N.C. App. 409, 576 S.E.2d 383, 2003 N.C. App. LEXIS 110 (2003).

§ 50A-208. Jurisdiction declined by reason of conduct.

(a) Except as otherwise provided in G.S. 50A-204 or by other law of this State, if a court of this State has jurisdiction under this Article because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

(1) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(2) A court of the state otherwise having jurisdiction under G.S. 50A-201 through G.S. 50A-203 determines that this State is a more appropriate forum under G.S. 50A-207; or

(3) No court of any other state would have jurisdiction under the criteria specified in G.S. 50A-201 through G.S. 50A-203.

(b) If a court of this State declines to exercise its jurisdiction pursuant to subsection (a), it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child-custody proceeding is commenced in a court having jurisdiction under G.S. 50A-201 through G.S. 50A-203.

(c) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection (a), it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, attorneys' fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this State unless authorized by law other than this Article. (1979, c. 110, s. 1; 1999-223, s. 3.)

OFFICIAL COMMENT

The "Clean Hands" section of the UCCJA has been truncated in this Act. Since there is no longer a multiplicity of jurisdictions which could take cognizance of a child-custody proceeding, there is less of a concern that one parent will take the child to another jurisdiction in an attempt to find a more favorable forum. Most of the jurisdictional problems generated by abducting parents should be solved by the prioritization of home State in Section 201; the exclusive, continuing jurisdiction provisions of Section 202; and the ban on modification in Section 203. For example, if a parent takes the child from the home State and seeks an original custody determination elsewhere, the stay-at-home parent has six months to file a custody petition under the extended home state jurisdictional provision of Section 201, which will ensure that the case is retained in the home State. If a petitioner for a modification determination takes the child from the State that issued the original custody determination, another State cannot assume jurisdiction as long at the first State exercises exclusive, continuing jurisdiction.

Nonetheless, there are still a number of cases where parents, or their surrogates, act in a reprehensible manner, such as removing, secreting, retaining, or restraining the child. This section ensures that abducting parents will not receive an advantage for their unjustifiable conduct. If the conduct that creates the jurisdiction is unjustified, courts must decline to exercise jurisdiction that is inappropriately invoked by one of the parties. For example, if one parent abducts the child pre-decree and establishes a new home State, that jurisdiction will decline to hear the case. There are exceptions. If the other party has acquiesced in the court's jurisdiction, the court may hear the case. Such acquiescence may occur by filing a pleading submitting to the jurisdiction, or by not filing in the court that would otherwise have jurisdiction under this Act. Similarly, if the court that would have jurisdiction finds that the court of this State is a more appropriate forum, the court may hear the case.

This section applies to those situations where jurisdiction exists because of the unjustified conduct of the person seeking to invoke it. If, for example, a parent in the State with exclusive, continuing jurisdiction under Section 202 has either restrained the child from visiting with the other parent, or has retained the child after visitation, and seeks to modify the decree, this section in inapplicable. The conduct of restraining or retaining the child did not create jurisdiction. Jurisdiction existed under this Act without regard to the parent's conduct. Whether a court should decline to hear the parent's request to modify is a matter of local law.

The focus in this section is on the unjustified conduct of the person who invokes the jurisdiction of the court. A technical illegality or wrong is insufficient to trigger the applicability of this section. This is particularly important in cases involving domestic violence and child abuse. Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal. Thus, if a parent flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under this section. An inquiry must be made into whether the flight was justified under the circumstances of the case. However, an abusive parent who seizes the child and flees to another State to establish jurisdiction has engaged in unjustifiable conduct and the new State must decline to exercise jurisdiction under this section.

Subsection (b) authorizes the court to fashion an appropriate remedy for the safety of the child and to prevent a repetition of the unjustified conduct. Thus, it would be appropriate for the court to notify the other parent and to provide for foster care for the child until the child is returned to the other parent. The court could also stay the proceeding and require that a custody proceeding be instituted in another State that would have jurisdiction under this Act. It should be noted that the court is not making a forum non conveniens analysis in this section. If the conduct is unjustifiable, it must decline jurisdiction. It may, however, retain jurisdiction until a custody proceeding is commenced in the appropriate tribunal if such retention is necessary to prevent a repetition of the wrongful conduct or to ensure the safety of the child.

The attorney's fee standard for this section is patterned after the International Child Abduction Remedies Act, 42 U.S.C. § 11607(b)(3). The assessed costs and fees are to be paid to the respondent who established that jurisdiction was based on unjustifiable conduct.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. *— Many of the cases cited below were decided under former G.S. 50A-8.*

Findings of Court Where Child Is Improperly Retained in This State. — Even when the district court has jurisdiction over the person of the out-of-state parent in an action to modify a foreign custody decree, it has no authority to exercise its jurisdiction without making findings of fact which support the conclusion that such exercise is required in the interest of the child, if the record shows that the parent seeking the modification has improperly retained the child. Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984).

A recitation in the trial court's order that it was in the best interest of child who was improperly retained by mother in this state that it assume jurisdiction did not comply with the stated policy of the former UCCJA or with the case law, as it did not contain specific facts. Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984).

Findings Where Child Is Abducted. — The trial court was not required by former G.S. 50A-8 to decline jurisdiction of a proceeding to modify a Virginia child custody decree merely because the mother had abducted one of the children and had taken her to this State if the court properly determined that it was in the best interest of the children that the court exercise jurisdiction despite the abduction; however, as the trial court's conclusion that it should exercise jurisdiction was unsupported by findings of fact, the case would be remanded for such findings. Williams v. Richardson, 53 N.C. App. 663, 281 S.E.2d 777 (1981), cert. denied, 304 N.C. 733, 288 S.E.2d 382 (1982).

California court did not obtain jurisdiction over child custody proceedings substantially in conformity with this Chapter where North Carolina rather than California was the home state of the children; there was no evidence that the children had a "significant connection" with California or that "substantial evidence" was available in California concerning the children's care; and there was significant evidence that defendant had on several occasions taken the children from North Carolina to California without plaintiff's consent. Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

Cited in David v. Ferguson, 153 N.C. App. 482, 571 S.E.2d 230, 2002 N.C. App. LEXIS 1176 (2002); Foley v. Foley, 156 N.C. App. 409, 576 S.E.2d 383, 2003 N.C. App. LEXIS 110 (2003).

§ 50A-209. Information to be submitted to court.

(a) In a child-custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

(1) Has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, the pleading or affidavit shall identify the court, the case number, and the date of the child-custody determination, if any;

(2) Knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, the pleading or affidavit shall identify the court, the case number, and the nature of the proceeding; and

(3) Knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

(b) If the information required by subdivisions (a) is not furnished, the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished.

(c) If the declaration as to any of the items described in subdivisions (a)(1) through (3) is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.

(d) Each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding.

(e) If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice. (1979, c. 110, s. 1; 1999-223, s. 3.)

OFFICIAL COMMENT

The pleading requirements from Section 9 of the UCCJA [former G.S. 50A-9] are generally carried over into this Act. However, the information is made subject to local law on the protection of names and other identifying information in certain cases. A number of States have enacted laws relating to the protection of victims in domestic violence and child abuse cases which provide for the confidentiality of victims names, addresses, and other information. These procedures must be followed if the child-custody proceeding of the State requires their applicability. See, e.g., California Family Law Code § 3409(a). If a State does not have local law that provides for protecting names and addresses, then subsection (e) or a similar provision should be adopted. Subsection (e) is based on the National Council of Juvenile and Family Court Judge's, Model Code on Domestic and Family Violence § 304(c). There are other models to choose from, in particular UIFSA 312.

In subsection (a)(2), the term "proceedings" should be read broadly to include more than custody proceedings. Thus, if one parent was being criminally prosecuted for child abuse or custodial interference, those proceedings should be disclosed. If the child is subject to the Interstate Compact on the Placement of Children, facts relating to compliance with the Compact should be disclosed in the pleading or affidavit.

Subsection (b) has been added. It authorizes the court to stay the proceeding until the information required in subsection (a) has been disclosed, although failure to provide the information does not deprive the court of jurisdiction to hear the case. This follows the majority of jurisdictions which held that failure to comply with the pleading requirements of the UCCJA did not deprive the court of jurisdiction to make a custody determination.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former G.S. 50A-9.*

Former § 50A-9 required that every party in a custody pleading give information under oath regarding the children's present address, the places where they lived within the last five years, and the names and present addresses of the persons with whom the children lived during that period. Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Subject Matter Jurisdiction. — Even where the juvenile petition filed by the county social services department failed to attach an affidavit as to the status of the minor child, the trial court did not lack subject matter jurisdiction over the minor child's neglect and dependency proceeding; although the better practice was to attach the affidavit, the failure to file the affidavit did not by itself divest the trial court of subject matter jurisdiction. In re D.S.A., 181 N.C. App. 715, 641 S.E.2d 18, 2007 N.C. App. LEXIS 375 (2007).

In dependency proceedings brought under G.S. 7B-101, the failure to file an affidavit complying with G.S. 50A-209(a) did not deprive the trial court of jurisdiction because nothing in the statute suggested that the information to be provided in this affidavit was jurisdictional; to the contrary, much statutory language led to the opposite conclusion because: (1) the information was required only if reasonably ascertainable; (2) if the information was not furnished at the outset, the court could stay the proceeding until the information was furnished; and (3) the statute required both parties to submit the information, and it would defy reason to suggest that a parent could defeat the court's jurisdiction by his or her own noncompliance with the statute. In re A.R.G., 361 N.C. 392, 646 S.E.2d 349, 2007 N.C. LEXIS 597 (2007).

Inaccuracy in address information for the children named in an affidavit supporting an abuse and neglect petition did not lead to lack of subject matter jurisdiction because the required information was known to the parents and was provided during the course of the hearing. In re M.G., 187 N.C. App. 536, 653 S.E.2d 581, 2007 N.C. App. LEXIS 2573 (2007), review granted, 666 S.E.2d 120, 2008 N.C. LEXIS 706 (N.C. 2008).

Proper Exercise of Jurisdiction Despite Noncompliance with Oath Requirements. — Court of appeals declined to accept plaintiff's argument that failure to comply fully with former 50A-9's oath requirements defeated the court's subject matter jurisdiction. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Failure of a county department of social services to comply with G.S. 50A-209 by failing to file an affidavit with the petition to terminate parental rights did not divest the trial court of jurisdiction in the termination proceeding; furthermore, the trial court was not required to stay the proceedings because the trial court's allowing the county department five days to file the affidavit was not prejudicial to the mother, as the trial court was able to determine whether jurisdiction existed prior to rendering its decision. In re Clark, 159 N.C. App. 75, 582 S.E.2d 657, 2003 N.C. App. LEXIS 1444 (2003).

Purpose of Oath Requirement. — An obvious purpose of the requirement of former 50A-9 that certain information be presented under oath was to enable the court to determine whether it should properly exercise jurisdiction, under the former UCCJA, of a child custody dispute. Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Affidavit Not Prerequisite to Jurisdiction Obtained under former § 7A-523. — Where the court obtained jurisdiction over a juvenile matter pursuant to former G.S. 7A-523, and not the former UCCJA, the affidavit referred to in this section was not a prerequisite to its jurisdiction. In re Botsford, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

Where Texas decree made no findings of fact to support its exercise of jurisdiction in determining custody of child, the North Carolina trial court correctly found and concluded that the Texas court had not assumed jurisdiction over the custody determination in substantial conformity with the former UCCJA or upon a finding of factual circumstances meeting the jurisdictional requirements of the former UCCJA. Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Cited in Chick v. Chick, 164 N.C. App. 444, 596 S.E.2d 303, 2004 N.C. App. LEXIS 1036 (2004).

§ 50A-210. Appearance of parties and child.

(a) In a child-custody proceeding in this State, the court may order a party to the proceeding who is in this State to appear before the court in person with or without the child. The court may order any person who is in this State and who has physical custody or control of the child to appear in person with the child.

(b) If a party to a child-custody proceeding whose presence is desired by the court is outside this State, the court may order that a notice given pursuant to G.S. 50A-108 include a statement directing the party to appear in person with or without the child and informing the party that failure to appear may result in a decision adverse to the party.

(c) The court may enter any orders necessary to ensure the safety of the child and of any person ordered to appear under this section.

(d) If a party to a child-custody proceeding who is outside this State is directed to appear under subsection (b) or desires to appear personally before the court with or without the child, the court may require another party to pay reasonable and necessary travel and other expenses of the party so appearing and of the child. (1979, c. 110, s. 1; 1999-223, s. 3.)

OFFICIAL COMMENT

No major changes have been made to this section which was Section 11 of the UCCJA [former G.S. 50A-11.] Language was added to subsection (a) to authorize the court to require a non-party who has physical custody of the child to produce the child.

Subsection (c) authorizes the court to enter orders providing for the safety of the child and the person ordered to appear with the child. If safety is a major concern, the court, as an alternative to ordering a party to appear with the child, could order and arrange for the party's testimony to be taken in another State under Section 111. This alternative might be important when there are safety concerns regarding requiring victims of domestic violence or child abuse to travel to the jurisdiction where the abuser resides.

Part 3. Enforcement.

§ 50A-301. Definitions.

In this Part:

(1) "Petitioner" means a person who seeks enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child-custody determination.

(2) "Respondent" means a person against whom a proceeding has been commenced for enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child-custody determination. (1999-223, s. 3.)

OFFICIAL COMMENT

For purposes of this article, "petitioner" and "respondent" are defined. The definitions clarify certain aspects of the notice and hearing sections.

CASE NOTES

No Attorney Fees After Contempt Motion. — Father's request for attorney fees was properly denied as a mother had filed a motion for contempt; she did not seek the expedited enforcement of a child custody determination, seek to register an out-of-state order, or otherwise utilize the remedies set forth in Part 3 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and thus Part 3 of the UCCJEA was not implicated and G.S. 50A-312 did not apply. Creighton v. Lazell-Frankel, 178 N.C. App. 227, 630 S.E.2d 738, 2006 N.C. App. LEXIS 1314 (2006).

§ 50A-302. Enforcement under Hague Convention.

Under this Part, a court of this State may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child-custody determination. (1999-223, s. 3.)

OFFICIAL COMMENT

This section applies the enforcement remedies provided by this article to orders requiring the return of a child issued under the authority of the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 et seq., implementing the Hague Convention on the Civil Aspects of International Child Abduction. Specific mention of ICARA proceedings is necessary because they often occur prior to any formal custody determination. However, the need for a speedy enforcement remedy for an order to return the child is just as necessary.

§ 50A-303. Duty to enforce.

(a) A court of this State shall recognize and enforce a child-custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this Article or the determination was made under factual circumstances meeting the jurisdictional standards of this Article, and the determination has not been modified in accordance with this Article.

(b) A court of this State may utilize any remedy available under other law of this State to enforce a child-custody determination made by a court of another state. The remedies provided in this Part are cumulative and do not affect the availability of other remedies to enforce a child-custody determination. (1979, c. 110, s. 1; 1999-223, s. 3.)

OFFICIAL COMMENT

This section is based on Section 13 of the UCCJA [former G.S. 50A-13] which contained the basic duty to enforce. The language of the original section has been retained and the duty to enforce is generally the same.

Enforcement of custody determinations of issuing States is also required by federal law in the PKPA, 28 U.S.C. § 1738A(a). The changes made in Article 2 of this Act now make a State's duty to enforce and not modify a child custody determination of another State consistent with the enforcement and nonmodification provisions of the PKPA. Therefore custody determinations made by a State pursuant to the UCCJA that would be enforceable under the PKPA will generally be enforced under this Act. However, if a State custody determination made pursuant to the UCCJA would not be enforceable under the PKPA, it will also not be enforceable under this Act. Thus a custody determination made by a "significant connection" jurisdiction when there is a home State is not enforceable under the PKPA regardless of whether a proceeding was ever commenced in the home State. Even though such a determination would be enforceable under the UCCJA with its four concurrent bases of jurisdiction, it would not be enforceable under this Act. This carries out the policy of the PKPA of strongly discouraging a State from exercising its concurrent "significant connection" jurisdiction under the UCCJA when another State could exercise "home state" jurisdiction.

This section also incorporates the concept of Section 15 of the UCCJA [former G.S. 50A-15] to the effect that a custody determination of another State will be enforced in the same manner as a custody determination made by a court of this State. Whatever remedies are available to enforce a local determination can be utilized to enforce a custody determination of another State. However, it remains a custody determination of the State that issued it. A child-custody determination of another State is not subject to modification unless the State would have jurisdiction to modify the determination under Article 2.

The remedies provided by this article for the enforcement of a custody determination will normally be used. This article does not detract from other remedies available under other local law. There is often a need for a number of remedies to ensure that a child-custody determination is obeyed. If other remedies would easily facilitate enforcement, they are still available. The petitioner, for example, can still cite the respondent for contempt of court or file a tort claim for intentional interference with custodial relations if those remedies are available under local law.

§ 50A-304. Temporary visitation.

(a) A court of this State which does not have jurisdiction to modify a child-custody determination may issue a temporary order enforcing:

(1) A visitation schedule made by a court of another state; or

(2) The visitation provisions of a child-custody determination of another state that does not provide for a specific visitation schedule.

(b) If a court of this State makes an order under subdivisions (a)(2) of this section, it shall specify in the order a period that it considers adequate to allow the petitioner to obtain an order from a court having jurisdiction under the criteria specified in Part 2. The order remains in effect until an order is obtained from the other court or the period expires. (1999-223, s. 3.)

OFFICIAL COMMENT

This section authorizes a court to issue a temporary order if it is necessary to enforce visitation rights without violating the rules on nonmodification contained in Section 303. Therefore, if there is a visitation schedule provided in the custody determination that was made in accordance with Article 2, a court can issue an order under this section implementing the schedule. An implementing order may include make-up or substitute visitation.

A court may also issue a temporary order providing for visitation if visitation was authorized in the custody determination, but no specific schedule was included in the custody determination. Such an order could include a substitution of a specific visitation schedule for "reasonable and seasonable."

However, a court may not, under subsection (a)(2) provide for a permanent change in visitation. Therefore, requests for a permanent change in the visitation schedule must be addressed to the court with exclusive, continuing jurisdiction under Section 202 or modification jurisdiction under Section 203. As under Section 204, subsection (b) of this section requires that the temporary visitation order stay in effect only long enough to allow the person who obtained the order to obtain a permanent modification in the State with appropriate jurisdiction under Article 2.

§ 50A-305. Registration of child-custody determination.

(a) A child-custody determination issued by a court of another state may be registered in this State, with or without a simultaneous request for enforcement, by sending to the appropriate court in this State:

(1) A letter or other document requesting registration;

(2) Two copies, including one certified copy, of the determination sought to be registered, and a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified; and

(3) Except as otherwise provided in G.S. 50A-209, the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child-custody determination sought to be registered.

(b) On receipt of the documents required by subsection (a), the registering court shall:

(1) Cause the determination to be filed as a foreign judgment, together with one copy of any accompanying documents and information, regardless of their form; and

(2) Direct the petitioner to serve notice upon the persons named pursuant to subdivision (a)(3) of this section, including notice of their opportunity to contest the registration in accordance with this section.

(c) The notice required by subdivision (b)(2) must state that:

(1) A registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of this State;

(2) A hearing to contest the validity of the registered determination must be requested within 20 days after service of notice; and

(3) Failure to contest the registration will result in confirmation of the child-custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.

(d) A person seeking to contest the validity of a registered order must request a hearing within 20 days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that:

(1) The issuing court did not have jurisdiction under Part 2;

(2) The child-custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under Part 2; or

(3) The person contesting registration was entitled to notice, but notice was not given in accordance with the standards of G.S. 50A-108 in the proceedings before the court that issued the order for which registration is sought.

(e) If a timely request for a hearing to contest the validity of the registration is not made, the registration is confirmed as a matter of law, and the person requesting registration and all persons served must be notified of the confirmation.

(f) Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration. (1979, c. 110, s. 1; 1997-81, s. 1; 1999-223, s. 3; 2007-484, s. 8.)

OFFICIAL COMMENT

This remainder of this article provides enforcement mechanisms for interstate child custody determinations.

This section authorizes a simple registration procedure that can be used to predetermine the enforceability of a custody determination. It parallels the process in UIFSA for the registration of child support orders. It should be as much of an aid to pro se litigants as the registration procedure of UIFSA.

A custody determination can be registered without any accompanying request for enforcement. This may be of significant assistance in international cases. For example, the custodial parent under a foreign custody order can receive an advance determination of whether that order would be recognized and enforced before sending the child to the United States for visitation. Article 26 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 35 I.L.M. 1391 (1996), requires those States which accede to the Convention to provide such a procedure.

Legal Periodicals. — For note, "A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Failure to Award Fees and Expenses Upheld. — Where the court determined that plaintiff had not violated Texas custody decree and that defendant was not entitled to its enforcement in North Carolina, there was no abuse of discretion in the court's failure to award attorneys' fees and travel expenses to plaintiff. Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985) (decided under former G.S. 50A-15).

Interpretation of 20-day window. — Nothing in G.S. 50A-305 requires that a party seeking registration of a child-custody determination issued by a court of another state must wait 20 days before registration is effective. Rather, the 20-day period provides the time frame during which a party may oppose registration on the grounds provided for in the statute or be limited to the sole ground provided in G.S. 50A-308(d)(2). Chick v. Chick, 164 N.C. App. 444, 596 S.E.2d 303, 2004 N.C. App. LEXIS 1036 (2004).

§ 50A-306. Enforcement of registered determination.

(a) A court of this State may grant any relief normally available under the law of this State to enforce a registered child-custody determination made by a court of another state.

(b) A court of this State shall recognize and enforce, but may not modify, except in accordance with Part 2, a registered child-custody determination of a court of another state. (1999-223, s. 3.)

OFFICIAL COMMENT

A registered child-custody determination can be enforced as if it was a child-custody determination of this State. However, it remains a custody determination of the State that issued it. A registered custody order is not subject to modification unless the State would have jurisdiction to modify the order under Article 2.

CASE NOTES

Applied in Chick v. Chick, 164 N.C. App. 444, 596 S.E.2d 303, 2004 N.C. App. LEXIS 1036 (2004).

§ 50A-307. Simultaneous proceedings.

If a proceeding for enforcement under this Part is commenced in a court of this State and the court determines that a proceeding to modify the determination is pending in a court of another state having jurisdiction to modify the determination under Part 2, the enforcing court shall immediately communicate with the modifying court. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding. (1999-223, s. 3.)

OFFICIAL COMMENT

The pleading rules of Section 308, require the parties to disclose any pending proceedings. Normally, an enforcement proceeding will take precedence over a modification action since the PKPA requires enforcement of child custody determinations made in accordance with its terms. However, the enforcement court must communicate with the modification court in order to avoid duplicative litigation. The courts might decide that the court with jurisdiction under Article 2 shall continue with the modification action and stay the enforcement proceeding. Or they might decide that the enforcement proceeding shall go forward. The ultimate decision rests with the court having exclusive, continuing jurisdiction under Section 202, or if there is no State with exclusive, continuing jurisdiction, then the decision rests with the State that would have jurisdiction to modify under Section 203. Therefore, if that court determines that the enforcement proceeding should be stayed or dismissed, the enforcement court should stay or dismiss the proceeding. If the enforcement court does not do so, the court with exclusive, continuing jurisdiction under Section 202, or with modification jurisdiction under Section 203, could enjoin the parties from continuing with the enforcement proceeding.

§ 50A-308. Expedited enforcement of child-custody determination.

(a) A petition under this Part must be verified. Certified copies of all orders sought to be enforced and of any order confirming registration must be attached to the petition. A copy of a certified copy of an order may be attached instead of the original.

(b) A petition for enforcement of a child-custody determination must state:
(1) Whether the court that issued the determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what the basis was;
(2) Whether the determination for which enforcement is sought has been vacated, stayed, or modified by a court whose decision must be enforced under this Article and, if so, identify the court, the case number, and the nature of the proceeding;
(3) Whether any proceeding has been commenced that could affect the current proceeding, including proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the proceeding;
(4) The present physical address of a child and the respondent, if known;
(5) Whether relief in addition to the immediate physical custody of the child and attorneys' fees is sought, including a request for assistance from law enforcement officials and, if so, the relief sought; and
(6) If the child-custody determination has been registered and confirmed under G.S. 50A-305, the date and place of registration.

(c) Upon the filing of a petition, the court shall issue an order directing the respondent to appear in person with or without the child at a hearing and may enter any order necessary to ensure the safety of the parties and the child. The hearing must be held on the next judicial day after service of the order unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The court may extend the date of hearing at the request of the petitioner.

(d) An order issued under subsection (c) must state the time and place of the hearing and advise the respondent that at the hearing the court will order that the petitioner may take immediate physical custody of the child and the payment of fees, costs, and expenses under G.S. 50A-312, and may schedule a hearing to determine whether further relief is appropriate, unless the respondent appears and establishes that:

(1) The child-custody determination has not been registered and confirmed under G.S. 50A-305 and that:
  a. The issuing court did not have jurisdiction under Part 2;
  b. The child-custody determination for which enforcement is sought has been vacated, stayed, or modified by a court having jurisdiction to do so under Part 2;
  c. The respondent was entitled to notice, but notice was not given in accordance with the standards of G.S. 50A-108 in the proceedings before the court that issued the order for which enforcement is sought; or

(2) The child-custody determination for which enforcement is sought was registered and confirmed under G.S. 50A-304, but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under Part 2. (1999-223, s. 3.)

OFFICIAL COMMENT

This section provides the normal remedy that will be used in interstate cases: the production of the child in a summary, remedial process based on habeas corpus.

The petition is intended to provide the court with as much information as possible. Attaching certified copies of all orders sought to be enforced allows the court to have the necessary information. Most of the information relates to the permissible scope of the court's inquiry. The petitioner has the responsibility to inform the court of all proceedings that would affect the current enforcement action. Specific mention is made of certain proceedings to ensure that they are disclosed. A 'procedure relating to domestic violence' includes not only protective order proceedings but also criminal prosecutions for child abuse or domestic violence.

The order requires the respondent to appear at a hearing on the next judicial day. The term 'next judicial day' in this section means the next day when a judge is at the courthouse. At the hearing, the court will order the child to be delivered to the petitioner unless the respondent is prepared to assert that the issuing State lacked jurisdiction, that notice was not given in accordance with Section 108, or that the order sought to be enforced has been vacated, modified, or stayed by a court with jurisdiction to do so under Article 2. The court is also to order payment of the fees and expenses set out in Section 312. The court may set another hearing to determine whether additional relief available under this state's law should be granted.

If the order has been registered and confirmed in accordance with Section 304, the only defense to enforcement is that the order has been vacated, stayed or modified since the registration proceeding by a court with jurisdiction to do so under Article 2.

CASE NOTES

Interpretation of 20-day Window After Registration. — Nothing in G.S. 50A-305 requires that a party seeking registration of a child-custody determination issued by a court of another state must wait 20 days before registration is effective. Rather, the 20-day period provides the time frame during which a party may oppose registration on the grounds provided for in the statute or be limited to the sole ground provided in G.S. 50A-308(d)(2). Chick v. Chick, 164 N.C. App. 444, 596 S.E.2d 303, 2004 N.C. App. LEXIS 1036 (2004).

Procedure. — Under the Uniform Child-Custody Jurisdiction and Enforcement Act, a party wishing to enforce a child-custody determination of another state with jurisdiction must file a petition for enforcement with a court of the state in which the respondent is located. In re Q.V., 164 N.C. App. 737, 596 S.E.2d 867, 2004 N.C. App. LEXIS 1140 (2004).

Cited in In re Q.V., 164 N.C. App. 737, 596 S.E.2d 867, 2004 N.C. App. LEXIS 1140 (2004).

§ 50A-309. Service of petition and order.

Except as otherwise provided in G.S. 50A-311, the petition and order must be served, by any method authorized by the law of this State, upon respondent and any person who has physical custody of the child. (1999-223, s. 3.)

OFFICIAL COMMENT

In keeping with other sections of this Act, the question of how the petition and order should be served is left to local law.

§ 50A-310. Hearing and order.

(a) Unless the court issues a temporary emergency order pursuant to G.S. 50A-204 upon a finding that a petitioner is entitled to immediate physical custody of the child, the court shall order that the petitioner may take immediate physical custody of the child unless the respondent establishes that:

(1) The child-custody determination has not been registered and confirmed under G.S. 50A-305 and that:

a. The issuing court did not have jurisdiction under Part 2;

b. The child-custody determination for which enforcement is sought has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under Part 2; or

c. The respondent was entitled to notice, but notice was not given in accordance with the standards of G.S. 50A-108 in the proceedings before the court that issued the order for which enforcement is sought; or

(2) The child-custody determination for which enforcement is sought was registered and confirmed under G.S. 50A-305 but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under Part 2.

(b) The court shall award the fees, costs, and expenses authorized under G.S. 50A-312 and may grant additional relief, including a request for the assistance of law enforcement officials, and set a further hearing to determine whether additional relief is appropriate.

(c) If a party called to testify refuses to answer on the ground that the testimony may be self-incriminating, the court may draw an adverse inference from the refusal.

(d) A privilege against disclosure of communications between spouses and a defense of immunity based on the relationship of husband and wife or parent and child may not be invoked in a proceeding under this Part. (1979, c. 110, s. 1; 1999-223, s. 3.)

OFFICIAL COMMENT

The scope of inquiry for the enforcing court is quite limited. Federal law requires the court to enforce the custody determination if the issuing state's decree was rendered in compliance with the PKPA. 28 U.S.C. § 1738A(a). This Act requires enforcement of custody determinations that are made in conformity with Article 2's jurisdictional rules.

The certified copy, or a copy of the certified copy, of the custody determination entitling the petitioner to the child is prima facie evidence of the issuing court's jurisdiction to enter the order. If the order is one that is entitled to be enforced under Article 2 and if it has been violated, the burden shifts to the respondent to show that the custody determination is not entitled to enforcement.

It is a defense to enforcement that another jurisdiction has issued a custody determination that is required to be enforced under Article 2. An example is when one court has based its original custody determination on the UCCJA § 3(a)(2) [former G.S. 50A-3(a)(2)] (significant connections) and another jurisdiction has rendered an original custody determination based on the UCCJA § 3(a)(1) [former G.S. 50A-3(a)(1)] (home State). When this occurs, Article 2 of this Act, as well as the PKPA, mandate that the home state determination be enforced in all other States, including the State that rendered the significant connections determination.

Lack of notice in accordance with Section 108 by a person entitled to notice and opportunity to be heard at the original custody determination is a defense to enforcement of the custody determination. The scope of the defense under this Act is the same as the defense would be under the law of the State that issued the notice. Thus, if the defense of lack of notice would not be available under local law if the respondent purposely hid from the petitioner, took deliberate steps to avoid service of process or elected not to participate in the initial proceedings, the defense would also not be available under this Act.

There are no other defenses to an enforcement action. If the child would be endangered by the enforcement of a custody or visitation order, there may be a basis for the assumption of emergency jurisdiction under Section 204 of this Act. Upon the finding of an emergency, the court issues a temporary order and directs the parties to proceed either in the court that is exercising continuing jurisdiction over the custody proceeding under Section 202, or the court that would have jurisdiction to modify the custody determination under Section 203.

The court shall determine at the hearing whether fees should be awarded under Section 312. If so, it should order them paid. The court may determine if additional relief is appropriate, including requesting law enforcement officers to assist the petitioner in the enforcement of the order. The court may set a hearing to determine whether further relief should be granted.

The remainder of this section is derived from UIFSA § 316 with regard to the privilege of self-incrimination, spousal privileges, and immunities. It is included to keep parallel the procedures for child support and child custody proceedings to the extent possible.

§ 50A-311. Warrant to take physical custody of child.

(a) Upon the filing of a petition seeking enforcement of a child-custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is immediately likely to suffer serious physical harm or be removed from this State.

(b) If the court, upon the testimony of the petitioner or other witness, finds that the child is imminently likely to suffer serious physical harm or be removed from this State, it may issue a warrant to take physical custody of the child. The petition must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The application for the warrant must include the statements required by G.S. 50A-308(b).

(c) A warrant to take physical custody of a child must:

(1) Recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;

(2) Direct law enforcement officers to take physical custody of the child immediately; and

(3) Provide for the placement of the child pending final relief.

(d) The respondent must be served with the petition, warrant, and order immediately after the child is taken into physical custody.

(e) A warrant to take physical custody of a child is enforceable throughout this State. If the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour.

(f) The court may impose conditions upon placement of a child to ensure the appearance of the child and the child's custodian. (1999-223, s. 3.)

OFFICIAL COMMENT

The section provides a remedy for emergency situations where there is a reason to believe that the child will suffer imminent, serious physical harm or be removed from the jurisdiction once the respondent learns that the petitioner has filed an enforcement proceeding. If the court finds such harm exists, it should temporarily waive the notice requirements and issue a warrant to take physical custody of the child. Immediately after the warrant is executed, the respondent is to receive notice of the proceedings.

The term "harm" cannot be totally defined and, as in the issuance of temporary retraining orders, the appropriate issuance of a warrant is left to the circumstances of the case. Those circumstances include cases where the respondent is the subject of a criminal proceeding as well as situations where the respondent is secreting the child in violation of a court order, abusing the child, a flight risk and other circumstances that the court concludes make the issuance of notice a danger to the child. The court must hear the testimony of the petitioner or another witness prior to issuing the warrant. The testimony may be heard in person, via telephone, or by any other means acceptable under local law. The court must State the reasons for the issuance of the warrant. The warrant can be enforced by law enforcement officers wherever the child is found in the State. The warrant may authorize entry upon private property to pick up the child if no less intrusive means are possible. In extraordinary cases, the warrant may authorize law enforcement to make a forcible entry at any hour.

The warrant must provide for the placement of the child pending the determination of the enforcement proceeding. Since the issuance of the warrant would not occur absent a risk of serious harm to the child, placement cannot be with the respondent. Normally, the child would be placed with the petitioner. However, if placement with the petitioner is not indicated, the court can order any other appropriate placement authorized under the laws of the court's State. Placement with the petitioner may not be indicated if there is a likelihood that the petitioner also will flee the jurisdiction. Placement with the petitioner may not be practical if the petitioner is proceeding through an attorney and is not present before the court.

This section authorizes the court to utilize whatever means are available under local law to ensure the appearance of the petitioner and child at the enforcement hearing. Such means might include cash bonds, a surrender of a passport, or whatever the court determines is necessary.

CASE NOTES

Order Authorizing Use of Law Enforcement Officials Vacated. — North Carolina order enforcing a Vermont child custody order directing the assistance of law enforcement officials in returning minor children involved in a custody dispute to Vermont to their father was vacated where none of the statutory circumstances allowing for use of law enforcement officials was present in the case. Chick v. Chick, 164 N.C. App. 444, 596 S.E.2d 303, 2004 N.C. App. LEXIS 1036 (2004).

§ 50A-312. Costs, fees, and expenses.

(a) The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorneys' fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

(b) The court may not assess fees, costs, or expenses against a state unless authorized by law other than this Article. (1999-223, s. 3.)

OFFICIAL COMMENT

This section is derived from the International Child Abduction Remedies Act, 42 U.S.C. § 11607(b)(3). Normally the court will award fees and costs against the non-prevailing party. Included as expenses are the amount of investigation fees incurred by private persons or by public officials as well as the cost of child placement during the proceedings.

The non-prevailing party has the burden of showing that such an award would be clearly inappropriate. Fees and costs may be inappropriate if their payment would cause the parent and child to seek public assistance.

This section implements the policies of Section 8(c) of Pub.L. 96-611 (part of the PKPA) which provides that:

In furtherance of the purposes of section 1738A of title 28, United States Code [this section], as added by subsection (a) of this section, State courts are encouraged to — (2) award to the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such section 1738A [this section], necessary travel expenses, attorneys' fees, costs of private investigations, witness fees or expenses, and other expenses incurred in connection with such custody determination....

The term "prevailing party" is not given a special definition for this Act. Each State will apply its own standard.

Subsection (b) was added to ensure that this section would not apply to the State unless otherwise authorized. The language is taken from UIFSA § 313 (court may assess costs against obligee or support enforcement agency only if allowed by local law).

CASE NOTES

Recovery of Costs Against County Department of Social Services. — When a child was adjudicated dependent and neglected pursuant to a petition filed by a county department of social services, after which the trial court relinquished jurisdiction to the state in which the child's parents were divorced, the child's father, who was successful in obtaining an award of custody of the child, was not entitled to recover his costs in doing so from the county department because the department was an agency of the state, and costs could not be awarded against the state under this statute unless they were authorized by a law other than the Uniform Child-Custody Jurisdiction and Enforcement Act, G.S. 50A-101 et seq., which they were not. In re Q.V., 164 N.C. App. 737, 596 S.E.2d 867, 2004 N.C. App. LEXIS 1140 (2004).

There is no indication, explicit or implicit, that the North Carolina General Assembly intended to exclude county departments of social services from its meaning of the word "state" as used generally in the Uniform Child-Custody Jurisdiction and Enforcement Act, G.S. 50A-101 et seq., and specifically in G.S. 50A-312(b). In re Q.V., 164 N.C. App. 737, 596 S.E.2d 867, 2004 N.C. App. LEXIS 1140 (2004).

Recovery of Costs Against State. — G.S. 50A-312(a) obligates a court to award fees, costs, and expenses to the prevailing party of a petition for enforcement of a child-custody determination pursuant to G.S. 50A-308 unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate, but G.S. 50A-312(b) specifically provides that fees, costs and expenses may not be awarded against a state unless authorized by some law other than the Uniform Child-Custody Jurisdiction and Enforcement Act, G.S. 50A-101 et seq. In re Q.V., 164 N.C. App. 737, 596 S.E.2d 867, 2004 N.C. App. LEXIS 1140 (2004).

No Attorney Fees After Contempt Motion. — Father's request for attorney fees was properly denied as a mother had filed a motion for contempt; she did not seek the expedited enforcement of a child custody determination, seek to register an out-of-state order, or otherwise utilize the remedies set forth in Part 3 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and thus Part 3 of the UCCJEA was not implicated and G.S. 50A-312 did not apply. Creighton v. Lazell-Frankel, 178 N.C. App. 227, 630 S.E.2d 738, 2006 N.C. App. LEXIS 1314 (2006).

§ 50A-313. Recognition and enforcement.

A court of this State shall accord full faith and credit to an order issued by another state and consistent with this Article which enforces a child-custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under Part 2. (1979, c.110, s.1; 1999-223, s. 3.)

OFFICIAL COMMENT

The enforcement order, to be effective, must also be enforced by other States. This section requires courts of this State to enforce and not modify enforcement orders issued by other States when made consistently with the provisions of this Act.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. *— The cases cited below were decided under former G.S. 50A-13.*

State Issuing Order Need Not Have Adopted former UCCJA. — States which have adopted the former Uniform Child Custody Jurisdiction Act must enforce an out-of-state custody order which substantially complies with the terms of the former UCCJA, regardless of whether the state issuing the order has adopted the former UCCJA. Copeland v. Copeland, 68 N.C. App. 276, 314 S.E.2d 297 (1984).

To modify a foreign child custody decree, trial court must detail a substantial change in circumstances affecting the welfare of the child, unless the court finds that the foreign decree was a disciplinary or punitive measure. Williams v. Richardson, 53 N.C. App. 663, 281 S.E.2d 777 (1981), cert. denied, 304 N.C. 733, 288 S.E.2d 382 (1982).

Failure to Attempt Service. — Where there was no attempt to serve other parent with notice of a Tennessee temporary custody hearing and she in fact never received notice of the hearing, the Tennessee court did not act substantially in conformity with the former UCCJA, and the order made by the Tennessee court was jurisdictionally defective. Henson v. Henson, 95 N.C. App. 777, 384 S.E.2d 70 (1989).

Where the court of another state has not properly assumed jurisdiction, the courts of this state are not bound to recognize and enforce the out-of-state judgment. Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

§ 50A-314. Appeals.

An appeal may be taken from a final order in a proceeding under this Part in accordance with expedited appellate procedures in other civil cases. Unless the court enters a temporary emergency order under G.S. 50A-204, the enforcing court may not stay an order enforcing a child-custody determination pending appeal. (1999-223, s. 3.)

OFFICIAL COMMENT

The order may be appealed as an expedited civil matter. An enforcement order should not be stayed by the court. Provisions for a stay would defeat the purpose of having a quick enforcement procedure. If there is a risk of serious mistreatment or abuse to the child, a petition to assume emergency jurisdiction must be filed under Section 204. This section leaves intact the possibility of obtaining an extraordinary remedy such as mandamus or prohibition from an appellate court to stay the court's enforcement action. In many States, it is not possible to limit the constitutional authority of appellate courts to issue a stay. However, unless the information before the appellate panel indicates that emergency jurisdiction would be assumed under Section 204, there is no reason to stay the enforcement of the order pending appeal.

§ 50A-315. Role of prosecutor or public official.

(a) In a case arising under this Article or involving the Hague Convention on the Civil Aspects of International Child Abduction, the prosecutor or other appropriate public official may take any lawful action, including resort to a proceeding under this Part or any other available civil proceeding to locate a child, obtain the return of a child, or enforce a child-custody determination if there is:

(1) An existing child-custody determination;
(2) A request to do so from a court in a pending child-custody proceeding;
(3) A reasonable belief that a criminal statute has been violated; or
(4) A reasonable belief that the child has been wrongfully removed or retained in violation of the Hague Convention on the Civil Aspects of International Child Abduction.

(b) A prosecutor or appropriate public official acting under this section acts on behalf of the court and may not represent any party. (1999-223, s. 3.)

OFFICIAL COMMENT

Sections 315-317 are derived from the recommendations of the *Obstacles Study* that urge a role for public authorities in civil enforcement of custody and visitation determinations. One of the basic policies behind this approach is that, as is the case with child support, the involvement of public authorities will encourage the parties to abide by the terms of the court order. The prosecutor usually would be the most appropriate public official to exercise authority under this section. However, States may locate the authority described in the section in the most appropriate public office for their governmental structure. The authority could be, for example, the Friend of the Court Office or the Attorney General. If the parties know that prosecutors and law enforcement officers are available to help secure the return of a child, the parties may be deterred from interfering with the exercise of rights established by court order.

The use of public authorities should provide a more effective method of remedying violations of the custody determination. Most parties do not have the resources to enforce a custody determination in another jurisdiction. The availability of the prosecutor or other government official as an enforcement agency will help ensure that remedies of this Act can be made available regardless of income level. In addition, the prosecutor may have resources to draw on that are unavailable to the average litigant.

The role of the public authorities should generally not begin until there is a custody determination that is sought to be enforced. The Act does not authorize the public authorities to be involved in the action leading up to the making of the custody determination, except when requested by the court, when there is a violation the Hague Convention on the Civil Aspects of International Child Abduction, or when the person holding the child has violated a criminal statute. This Act does not mandate that the public authorities be involved in all cases referred to it. There is only so much time and money available for enforcement proceedings. Therefore, the public authorities eventually will develop guidelines to determine which cases will receive priority.

The use of civil procedures instead of, or in addition to, filing and prosecuting criminal charges enlarges the prosecutor's options and may provide a more economical and less disruptive means of solving problems of criminal abduction and retention. With the use of criminal proceedings alone, the procedure may be inadequate to ensure the return of the child. The civil options would permit the prosecutor to resolve that recurring and often frustrating problem.

A concern was expressed about whether allowing the prosecutor to use civil means as a method of settling a child abduction violated either DR 7-105(A) of the Code of Professional Responsibility or Model Rule of Professional Responsibility 4.4. Both provisions either explicitly or implicitly disapprove of a lawyer threatening criminal action to gain an advantage in a civil case. However, the prohibition relates to threats that are solely to gain an advantage in a civil case. If the prosecutor has a good faith reason for pursuing the criminal action, there is no ethical violation. See *Committee on Legal Ethics v. Printz*, 416 S.E. 2d 720 (W.Va. 1992) (lawyer can threaten to press criminal charges against a client's former employee unless employee made restitution).

It must be emphasized that the public authorities do not become involved in the merits of the case. They are authorized only to locate the child and enforce the custody determination. The public authority is authorized by this section to utilize any civil proceeding to secure the enforcement of the custody determination. In most jurisdictions, that would be a proceeding under this Act. If the prosecutor proceeds pursuant to this Act, the prosecutor is subject to its provisions. There is nothing in this Act that would prevent a State from authorizing the prosecutor or other public official to use additional remedies beyond those provided in this Act.

The public authority does not represent any party to the custody determination. It acts as a "friend of the court." Its role is to ensure that the custody determination is enforced.

Sections 315-317 are limited to cases covered by this Act, i.e. interstate cases. However, States may, if they wish, extend this part of the Act to intrastate cases.

It should also be noted that the provisions of this section relate to the civil enforcement of child custody determinations. Nothing in this section is meant to detract from the ability of the prosecutor to use criminal provisions in child abduction cases.

CASE NOTES

Order Authorizing Use of Law Enforcement Official Vacated. — North Carolina order enforcing a Vermont child custody order directing the assistance of law enforcement officials in returning minor children involved in a custody dispute to Vermont to their father was vacated where none of the statutory circumstances allowing for use of law enforcement officials was present in the case. Chick v. Chick, 164 N.C. App. 444, 596 S.E.2d 303, 2004 N.C. App. LEXIS 1036 (2004).

§ 50A-316. Role of law enforcement.

At the request of a prosecutor or other appropriate public official acting under G.S. 50A-315, a law enforcement officer may take any lawful action reasonably necessary to locate a child or a party and assist a prosecutor or appropriate public official with responsibilities under G.S. 50A-315. (1979, c. 110, s. 1; 1999-223, s. 3.)

OFFICIAL COMMENT

This section authorizes law enforcement officials to assist in locating a child and enforcing a custody determination when requested to do so by the public authorities. It is to be read as an enabling provision. Whether law enforcement officials have discretion in responding to a request by the prosecutor or other public official is a matter of local law.

CASE NOTES

Order Authorizing the Use of Law Enforcement Officials Vacated. — North Carolina order enforcing a Vermont child custody order directing the assistance of law enforcement officials in returning minor children involved in a custody dispute to Vermont to their father was vacated where none of the statutory circumstances allowing for use of law enforcement officials was present in the case. Chick v. Chick, 164 N.C. App. 444, 596 S.E.2d 303, 2004 N.C. App. LEXIS 1036 (2004).

Court erred in authorizing law enforcement officers to pick up children who were residing with petitioner and deliver them to respondent in an effort to assist Georgia court in enforcing its custody order; while trial court could have resorted to traditional contempt proceedings, there was no statutory basis for invoking the participation of law enforcement officers in producing the children. Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990) (decided under former G.S. 50A-20).

§ 50A-317. Costs and expenses.

If the respondent is not the prevailing party, the court may assess against the respondent all direct expenses and costs incurred by the prosecutor or other appropriate public official and law enforcement officers under G.S. 50A-315 or G.S. 50A-316. (1999-223, s. 3.)

OFFICIAL COMMENT

One of the major problems of utilizing public officials to locate children and enforce custody and visitation determinations is cost. This section authorizes the prosecutor and law enforcement to recover costs against the non-prevailing party. The use of the term "direct" indicates that overhead is not a recoverable cost. This section cannot be used to recover the value of the time spent by the public authorities' attorneys.

Chapter 50B.

Domestic Violence.

Sec.
50B-1. Domestic violence; definition.
50B-2. Institution of civil action; motion for emergency relief; temporary orders; temporary custody.
50B-3. Relief.
50B-3.1. Surrender and disposal of firearms; violations; exemptions.
50B-4. Enforcement of orders.
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50B-4.2. False statement regarding protective order a misdemeanor.

Sec.
50B-5. Emergency assistance.
50B-5.5. Employment discrimination unlawful.
50B-6. Construction of Chapter.
50B-7. Remedies not exclusive.
50B-8. Effect upon prosecution for violation of § 14-184 or other offense against public morals.
50B-9. Domestic Violence Center Fund.

§ 50B-1. Domestic violence; definition.

(a) Domestic violence means the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:

(1) Attempting to cause bodily injury, or intentionally causing bodily injury; or

(2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or

(3) Committing any act defined in G.S. 14-27.2 through G.S. 14-27.7.

(b) For purposes of this section, the term "personal relationship" means a relationship wherein the parties involved:

(1) Are current or former spouses;

(2) Are persons of opposite sex who live together or have lived together;

(3) Are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren. For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16;

(4) Have a child in common;

(5) Are current or former household members;

(6) Are persons of the opposite sex who are in a dating relationship or have been in a dating relationship. For purposes of this subdivision, a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship.

(c) As used in this Chapter, the term "protective order" includes any order entered pursuant to this Chapter upon hearing by the court or consent of the parties. (1979, c. 561, s. 1; 1985, c. 113, s. 1; 1987, c. 828; 1987 (Reg. Sess., 1988), c. 893, ss. 1, 3; 1995 (Reg. Sess., 1996), c. 591, s. 1; 1997-471, s. 1; 2001-518, s. 3; 2003-107, s. 1; 2009-58, s. 5.)

Cross References. — For the Address Confidentiality Program, see G.S. 15C-1 et seq. As to privileged nature of communications with agents of rape crisis centers and domestic violence programs, see G.S. 8-53.12. As to requirement that Attorney General's Office develop reporting system and database on homicides in which victim and offender had personal relationship, as defined by this section, see G.S. 114-2.7.

Domestic Violence Fatality Prevention and Protection Review Team. — Session Laws 2009-52, s. 1(a)-(d), provides for the establishment, composition, and powers and duties of a Domestic Violence Fatality Prevention and Protection Review Team, modeled after the North Carolina Child Fatality Prevention Team. A county may establish such a team for the purpose of identifying and reviewing domestic violence-related deaths and to facilitate communication among various agencies and organizations involved in domestic violence cases in order to prevent future fatalities.

Session Laws 2009-52, s. 1(e)-(g), provides for confidentiality regarding, and certain limitations on access to, the medical, hospital, and county or agency records the Review Team utilizes in performing its functions.

Session Laws 2009-52, ss. 2 and 3, provide for the Review Team to issue a final report by June 15, 2014, and to terminate upon filing its final report or on June 15, 2014, whichever is earlier.

Session Laws 2009-52, s. 4, provides: "This act shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act."

Session Laws 2009-52, s. 5, provides: "This act applies to Mecklenburg County only."

Editor's Note. — Session Laws 2008-4, s. 2 provides: "The North Carolina Domestic Violence Commission, in consultation with the North Carolina Coalition Against Domestic Violence, the North Carolina Attorney General's Office, and the Governor's Crime Commission, shall study the adoption of a statewide automated victim notification system for persons who have received a protective order under Chapter 50B of the General Statutes. As part of its study of this issue, the Domestic Violence Commission shall review:

"(1) Automated notification systems used in other state jurisdictions to notify protective order holders of critical dates, e.g., the date the respondent, if incarcerated, will be released from custody.

"(2) Data, if any, on the effectiveness of other state systems.

"(3) The current statewide system which provides automated notice to crime victims (SAVAN), to determine if it could be enhanced to include the proposed system.

"(4) Sources of grant funding that are available to implement the system.

"(5) Methods utilized for registering into the system, and whether the information should be accessible to the general public, in addition to the person or persons protected by the order.

"(6) Methods to ensure that information relating to the respondent of an order is uploaded in a timely manner and to confirm that notification has been sent to registrants.

"The North Carolina Domestic Violence Commission shall report with the results of its study, and any recommendations, to the Joint Legislative Committee on Domestic Violence and the General Assembly on or before January 1, 2009."

Session Laws 2009-342, s. 6, provides: "The Joint Legislative Committee on Domestic Violence supports the adoption of an automated statewide domestic violence protective order notification system. In order to determine the financial and operational impact of developing the system, the Administrative Office of the Courts, in consultation with the Governor's Crime Commission and the North Carolina Attorney General's Office, shall (i) identify information in available databases relating to civil domestic violence protective orders, criminal no-contact order conditions, and postarrest conditions of release and (ii) determine the financial impact, including personnel costs, for implementing a domestic violence protective order notification system which interfaces with the North Carolina Statewide Automated Victim Assistance Notification System. The Administrative Office of the Courts and the Governor's Crime Commission shall jointly report the findings to the Joint Legislative Committee on Domestic Violence and the Fiscal Research Division by February 1, 2010."

Session Laws 2009-342, s. 7, provides: "The North Carolina Domestic Violence Commission, in consultation with the North Carolina Coalition Against Domestic Violence and the North Carolina Coalition Against Sexual Assault, shall study the issue of State oversight and coordination of services to victims of sexual violence and whether sexual violence should be included as a focus area of the Commission. The study shall include, but is not limited to, a review of the organization and membership of entities in other states that provide (i) information and recommendations to state legislatures on domestic and sexual violence and (ii) information and services to the public regarding these issues. The Commission shall report its findings and recommendations to the Joint Legislative Committee on Domestic Violence by February 1, 2010."

Effect of Amendments. — Session Laws 2009-58, s. 5, effective June 5, 2009, substituted "G.S. 14-277.3A" for "G.S. 14-277.3" in subdivision (a)(2).

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For comment, "North Carolina's Domestic Violence Act: Preventing Spouse Abuse?", see 17 N.C. Cent. L.J. 82 (1988).

For 1997 legislative survey, see 20 Campbell L. Rev. 459.

CASE NOTES

Applicability of Chapter. — This Chapter did not become effective until October 1, 1979, and applies only to acts of domestic violence occurring on or after that date. Story v. Story, 57 N.C. App. 509, 291 S.E.2d 923 (1982).

TRO Was a "Protective Order." — Temporary restraining order (TRO) was a protective order entered pursuant to a hearing; the "hearing" requirement in G.S. 50B-1(c) was satisfied when defendant received notice that a TRO had entered against defendant. State v. Byrd, 185 N.C. App. 597, 649 S.E.2d 444, 2007 N.C. App. LEXIS 1953 (2007).

Temporary Restraining Order Not Entered Upon Hearing as Required Under G.S. 50B-1(c). — Trial court erred in enhancing defendant's sentence under G.S. 50B-4.1(d) for his knowing violation of a valid protective order because a temporary restraining order (TRO) was not a valid domestic violence protective order under Chapter 50B but an ex parte TRO entered under N.C. R. Civ. P. 65(b), and the order was not entered upon hearing by the trial court or consent of the parties as required under G.S. 50B-1(c); only a valid protective order entered under Chapter 50B can be used to enhance a defendant's sentence under G.S. 50B-4.1(d), and Chapter 50B requires that a defendant be given notice and the opportunity to be heard before entry of a protective order. State v. Byrd, 363 N.C. 214, 675 S.E.2d 323, 2009 N.C. LEXIS 347 (2009).

This Chapter is not designed to establish alternative grounds for jurisdiction over custody disputes apart from those set forth in Chapter 50A. Danna v. Danna, 88 N.C. App. 680, 364 S.E.2d 694, cert. denied, 322 N.C. 479, 370 S.E.2d 221 (1988).

Jurisdiction over Custody and Visitation Rights Is Governed by Chapter 50A. — Whenever the relief sought under this Chapter is a determination of custody or visitation rights, the existence of subject matter jurisdiction over the action is governed by Chapter 50A, just as it is in any other custody dispute. Danna v. Danna, 88 N.C. App. 680, 364 S.E.2d 694, cert. denied, 322 N.C. 479, 370 S.E.2d 221 (1988).

This Chapter does not establish an affirmative duty on the part of law enforcement agencies to protect victims or threatened victims of domestic violence upon request; its effect is limited to enabling such persons to more readily obtain the court's protection and such assistance as any local agency approached sees fit to give. Braswell v. Braswell, 98 N.C. App. 231, 390 S.E.2d 752, modified on other grounds, 330 N.C. 363, 410 S.E.2d 897 (1991).

This Chapter does not establish victims of domestic violence as a protected class of persons or extend employment security status to such persons, and domestic violence victims were not members of a protected class or otherwise entitled to special treatment; the termination of the at will employment of a domestic violence victim did not violate public policy, and a trial court's dismissal of his wrongful termination suit was affirmed. Imes v. City of Asheville, 163 N.C. App. 668, 594 S.E.2d 397, 2004 N.C. App. LEXIS 583 (2004), aff'd, 359 N.C. 182, 606 S.E.2d 117 (2004).

Subjective Fear of Imminent Serious Bodily Injury. — This section imposes a subjective test, rather than an objective reasonableness test, to determine whether an act of domestic violence has occurred. Brandon v. Brandon, 132 N.C. App. 646, 513 S.E.2d 589 (1999).

Evidence of Imminent Serious Bodily Injury. — The evidence supported a finding that the husband threatened imminent serious bodily injury to the wife, where a deputy had to stop the husband from entering a rental house owned by the parties, the husband threatened the wife in the deputies' presence, and his subsequent threat to kill her was relayed to the wife. Brandon v. Brandon, 132 N.C. App. 646, 513 S.E.2d 589 (1999).

Fear of Continued Harassment Supported Protective Order for Domestic Violence. — Protective order against a husband for acts of domestic violence was supported by the evidence as, inter alia, the husband yelled at the wife "Would you like to hurt me? Would you like to kill and hit me? Would that make you feel better?," the husband banged a stapler on a counter, threw a water bottle in the wife's direction, and refused to leave their jointly-owned business during the late night hours, and the wife was afraid of the husband and thought he was "out of control." Wornstaff v. Wornstaff, 179 N.C. App. 516, 634 S.E.2d 567, 2006 N.C. App. LEXIS 1975 (2006).

Declaratory Relief. — Appellate court erred in reversing a trial court's denial of a husband's request for a declaratory judgment on the constitutionality of G.S. 50B-1 et seq., because G.S. 1-257 permitted a trial court, in the exercise of its discretion, to decline a request for declaratory relief when (1) the requested declaration would serve no useful purpose in clarifying or settling the legal relations at issue, or (2) the requested declaration would not terminate or afford relief from the uncertainty, insecurity, or controversy giving rise to the proceeding; in the instant case the trial court had dismissed a wife's motion for a domestic violence protective order against the husband, and because the husband was not subject to the provisions of the DVA at the time the trial court addressed his counterclaim and because he made no showing that he was threatened with further litigation under the DVA, a declaration as to the constitutionality of the DVA could not have altered the husband's legal position. Augur v. Augur, 356 N.C. 582, 573 S.E.2d 125, 2002 N.C. LEXIS 1262 (2002).

Collateral estoppel effect of findings in domestic violence protective order entered under G.S. 50B-1(a), finding that the mother was responsible for the incident, collaterally estopped the finding in the custody case that the father was responsible for the incident; when the protective order was not appealed the collateral legal consequences of that order became final, precluding reconsideration of the order in the custody action under G.S. 50-13.2. Doyle v. Doyle, 176 N.C. App. 547, 626 S.E.2d 845, 2006 N.C. App. LEXIS 517 (2006).

Domestic violence protective order entered pursuant to G.S. 50B-3 was erroneous because there was no competent evidence that the father against whom the order was entered had placed a member of the mother's family in fear of (1) imminent serious bodily injury or (2) continued harassment that rose to such a level as to inflict substantial emotional distress; the fact that there was an investigation by the Department of Social Service was not relevant where there was no evidence presented regarding what any alleged investigation revealed. The trial court admitted a statement made to the mother by her son for the limited purpose of explaining why the mother left the home, and, thus, the statement was not admitted to prove that the father committed the act at issue, and was not competent to support a finding of domestic violence by the father. Burress v. Burress, — N.C. App. —, 672 S.E.2d 732, 2009 N.C. App. LEXIS 148 (2009).

Cited in State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

§ 50B-2. Institution of civil action; motion for emergency relief; temporary orders; temporary custody.

(a) Any person residing in this State may seek relief under this Chapter by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person. Any aggrieved party entitled to relief under this Chapter may file a civil action and proceed pro se, without the assistance of legal counsel. The district court division of the General Court of Justice shall have original jurisdiction over actions instituted under this Chapter. Any action for a domestic violence protective order requires that a summons be issued and served. The summons issued pursuant to this Chapter shall require the defendant to answer within 10 days of the date of service. Attachments to the summons shall include the complaint, notice of hearing, any temporary or ex parte order that has been issued, and other papers through the appropriate law enforcement agency where the defendant is to be served. No court costs shall be assessed for the filing, issuance, registration, or service of a protective order or petition for a protective order or witness subpoena in compliance with the Violence Against Women Act, 42 U.S.C. § 3796gg-5.

(b) Emergency Relief. — A party may move the court for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself or a minor child. A hearing on a motion for emergency relief, where no ex parte order is entered, shall be held after five days' notice of the hearing to the other party or after five days from the date of service of process on the other party, whichever occurs first, provided, however, that no hearing shall be required if the service of process is not completed on the other party. If the party is proceeding pro se and does not request an ex parte hearing, the clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection, and shall effect service of the summons, complaint, notice, and other papers through the appropriate law enforcement agency where the defendant is to be served.

(c) Ex Parte Orders. — Prior to the hearing, if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the court may enter orders as it deems necessary to protect the aggrieved party or minor children from those acts provided, however, that a temporary order for custody ex parte and prior to service of process and notice shall not be entered unless the court finds that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse. If the court finds that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse, upon request of the aggrieved party, the court shall consider and may order the other party to stay away from a minor child, or to return a minor child to, or not remove a minor child from, the physical care of a parent or person in loco parentis, if the court finds that the order is in the best interest of the minor child and is necessary for the safety of the minor child. If the court determines that it is in the best interest of the minor child for the other party to have contact with the minor child or children, the court shall issue an order designed to protect the safety and well-being of the minor child and the aggrieved party. The order shall specify the terms of contact between the other party and the minor child and may include a specific schedule of time and location of exchange of the minor child, supervision by a third party or supervised visitation center, and any other conditions that will ensure both the well-being of the minor child and the aggrieved party. Upon the issuance of an ex parte order under this subsection, a hearing shall be held within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later. If an aggrieved party acting pro se requests ex parte relief, the clerk of superior court shall schedule an ex parte hearing with the district court division of the General Court of Justice within 72 hours of the filing for said relief, or by the end of the next day on which the district court is in session in the county in which the action was filed, whichever shall first occur. If the district court is not in session in said county, the aggrieved party may contact the clerk of superior court in any other county within the same judicial district who shall schedule an ex parte hearing with the district court division of the General Court of Justice by the end of the next day on which said court division is in session in that county. Upon the issuance of an ex parte order under this subsection, if the party is proceeding pro se, the Clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection, and shall effect service of the summons, complaint, notice, order and other papers through the appropriate law enforcement agency where the defendant is to be served.

(c1) Ex Parte Orders by Authorized Magistrate. — The chief district court judge may authorize a magistrate or magistrates to hear any motions for emergency relief ex parte. Prior to the hearing, if the magistrate determines that at the time the party is seeking emergency relief ex parte the district court is not in session and a district court judge is not and will not be available to hear the motion for a period of four or more hours, the motion may be heard by the magistrate. If it clearly appears to the magistrate from specific facts shown that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the magistrate may enter orders as it deems necessary to protect the aggrieved party or minor children from those acts, except that a temporary order for custody ex parte and prior to service of process and notice shall not be entered unless the magistrate finds that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse. If the magistrate finds that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse, upon request of the aggrieved party, the magistrate shall consider and may order the other party to stay away from a minor child, or to return a minor child to, or not remove a minor child from, the physical care of a parent or person in loco parentis, if the magistrate finds that the order is in the best interest of the minor child and is necessary for the safety of the minor child. If the magistrate determines that it is in the best interest of the minor child for the other party to have contact with the minor child or children, the magistrate shall issue an order designed to protect the safety and well-being of the minor child and the aggrieved party. The order shall specify the terms of contact between the other party and the minor child and may include a specific schedule of time and location of exchange of the minor child, supervision by a third party or supervised visitation center, and any other conditions that will ensure both the well-being of the minor child and the aggrieved party. An ex parte order entered under this subsection shall expire and the magistrate shall schedule an ex parte hearing before a district court judge by the end of the next day on which the district court is in session in the county in which the action was filed. Ex parte orders entered by the district court judge pursuant to this subsection shall be entered and scheduled in accordance with subsection (c) of this section.

(c2) The authority granted to authorized magistrates to award temporary child custody pursuant to subsection (c1) of this section and pursuant to G.S. 50B-3(a)(4) is granted subject to custody rules to be established by the supervising chief district judge of each judicial district.

(d) Pro Se Forms. — The clerk of superior court of each county shall provide to pro se complainants all forms that are necessary or appropriate to enable them to proceed pro se pursuant to this section. The clerk shall, whenever feasible, provide a private area for complainants to fill out forms and make inquiries. The clerk shall provide a supply of pro se forms to authorized magistrates who shall make the forms available to complainants seeking relief under subsection (c1) of this section. (1979, c. 561, s. 1; 1985, c. 113, ss. 2, 3; 1987 (Reg. Sess., 1988), c. 893, s. 2; 1989, c. 461, s. 1; 1994, Ex. Sess., c. 4, s. 1; 1997-471, s. 2; 2001-518, s. 4; 2002-126, s. 29A.6(a); 2004-186, ss. 17.2, 19.1; 2009-342, s. 2.)

Effect of Amendments. — Session Laws 2009-342, s. 2, effective for actions or motions filed on or after December 1, 2009, added the fourth through sixth sentences in subsection (a).

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For 1997 legislative survey, see 20 Campbell L. Rev. 459 (1998).

CASE NOTES

The dismissal of a temporary ex parte domestic violence protective order was interlocutory, did not affect a substantial right, and therefore was not immediately appealable. Hayes v. Hayes, 139 N.C. App. 831, 534 S.E.2d 639, 2000 N.C. App. LEXIS 1034 (2000).

Judicial Immunity Granted. — Whether or not a magistrate's alleged comments made in connection with plaintiff's arrest regarding a domestic violence matter were appropriate, they were made in connection with judicial acts within the magistrate's jurisdiction; he was, therefore, entitled to immunity, and his motion to dismiss plaintiff's 42 U.S.C.S. § 1983 claim was granted. Cole v. Summey, 329 F. Supp. 2d 591, 2004 U.S. Dist. LEXIS 15840 (M.D.N.C. 2004).

Motion in the cause in wife's G.S. ch. 50 action alleging acts of domestic violence allowed the wife to avail herself of the protections found in G.S. ch. 50B; thus, the temporary restraining order granted in the G.S. ch. 50 action was issued pursuant to G.S. ch. 50B. State v. Byrd, 185 N.C. App. 597, 649 S.E.2d 444, 2007 N.C. App. LEXIS 1953 (2007).

Applied in Smart v. Smart, 59 N.C. App. 533, 297 S.E.2d 135 (1982).

Cited in Braswell v. Braswell, 98 N.C. App. 231, 390 S.E.2d 752 (1990); Anderson v. Anderson, 101 N.C. App. 682, 400 S.E.2d 764 (1991); Brandon v. Brandon, 132 N.C. App. 646, 513 S.E.2d 589 (1999); State v. Byrd, 363 N.C. 214, 675 S.E.2d 323, 2009 N.C. LEXIS 347 (2009).

§ 50B-3. Relief.

(a) If the court, including magistrates as authorized under G.S. 50B-2(c1), finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence. A protective order may include any of the following types of relief:

(1) Direct a party to refrain from such acts.
(2) Grant to a party possession of the residence or household of the parties and exclude the other party from the residence or household.
(3) Require a party to provide a spouse and his or her children suitable alternate housing.
(4) Award temporary custody of minor children and establish temporary visitation rights pursuant to G.S. 50B-2 if the order is granted ex parte, and pursuant to subsection (a1) of this section if the order is granted after notice or service of process.
(5) Order the eviction of a party from the residence or household and assistance to the victim in returning to it.
(6) Order either party to make payments for the support of a minor child as required by law.
(7) Order either party to make payments for the support of a spouse as required by law.
(8) Provide for possession of personal property of the parties, including the care, custody, and control of any animal owned, possessed, kept, or held as a pet by either party or minor child residing in the household.
(9) Order a party to refrain from doing any or all of the following:
    a. Threatening, abusing, or following the other party.
    b. Harassing the other party, including by telephone, visiting the home or workplace, or other means.
    b1. Cruelly treating or abusing an animal owned, possessed, kept, or held as a pet by either party or minor child residing in the household.
    c. Otherwise interfering with the other party.
(10) Award attorney's fees to either party.
(11) Prohibit a party from purchasing a firearm for a time fixed in the order.
(12) Order any party the court finds is responsible for acts of domestic violence to attend and complete an abuser treatment program if the program is approved by the Domestic Violence Commission.
(13) Include any additional prohibitions or requirements the court deems necessary to protect any party or any minor child.

(a1) Upon the request of either party at a hearing after notice or service of process, the court shall consider and may award temporary custody of minor children and establish temporary visitation rights as follows:

(1) In awarding custody or visitation rights, the court shall base its decision on the best interest of the minor child with particular consideration given to the safety of the minor child.
(2) For purposes of determining custody and visitation issues, the court shall consider:
    a. Whether the minor child was exposed to a substantial risk of physical or emotional injury or sexual abuse.
    b. Whether the minor child was present during acts of domestic violence.
    c. Whether a weapon was used or threatened to be used during any act of domestic violence.
    d. Whether a party caused or attempted to cause serious bodily injury to the aggrieved party or the minor child.
    e. Whether a party placed the aggrieved party or the minor child in reasonable fear of imminent serious bodily injury.
    f. Whether a party caused an aggrieved party to engage involuntarily in sexual relations by force, threat, or duress.

g. Whether there is a pattern of abuse against an aggrieved party or the minor child.
h. Whether a party has abused or endangered the minor child during visitation.
i. Whether a party has used visitation as an opportunity to abuse or harass the aggrieved party.
j. Whether a party has improperly concealed or detained the minor child.
k. Whether a party has otherwise acted in a manner that is not in the best interest of the minor child.

(3) If the court awards custody, the court shall also consider whether visitation is in the best interest of the minor child. If ordering visitation, the court shall provide for the safety and well-being of the minor child and the safety of the aggrieved party. The court may consider any of the following:
a. Ordering an exchange of the minor child to occur in a protected setting or in the presence of an appropriate third party.
b. Ordering visitation supervised by an appropriate third party, or at a supervised visitation center or other approved agency.
c. Ordering the noncustodial parent to attend and complete, to the satisfaction of the court, an abuser treatment program as a condition of visitation.
d. Ordering either or both parents to abstain from possession or consumption of alcohol or controlled substances during the visitation or for 24 hours preceding an exchange of the minor child.
e. Ordering the noncustodial parent to pay the costs of supervised visitation.
f. Prohibiting overnight visitation.
g. Requiring a bond from the noncustodial parent for the return and safety of the minor child.
h. Ordering an investigation or appointment of a guardian ad litem or attorney for the minor child.
i. Imposing any other condition that is deemed necessary to provide for the safety and well-being of the minor child and the safety of the aggrieved party.

If the court grants visitation, the order shall specify dates and times for the visitation to take place or other specific parameters or conditions that are appropriate. A person, supervised visitation center, or other agency may be approved to supervise visitation after appearing in court or filing an affidavit accepting that responsibility and acknowledging accountability to the court.

(4) A temporary custody order entered pursuant to this Chapter shall be without prejudice and shall be for a fixed period of time not to exceed one year. Nothing in this section shall be construed to affect the right of the parties to a de novo hearing under Chapter 50 of the General Statutes. Any subsequent custody order entered under Chapter 50 of the General Statutes supersedes a temporary order issued pursuant to this Chapter.

(b) Protective orders entered pursuant to this Chapter shall be for a fixed period of time not to exceed one year. The court may renew a protective order for a fixed period of time not to exceed two years, including an order that previously has been renewed, upon a motion by the aggrieved party filed before the expiration of the current order; provided, however, that a temporary award of custody entered as part of a protective order may not be renewed to extend a temporary award of custody beyond the maximum one-year period. The court may renew a protective order for good cause. The commission of an act as defined in G.S. 50B-1(a) by the defendant after entry of the current order is not required for an order to be renewed. Protective orders entered, including consent orders, shall not be mutual in nature except where both parties file a claim and the court makes detailed findings of fact indicating that both parties acted as aggressors, that neither party acted primarily in self-defense, and that the right of each party to due process is preserved.

(c) A copy of any order entered and filed under this Article shall be issued to each party. In addition, a copy of the order shall be issued promptly to and retained by the police department of the city of the victim's residence. If the victim does not reside in a city or resides in a city with no police department, copies shall be issued promptly to and retained by the sheriff, and the county police department, if any, of the county in which the victim resides. If the defendant is ordered to stay away from the child's school, a copy of the order shall be delivered promptly by the sheriff to the principal or, in the principal's absence, the assistant principal or the principal's designee of each school named in the order.

(c1) When a protective order issued under this Chapter is filed with the Clerk of Superior Court, the clerk shall provide to the applicant an informational sheet developed by the Administrative Office of the Courts that includes:

(1) Domestic violence agencies and services.
(2) Sexual assault agencies and services.
(3) Victims' compensation services.
(4) Legal aid services.
(5) Address confidentiality services.
(6) An explanation of the plaintiff's right to apply for a permit under G.S. 14-415.15.

(d) The sheriff of the county where a domestic violence order is entered shall provide for prompt entry of the order into the National Crime Information Center registry and shall provide for access of such orders to magistrates on a 24-hour-a-day basis. Modifications, terminations, renewals, and dismissals of the order shall also be promptly entered. (1979, c. 561, s. 1; 1985, c. 463; 1994, Ex. Sess., c. 4, s. 2; 1995, c. 527, s. 1; 1995 (Reg. Sess., 1996), c. 591, s. 2; c. 742, s. 42.1.; 1999-23, s. 1; 2000-125, s. 9; 2002-105, s. 2; 2002-126, s. 29A.6(b); 2003-107, s. 2; 2004-186, ss. 17.3-17.5; 2005-343, s. 2; 2005-423, s. 1; 2007-116, s. 3; 2009-425, s. 1.)

Editor's Note. — Session Laws 1999-23, s. 8, provides that the amendments made by ss. 1 and 2 of that act become effective February 1, 2000, only if funds are received by federal grant to implement those sections. The State Revisor of Statutes was informed that funds were received.

This section, as amended by Session Laws 2004-186, ss. 17.3 through 17.5, effective October 1, 2004, is applicable to actions filed on or after that date.

Subsection (c1), added by Session Laws 2005-343, s. 2, effective October 1, 2005, is applicable to protective orders issued on or after that date.

Session Laws 2005-343, s. 3, provides: "The Administrative Office of the Courts shall develop a standard informational sheet for plaintiffs issued protective orders under Chapter 50B of the General Statutes that explains the plaintiffs' right to apply for a permit under G.S. 14-415.15."

This section, as amended by Session Laws 2005-423, s. 1, effective October 1, 2005, is applicable to orders entered on or after that date.

Session Laws 2008-4, s. 2 provides: "The North Carolina Domestic Violence Commission, in consultation with the North Carolina Coalition Against Domestic Violence, the North Carolina Attorney General's Office, and the Governor's Crime Commission, shall study the adoption of a statewide automated victim notification system for persons who have received a protective order under Chapter 50B of the General Statutes. As part of its study of this issue, the Domestic Violence Commission shall review:

"(1) Automated notification systems used in other state jurisdictions to notify protective order holders of critical dates, e.g., the date the respondent, if incarcerated, will be released from custody.

"(2) Data, if any, on the effectiveness of other state systems.

"(3) The current statewide system which provides automated notice to crime victims

(SAVAN), to determine if it could be enhanced to include the proposed system.

"(4) Sources of grant funding that are available to implement the system.

"(5) Methods utilized for registering into the system, and whether the information should be accessible to the general public, in addition to the person or persons protected by the order.

"(6) Methods to ensure that information relating to the respondent of an order is uploaded in a timely manner and to confirm that notification has been sent to registrants.

"The North Carolina Domestic Violence Commission shall report with the results of its study, and any recommendations, to the Joint Legislative Committee on Domestic Violence and the General Assembly on or before January 1, 2009."

Session Laws 2009-342, s. 6, provides: "The Joint Legislative Committee on Domestic Violence supports the adoption of an automated statewide domestic violence protective order notification system. In order to determine the financial and operational impact of developing the system, the Administrative Office of the Courts, in consultation with the Governor's Crime Commission and the North Carolina Attorney General's Office, shall (i) identify information in available databases relating to civil domestic violence protective orders, criminal no-contact order conditions, and postarrest conditions of release and (ii) determine the financial impact, including personnel costs, for implementing a domestic violence protective order notification system which interfaces with the North Carolina Statewide Automated Victim Assistance Notification System. The Administrative Office of the Courts and the Governor's Crime Commission shall jointly report the findings to the Joint Legislative Committee on Domestic Violence and the Fiscal Research Division by February 1, 2010."

Session Laws 2009-342, s. 7, provides: "The North Carolina Domestic Violence Commission, in consultation with the North Carolina Coalition Against Domestic Violence and the North Carolina Coalition Against Sexual Assault, shall study the issue of State oversight and coordination of services to victims of sexual violence and whether sexual violence should be included as a focus area of the Commission. The study shall include, but is not limited to, a review of the organization and membership of entities in other states that provide (i) information and recommendations to state legislatures on domestic and sexual violence and (ii) information and services to the public regarding these issues. The Commission shall report its findings and recommendations to the Joint Legislative Committee on Domestic Violence by February 1, 2010."

Effect of Amendments. — Session Laws 2009-425, s. 1, effective August 5, 2009, in subdivision (a)(8), added the language following "property of the parties"; and added subdivision (a)(9)b1.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For legislative survey on family and juvenile law, see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

Domestic Violence Protective Order Improperly Issued. — The court's findings of fact did not support its conclusion of law that an act of domestic violence had occurred, where the court found that the husband had threatened the wife with immediate serious bodily injury, but no acts of domestic violence had been shown of which the court could bring about a cessation. Brandon v. Brandon, 132 N.C. App. 646, 513 S.E.2d 589 (1999).

Evidence indicating that the former wife entered the former husband's trailer and spilled pasta and spices on the floor did not support the conclusion that domestic violence occurred to support issuance of a domestic violence protective order. Price v. Price, 133 N.C. App. 440, 514 S.E.2d 553 (1999).

Domestic violence protective order was not appropriate when daughter said that her father's touching made her feel creepy, but failed to demonstrate that she was in fear of bodily injury. Smith v. Smith, 145 N.C. App. 434, 549 S.E.2d 912, 2001 N.C. App. LEXIS 666 (2001).

Domestic violence protective order entered pursuant to G.S. 50B-3 was erroneous because there was no competent evidence that the father against whom the order was entered had placed a member of the mother's family in fear of (1) imminent serious bodily injury or (2) continued harassment that rose to such a level as to inflict substantial emotional distress; the fact that there was an investigation by the Department of Social Service was not relevant where there was no evidence presented regarding what any alleged investigation revealed. The trial court admitted a statement made to the mother by her son for the limited purpose of explaining why the mother left the home, and, thus, the statement was not admitted to prove that the father committed the act at issue, and was not competent to support a finding of domestic violence by the father. Burress v. Burress, — N.C. App. —, 672 S.E.2d 732, 2009 N.C. App. LEXIS 148 (2009).

Mootness. — Father's appeal of domestic violence protective order was not moot even though the order had expired as the father still might face legal consequences from the order.

Smith v. Smith, 145 N.C. App. 434, 549 S.E.2d 912, 2001 N.C. App. LEXIS 666 (2001).

Consent Decree Vacated. — Trial court's authority to enter a protective order or approve a consent agreement is dependent upon finding that an act of domestic violence occurred and that the order furthers the purpose of ceasing acts of domestic violence; since a trial court's order approving a consent agreement provided that the domestic violence claims were dismissed, the trial court did not have authority to enter the consent decree, and the consent decree was vacated. Bryant v. Williams, 161 N.C. App. 444, 588 S.E.2d 506, 2003 N.C. App. LEXIS 2195 (2003).

Collateral Estoppel Effect of Findings in Protective Order. — Where a trial judge found in domestic violence protective order proceedings that the mother was responsible for the altercation and where a different trial judge made the opposite finding in later custody proceedings, G.S. 50B-3(a1)(4) did not preclude an award of primary physical custody to the mother, but G.S. 50B-3(a1)(4) did not mandate a de novo consideration of which party committed domestic violence, as this would have undermined the mandate of G.S. 50B-3(a) requiring a trial court to issue a domestic violence protective order if it found that domestic violence occurred. Doyle v. Doyle, 176 N.C. App. 547, 626 S.E.2d 845, 2006 N.C. App. LEXIS 517 (2006).

Cited in Braswell v. Braswell, 98 N.C. App. 231, 390 S.E.2d 752; Story v. Story, 57 N.C. App. 509, 291 S.E.2d 923 (1982); Benfield v. Pilot Life Ins. Co., 82 N.C. App. 293, 346 S.E.2d 283 (1986), modified on other grounds, 330 N.C. 363, 410 S.E.2d 897 (1991); Brandon v. Brandon, 132 N.C. App. 646, 513 S.E.2d 589 (1999); State v. Byrd, 363 N.C. 214, 675 S.E.2d 323, 2009 N.C. LEXIS 347 (2009).

§ 50B-3.1. Surrender and disposal of firearms; violations; exemptions.

(a) Required Surrender of Firearms. — Upon issuance of an emergency or ex parte order pursuant to this Chapter, the court shall order the defendant to surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant if the court finds any of the following factors:

(1) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons.

(2) Threats to seriously injure or kill the aggrieved party or minor child by the defendant.

(3) Threats to commit suicide by the defendant.

(4) Serious injuries inflicted upon the aggrieved party or minor child by the defendant.

(b) Ex Parte or Emergency Hearing. — The court shall inquire of the plaintiff, at the ex parte or emergency hearing, the presence of, ownership of, or otherwise access to firearms by the defendant, as well as ammunition, permits to purchase firearms, and permits to carry concealed firearms, and include, whenever possible, identifying information regarding the description, number, and location of firearms, ammunition, and permits in the order.

(c) Ten-Day Hearing. — The court, at the 10-day hearing, shall inquire of the defendant the presence of, ownership of, or otherwise access to firearms by the defendant, as well as ammunition, permits to purchase firearms, and permits to carry concealed firearms, and include, whenever possible, identifying information regarding the description, number, and location of firearms, ammunition, and permits in the order.

(d) Surrender. — Upon service of the order, the defendant shall immediately surrender to the sheriff possession of all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant. In the event that weapons cannot be surrendered at the time the order is served, the defendant shall surrender the firearms, ammunitions, and permits to the sheriff within 24 hours of service at a time and place specified by the sheriff.

The sheriff shall store the firearms or contract with a licensed firearms dealer to provide storage.

(1) If the court orders the defendant to surrender firearms, ammunition, and permits, the court shall inform the plaintiff and the defendant of the terms of the protective order and include these terms on the face of the order, including that the defendant is prohibited from owning, possessing, purchasing, or receiving or attempting to own, possess, purchase, or receive a firearm for so long as the protective order or any successive protective order is in effect. The terms of the order shall include instructions as to how the defendant may request retrieval of any firearms, ammunition, and permits surrendered to the sheriff when the protective order is no longer in effect. The terms shall also include notice of the penalty for violation of G.S. 14-269.8.

(2) The sheriff may charge the defendant a reasonable fee for the storage of any firearms and ammunition taken pursuant to a protective order. The fees are payable to the sheriff. The sheriff shall transmit the proceeds of these fees to the county finance officer. The fees shall be used by the sheriff to pay the costs of administering this section and for other law enforcement purposes. The county shall expend the restricted funds for these purposes only. The sheriff shall not release firearms, ammunition, or permits without a court order granting the release. The defendant must remit all fees owed prior to the authorized return of any firearms, ammunition, or permits. The sheriff shall not incur any civil or criminal liability for alleged damage or deterioration due to storage or transportation of any firearms or ammunition held pursuant to this section.

(e) Retrieval. — If the court does not enter a protective order when the ex parte or emergency order expires, the defendant may retrieve any weapons surrendered to the sheriff unless the court finds that the defendant is precluded from owning or possessing a firearm pursuant to State or federal law or final disposition of any pending criminal charges committed against the person that is the subject of the current protective order.

(f) Motion for Return. — The defendant may request the return of any firearms, ammunition, or permits surrendered by filing a motion with the court at the expiration of the current order or final disposition of any pending criminal charges committed against the person that is the subject of the current protective order and not later than 90 days after the expiration of the current order or final disposition of any pending criminal charges committed against the person that is the subject of the current protective order. Upon receipt of the motion, the court shall schedule a hearing and provide written notice to the plaintiff who shall have the right to appear and be heard and to the sheriff who has control of the firearms, ammunition, or permits. The court shall determine whether the defendant is subject to any State or federal law or court order that precludes the defendant from owning or possessing a firearm. The inquiry shall include:

(1) Whether the protective order has been renewed.

(2) Whether the defendant is subject to any other protective orders.

(3) Whether the defendant is disqualified from owning or possessing a firearm pursuant to 18 U.S.C. § 922 or any State law.

(4) Whether the defendant has any pending criminal charges, in either State or federal court, committed against the person that is the subject of the current protective order.

The court shall deny the return of firearms, ammunition, or permits if the court finds that the defendant is precluded from owning or possessing a firearm pursuant to State or federal law or if the defendant has any pending criminal charges, in either State or federal court, committed against the person that is the subject of the current protective order until the final disposition of those charges.

(g) Motion for Return by Third-Party Owner. — A third-party owner of firearms, ammunition, or permits who is otherwise eligible to possess such items may file a motion requesting the return to said third party of any such items in the possession of the sheriff seized as a result of the entry of a domestic violence protective order. The motion must be filed not later than 30 days after the seizure of the items by the sheriff. Upon receipt of the third party's motion, the court shall schedule a hearing and provide written notice to all parties and the sheriff. The court shall order return of the items to the third party unless the court determines that the third party is disqualified from owning or possessing said items pursuant to State or federal law. If the court denies the return of said items to the third party, the items shall be disposed of by the sheriff as provided in subsection (h) of this section.

(h) Disposal of Firearms. — If the defendant does not file a motion requesting the return of any firearms, ammunition,. or permits surrendered within the time period prescribed by this section, if the court determines that the defendant is precluded from regaining possession of any firearms, ammunition, or permits surrendered, or if the defendant or third-party owner fails to remit all fees owed for the storage of the firearms or ammunition within 30 days of the entry of the order granting the return of the firearms, ammunition, or permits, the sheriff who has control of the firearms, ammunition, or permits shall give notice to the defendant, and the sheriff shall apply to the court for an order of disposition of the firearms, ammunition, or permits. The judge, after a hearing, may order the disposition of the firearms, ammunition, or permits in one or more of the ways authorized by law, including subdivision (4), (4b), (5), or (6) of G.S. 14-269.1. If a sale by the sheriff does occur, any proceeds from the sale after deducting any costs associated with the sale, and in accordance with all applicable State and federal law, shall be provided to the defendant, if requested by the defendant by motion made before the hearing or at the hearing and if ordered by the judge.

(i) It is unlawful for any person subject to a protective order prohibiting the possession or purchase of firearms to:

(1) Fail to surrender all firearms, ammunition, permits to purchase firearms, and permits to carry concealed firearms to the sheriff as ordered by the court;

(2) Fail to disclose all information pertaining to the possession of firearms, ammunition, and permits to purchase and permits to carry concealed firearms as requested by the court; or

(3) Provide false information to the court pertaining to any of these items.

(j) Violations. — In accordance with G.S. 14-269.8, it is unlawful for any person to own, possess, purchase, or receive or attempt to own, possess, purchase, or receive a firearm, as defined in G.S. 14-409.39(2), machine gun, ammunition, or permits to purchase or carry concealed firearms if ordered by the court for so long as that protective order or any successive protective order entered against that person pursuant to this Chapter is in effect. Any defendant violating the provisions of this section shall be guilty of a Class H felony.

(k) Official Use Exemption. — This section shall not prohibit law enforcement officers and members of any branch of the United States armed forces, not otherwise prohibited under federal law, from possessing or using firearms for official use only.

(*l*) Nothing in this section is intended to limit the discretion of the court in granting additional relief as provided in other sections of this Chapter. (2003-410, s. 1; 2004-203, s. 34(a); 2005-287, s. 4; 2005-423, ss. 2, 3.)

Cross References. — As to prohibition of purchase or possession of firearms by person subject to domestic violence order, see G.S. 14-269.8.

Editor's Note. — Subsection (h), as amended by Session Laws 2004-203, s. 34(a), effective December 1, 2004, is applicable to offenses committed on or after that date.

§ 50B-4. Enforcement of orders.

(a) A party may file a motion for contempt for violation of any order entered pursuant to this Chapter. This party may file and proceed with that motion pro se, using forms provided by the clerk of superior court or a magistrate authorized under G.S. 50B-2(c1). Upon the filing pro se of a motion for contempt under this subsection, the clerk, or the authorized magistrate, if the facts show clearly that there is danger of acts of domestic violence against the aggrieved party or a minor child and the motion is made at a time when the clerk is not available, shall schedule and issue notice of a show cause hearing with the district court division of the General Court of Justice at the earliest possible date pursuant to G.S. 5A-23. The Clerk, or the magistrate in the case of notice issued by the magistrate pursuant to this subsection, shall effect service of the motion, notice, and other papers through the appropriate law enforcement agency where the defendant is to be served.

(b) Repealed by Session Laws 1999-23, s. 2, effective February 1, 2000.

(c) A valid protective order entered pursuant to this Chapter shall be enforced by all North Carolina law enforcement agencies without further order of the court.

(d) A valid protective order entered by the courts of another state or the courts of an Indian tribe shall be accorded full faith and credit by the courts of North Carolina whether or not the order has been registered and shall be enforced by the courts and the law enforcement agencies of North Carolina as if it were an order issued by a North Carolina court. In determining the validity of an out-of-state order for purposes of enforcement, a law enforcement officer may rely upon a copy of the protective order issued by another state or the courts of an Indian tribe that is provided to the officer and on the statement of a person protected by the order that the order remains in effect. Even though registration is not required, a copy of a protective order may be registered in North Carolina by filing with the clerk of superior court in any county a copy of the order and an affidavit by a person protected by the order that to the best of that person's knowledge the order is presently in effect as written. Notice of the registration shall not be given to the defendant. Upon registration of the order, the clerk shall promptly forward a copy to the sheriff of that county. Unless the issuing state has already entered the order, the sheriff shall provide for prompt entry of the order into the National Crime Information Center registry pursuant to G.S. 50B-3(d).

(e) Upon application or motion by a party to the court, the court shall determine whether an out-of-state order remains in full force and effect.

(f) The term "valid protective order," as used in subsections (c) and (d) of this section, shall include an emergency or ex parte order entered under this Chapter. (1979, c. 561, s. 1; 1985, c. 113, s. 4; 1987, c. 739, s. 6; 1989, c. 461, s. 2; 1994, Ex. Sess., c. 4, s. 3; 1995 (Reg. Sess., 1996), c. 591, s. 3; 1999-23, s. 2; 2002-126, s. 29A.6(c); 2003-107, s. 3; 2009-342, s. 4.)

Editor's Note. — Session Laws, 1999-23, s. 8, provides that the amendments made by ss. 1 and 2 of that act become effective February 1, 2000, only if funds are received by federal grant to implement those sections. The State Revisor of Statutes was informed that funds were received.

Effect of Amendments. — Session Laws 2009-342, s. 4, effective July 24, 2009, added subsection (f).

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Civil Liability for Failing to Enforce Protective Order. — If, as plaintiff alleged, police officers promised to protect her by arresting her husband for violating a protective order but failed to do so, and her reliance on the promise was causally related to her injury by her husband, the officers owed her a "special duty" and therefore were not shielded from liability for negligence under the public duty doctrine. Cockerham-Ellerbee v. Town of Jonesville, 176 N.C. App. 372, 626 S.E.2d 685, 2006 N.C. App. LEXIS 533 (2006). See Editor's note under G.S. 50B-4.1, quoting Session Laws 2009-389, s. 1, as to the holding in this case.

Cited in Braswell v. Braswell, 98 N.C. App. 231, 390 S.E.2d 752 (1990).

§ 50B-4.1. Violation of valid protective order.

(a) Except as otherwise provided by law, a person who knowingly violates a valid protective order entered pursuant to this Chapter or who knowingly violates a valid protective order entered by the courts of another state or the courts of an Indian tribe shall be guilty of a Class A1 misdemeanor.

(b) A law enforcement officer shall arrest and take a person into custody, with or without a warrant or other process, if the officer has probable cause to believe that the person knowingly has violated a valid protective order excluding the person from the residence or household occupied by a victim of domestic violence or directing the person to refrain from doing any or all of the acts specified in G.S. 50B-3(a)(9).

(c) When a law enforcement officer makes an arrest under this section without a warrant, and the party arrested contests that the out-of-state order or the order issued by an Indian court remains in full force and effect, the party arrested shall be promptly provided with a copy of the information applicable to the party which appears on the National Crime Information Center registry by the sheriff of the county in which the arrest occurs.

(d) Unless covered under some other provision of law providing greater punishment, a person who commits a felony at a time when the person knows the behavior is prohibited by a valid protective order as provided in subsection (a) of this section shall be guilty of a felony one class higher than the principal felony described in the charging document. This subsection shall not apply to a person who is charged with or convicted of a Class A or B1 felony or to a person charged under subsection (f) or subsection (g) of this section.

(e) An indictment or information that charges a person with committing felonious conduct as described in subsection (d) of this section shall also allege that the person knowingly violated a valid protective order as described in subsection (a) of this section in the course of the conduct constituting the underlying felony. In order for a person to be punished as described in subsection (d) of this section, a finding shall be made that the person knowingly violated the protective order in the course of conduct constituting the underlying felony.

(f) Unless covered under some other provision of law providing greater punishment, any person who knowingly violates a valid protective order as provided in subsection (a) of this section, after having been previously convicted of two offenses under this Chapter, shall be guilty of a Class H felony.

(g) Unless covered under some other provision of law providing greater punishment, any person who, while in possession of a deadly weapon on or about his or her person or within close proximity to his or her person, knowingly violates a valid protective order as provided in subsection (a) of this section by failing to stay away from a place, or a person, as so directed under the terms of the order, shall be guilty of a Class H felony.

(h) For the purposes of this section, the term "valid protective order" shall include an emergency or ex parte order entered under this Chapter. (1997-471, s. 3; 1997-456, s. 27; 1999-23, s. 4; 2001-518, s. 5; 2007-190, s. 1; 2008-93, s. 1; 2009-342, s. 5; 2009-389, s. 2.)

Editor's Note. — Session Laws 2005-295, s. 1, effective August 22, 2005, provides: "The North Carolina Sentencing and Policy Advisory Commission, pursuant to its statutory responsibilities under Article 4 of Chapter 164 of the General Statutes, shall study aggravating factors which may be considered in capital felony sentencing pursuant to G.S. 15A-2000(e). In particular, the Commission shall examine the question of whether the State's capital sentencing law should include as an aggravating factor that the capital felony was committed at a time when the defendant knew the behavior was prohibited by a valid protective order entered pursuant to Chapter 50B of the General Statutes of North Carolina, or by a valid protective order entered by the courts of another state or the courts of an Indian tribe. The Commission shall report its findings and recommendations to the 2005 General Assembly not later than May 1, 2006. The report shall describe the Commission's deliberations and shall include any policy recommendations and proposed legislation."

Subsections (d) and (g), as amended and added by Session Laws 2007-190, s. 1, effective December 1, 2007, are applicable to offenses committed on or after that date.

Session Laws 2008-93, s. 2, provides: "This act becomes effective December 1, 2008, and applies to offenses committed on or after that date, but offenses committed before that date count in determining the total prior offenses."

Session Laws 2009-389, s. 1, provides: "Notwithstanding the holding by the North Carolina Court of Appeals in Cockerham-Ellerbee v. The Town of Jonesville, 176 N.C. App. 372, 626 S.E.2d 685 (2006), G.S. 50B-4.1(b) creates a mandatory provision requiring a law enforcement officer to arrest and take a person into custody without a warrant or other process if the requirements set forth in the subsection are met."

Effect of Amendments. — Session Laws 2008-93, s. 1, effective December 1, 2008, substituted "two offenses" for "three offenses" in subsection (f). See Editor's note for applicability.

Session Laws 2009-342, s. 5, effective July 24, 2009, added subsection (h).

Session Laws 2009-389, s. 2, effective July 31, 2009, substituted "custody, with or without a warrant or other process," for "custody without a warrant or other process" in subsection (b).

CASE NOTES

Civil Liability for Failing to Enforce Protective Order. — If, as plaintiff alleged, police officers promised to protect her by arresting her husband for violating a protective order but failed to do so, and her reliance on the promise was causally related to her injury by her husband, the officers owed her a "special duty" and therefore were not shielded from liability for negligence under the public duty doctrine. Cockerham-Ellerbee v. Town of Jonesville, 176 N.C. App. 372, 626 S.E.2d 685, 2006 N.C. App. LEXIS 533 (2006). See Editor's note under G.S. 50B-4.1, quoting Session Laws 2009-389, s. 1, as to the holding in this case.

Enhancement for Knowingly Violating Protective Order. — Defendant was subject to an enhanced penalty for knowingly violating a temporary restraining order (TRO) because the TRO was a protective order entered pursuant to a hearing; the "hearing" requirement in G.S. 50B-1(c) was satisfied when defendant received notice that a TRO had entered against defendant. State v. Byrd, 185 N.C. App. 597, 649 S.E.2d 444, 2007 N.C. App. LEXIS 1953 (2007).

Trial court erred in enhancing defendant's sentence under G.S. 50B-4.1(d) for his knowing violation of a valid protective order because a temporary restraining order (TRO) was not a valid domestic violence protective order under Chapter 50B but an ex parte TRO entered under N.C. R. Civ. P. 65(b), and the order was not entered upon hearing by the trial court or consent of the parties as required under G.S. 50B-1(c); only a valid protective order entered under Chapter 50B can be used to enhance a defendant's sentence under G.S. 50B-4.1(d), and Chapter 50B requires that a defendant be given notice and the opportunity to be heard before entry of a protective order. State v. Byrd, 363 N.C. 214, 675 S.E.2d 323, 2009 N.C. LEXIS 347 (2009).

By limiting applicability of the enhancement provision to violation of protective orders issued after a hearing, the General Assembly recognizes and gives deference to protection of a defendant's liberty interest through due process of law; therefore, a temporary restraining order entered under N.C. R. Civ. P. 65(b) is not the functional legal equivalent of a protective order entered pursuant to the procedure set forth in Chapter 50B. State v. Byrd, 363 N.C. 214, 675 S.E.2d 323, 2009 N.C. LEXIS 347 (2009).

Cited in State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001).

§ 50B-4.2. False statement regarding protective order a misdemeanor.

A person who knowingly makes a false statement to a law enforcement agency or officer that a protective order entered pursuant to this Chapter or by the courts of another state or Indian tribe remains in effect shall be guilty of a Class 2 misdemeanor. (1999-23, s. 5.)

§ 50B-5. Emergency assistance.

(a) A person who alleges that he or she or a minor child has been the victim of domestic violence may request the assistance of a local law enforcement agency. The local law enforcement agency shall respond to the request for assistance as soon as practicable. The local law enforcement officer responding to the request for assistance may take whatever steps are reasonably necessary to protect the complainant from harm and may advise the complainant of sources of shelter, medical care, counseling and other services. Upon request by the complainant and where feasible, the law enforcement officer may transport the complainant to appropriate facilities such as hospitals, magistrates' offices, or public or private facilities for shelter and accompany the complainant to his or her residence, within the jurisdiction in which the request for assistance was made, so that the complainant may remove food, clothing, medication and such other personal property as is reasonably necessary to enable the complainant and any minor children who are presently in the care of the complainant to remain elsewhere pending further proceedings.

(b) In providing the assistance authorized by subsection (a), no officer may be held criminally or civilly liable on account of reasonable measures taken under authority of subsection (a). (1979, c. 561, s. 1; 1985, c. 113, s. 5; 1999-23, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article, "Litigating Police Misconduct Claims in North Carolina," see 19 N.C. Cent. L.J. 113 (1991).

CASE NOTES

Subsection (b) Not a Directive. — The provision of subsection (b) absolving officers from liability if reasonable measures are taken cannot be construed as a directive to take such measures. Braswell v. Braswell, 98 N.C. App. 231, 390 S.E.2d 752, modified on other grounds, 330 N.C. 363, 410 S.E.2d 897 (1991).

§ 50B-5.5. Employment discrimination unlawful.

(a) No employer shall discharge, demote, deny a promotion, or discipline an employee because the employee took reasonable time off from work to obtain or attempt to obtain relief under this Chapter. An employee who is absent from the workplace shall follow the employer's usual time-off policy or procedure, including advance notice to the employer, when required by the employer's usual procedures, unless an emergency prevents the employee from doing so. An employer may require documentation of any emergency that prevented the employee from complying in advance with the employer's usual time-off policy or procedure, or any other information available to the employee which supports the employee's reason for being absent from the workplace.

(b) The Commissioner of Labor shall enforce the provisions of this section according to Article 21 of Chapter 95 of the General Statutes, including the rules and regulations issued pursuant to the Article. (2004-186, s. 18.1.)

§ 50B-6. Construction of Chapter.

This Chapter shall not be construed as granting a status to any person for any purpose other than those expressly stated herein. This Chapter shall not be construed as relieving any person or institution of the duty to report to the department of social services, as required by G.S. 7B-301, if the person or institution has cause to suspect that a juvenile is abused or neglected. (1979, c. 561, s. 1; 1985, c. 113, s. 6; 1998-202, s. 13(r).)

CASE NOTES

Marital Status Not Changed. — The legislature obviously did not intend for protective orders under this Chapter to change marital status. Benfield v. Pilot Life Ins. Co., 82 N.C. App. 293, 346 S.E.2d 283 (1986).

Wife who had obtained a temporary protective order under this Chapter containing findings that husband had physically assaulted wife, ordering him to vacate and not return to the family residence, and granting exclusive possession and full use of the home to wife was not legally separated at the time of her husband's death, for purposes of insurance policy providing benefits upon the death of husband unless they were legally separated. Benfield v. Pilot Life Ins. Co., 82 N.C. App. 293, 346 S.E.2d 283 (1986).

Cited in Braswell v. Braswell, 98 N.C. App. 231, 390 S.E.2d 752 (1990); Augur v. Augur, 356 N.C. 582, 573 S.E.2d 125, 2002 N.C. LEXIS 1262 (2002).

§ 50B-7. Remedies not exclusive.

The remedies provided by this Chapter are not exclusive but are additional to remedies provided under Chapter 50 and elsewhere in the General Statutes. (1979, c. 561, s. 1.)

CASE NOTES

Cited in Braswell v. Braswell, 98 N.C. App. 231, 390 S.E.2d 752 (1990).

§ 50B-8. Effect upon prosecution for violation of § 14-184 or other offense against public morals.

The granting of a protective order, prosecution for violation of this Chapter, or the granting of any other relief or the institution of any other enforcement proceedings under this Chapter shall not be construed to afford a defense to any person or persons charged with fornication and adultery under G.S. 14-184 or charged with any other offense against the public morals; and prosecution, conviction, or prosecution and conviction for violation of any provision of this Chapter shall not be a bar to prosecution for violation of G.S. 14-184 or of any other statute defining an offense or offenses against the public morals. (1979, c. 561, s. 1; 2003-107, s. 4.)

Cross References. — For similar provision applicable to domestic criminal trespass, see G.S. 14-134.3.

CASE NOTES

Cited in Braswell v. Braswell, 98 N.C. App. 231, 390 S.E.2d 752 (1990).

§ 50B-9. Domestic Violence Center Fund.

The Domestic Violence Center Fund is established within the State Treasury. The fund shall be administered by the Department of Administration, North Carolina Council for Women, and shall be used to make grants to centers for victims of domestic violence and to The North Carolina Coalition Against Domestic Violence, Inc. This fund shall be administered in accordance with the provisions of the Executive Budget Act. The Department of Administration shall make quarterly grants to each eligible domestic violence center and to The North Carolina Coalition Against Domestic Violence, Inc. Each grant recipient shall receive the same amount. To be eligible to receive funds under this section, a domestic violence center must meet the following requirements:

(1) It shall have been in operation on the preceding July 1 and shall continue to be in operation.

(2) It shall offer all of the following services: a hotline, transportation services, community education programs, daytime services, and call forwarding during the night and it shall fulfill other criteria established by the Department of Administration.

(3) It shall be a nonprofit corporation or a local governmental entity. (1991, c. 693, s. 3; 1991 (Reg. Sess., 1992), c. 988, s. 1.)

Editor's Note. — Session Laws 2009-451, s. 20A.6, provides: "For program year 2009-2010, the provisions of G.S. 50B-9(1) and any other protocol, policy, or guideline related to the timing of any grant application shall not exclude the Domestic Violence Task Force of Pamlico County as an eligible domestic violence center pursuant to G.S. 50B-9."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

for victims of domestic violence and to The North Carolina Coalition Against Domestic Violence, Inc. This fund shall be administered in accordance with the provisions of the Executive Budget Act. The Department of Administration shall make quarterly grants to each eligible domestic violence center and to The North Carolina Coalition Against Domestic Violence, Inc. Each grant recipient shall receive the same amount. To be eligible to receive funds under this section, a domestic violence center must meet the following requirements:

(1) It shall have been in operation on the preceding July 1 and shall continue to be in operation.

(2) It shall offer all of the following services: a hotline, transportation services, community education programs, daytime services, and call forwarding during the night and it shall fulfill other criteria established by the Department of Administration.

(3) It shall be a nonprofit corporation or a local governmental entity. (1991, c. 693, s. 3; 1991 (Reg. Sess., 1992), c. 858, s. 1.)

Editor's Note. — Session Laws 2009-451, s. 20A.6, provides: "For program year 2009-2010, the provisions of G.S. 50B-9(1) and any other protocol, policy, or guideline related to the funding of any grant application, shall not exclude the Domestic Violence Task Force of Franklin County as an eligible domestic violence center pursuant to G.S. 50B-9."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009.'"

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

Cited in [illegible], 98 N.C. App. [illegible], 390 S.E.2d [illegible] (1990).

§ 50B-8. Effect upon prosecution for violation of § 14-184 or other offense against public morals.

The granting of a protective order, prosecution for violation of this Chapter, or the granting of any other relief or the institution of any other enforcement proceedings under this Chapter shall not be construed to afford a defense to any person or persons charged with fornication and adultery under G.S. 14-184 or charged with any other offense against the public morals; and prosecution, conviction, or prosecution and conviction for violation of any provision of this Chapter shall not be a bar to prosecution for violation of G.S. 14-184 or of any other statute defining an offense or offenses against the public morals. (1979, c. 561, s. 1; 2003-107, s. 4.)

Cross References. — For similar provisions applicable to domestic criminal trespass, see G.S. 14-134.3.

CASE NOTES

Cited in [illegible], 98 N.C. App. [illegible], [illegible] (1990).

§ 50B-9. Domestic Violence Center Fund.

The Domestic Violence Center Fund is established within the State Treasury. The fund shall be administered by the Department of Administration, North Carolina Council for Women, and shall be used to make grants to centers

Chapter 50C.

Civil No-Contact Orders.

Sec.
50C-1. Definitions.
50C-2. Commencement of action; filing fees not permitted; assistance.
50C-3. Process for action for no-contact order.
50C-4. Hearsay exception.
50C-5. Civil no-contact order; remedy.
50C-6. Temporary civil no-contact order; court holidays and evenings.
50C-7. Permanent civil no-contact order.
50C-8. Duration; extension of orders.
50C-9. Notice of orders.
50C-10. Violation.
50C-11. Remedies not exclusive.

§ 50C-1. Definitions.

The following definitions apply in this Chapter:

(1) Abuse. — To physically or mentally harm, harass, intimidate, or interfere with the personal liberty of another.

(2) Civil no-contact order. — An order granted under this Chapter, which includes a remedy authorized by G.S. 50C-5.

(3) Nonconsensual. — A lack of freely given consent.

(4) Sexual conduct. — Any intentional or knowing touching, fondling, or sexual penetration by a person, either directly or through clothing, of the sexual organs, anus, or breast of another, whether an adult or a minor, for the purpose of sexual gratification or arousal. For purposes of this subdivision, the term shall include the transfer or transmission of semen.

(5) Repealed by Session Laws 2004-199, s. 50, effective August 17, 2004.

(6) Stalking. — On more than one occasion, following or otherwise harassing, as defined in G.S. 14-277.3A(b)(2), another person without legal purpose with the intent to do any of the following:
   a. Place the person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.
   b. Cause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment and that in fact causes that person substantial emotional distress.

(7) Unlawful conduct. — The commission of one or more of the following acts by a person 16 years of age or older upon a person, but does not include acts of self-defense or defense of others:
   a. Nonconsensual sexual conduct, including single incidences of nonconsensual sexual conduct.
   b. Stalking.

(8) Victim. — A person against whom an act of unlawful conduct has been committed by another person not involved in a personal relationship with the person as defined in G.S. 50B-1(b). (2004-194, s. 1; 2004-199, s. 50; 2007-199, s. 1; 2009-58, s. 6.)

Editor's Note. — Session Laws 2004-199, s. 50, provides: "If House Bill 951, 2003 Regular Session [2004-194], becomes law, then G.S. 50C-1(5) as enacted by Section 1 of House Bill 951, 2003 Regular Session [2004-194] is repealed." G.S. 50C-1(5) is set out above as repealed.

Effect of Amendments. — Session Laws 2009-58, s. 6, effective June 5, 2009, substituted "G.S. 14-277.3A(b)(2)" for "G.S. 14-277.3(c)" in the introductory language of subdivision (6).

CASE NOTES

Harassment Could Not Support Civil No-Contact Order. — Finding that a blogger had harassed the victims under G.S. 50C-1(6) and (7) by knowingly publishing electronic or computerized transmissions directed at the victims that tormented, terrorized, or terrified the victims and served no legitimate purpose could not support a civil no-contact order, even though the correct definition of harassment under G.S. 14-277.3(c) [now G.S. 14-277.3A] was used. Ramsey v. Harman, 191 N.C. App. 146, 661 S.E.2d 924, 2008 N.C. App. LEXIS 1146 (2008).

Civil No-Contact Order Improper. — Civil no-contact order was improperly entered for stalking under G.S. 50C-1(6) since there was no evidence that a blogger intended to cause and caused the victims to suffer substantial emotional distress as: (1) the trial court found that the messages on a website did not contain language "threatening to inflict bodily harm" or "physical injury"; (2) a claim that a child became "embarrassed" when the child had allegedly observed teachers viewing the blogger's website in the school library was implausible; (3) the blogger never had any communication with the victim or the child, and the child's name was not mentioned on the website; and (4) the blog was posted in retaliation for messages posted by the victim on a rival website, and an alleged threatening phone call from the victim's mother. Ramsey v. Harman, 191 N.C. App. 146, 661 S.E.2d 924, 2008 N.C. App. LEXIS 1146 (2008).

§ 50C-2. Commencement of action; filing fees not permitted; assistance.

(a) An action is commenced under this Chapter by filing a verified complaint for a civil no-contact order in district court or by filing a motion in any existing civil action, by any of the following:

(1) A person who is a victim of unlawful conduct that occurs in this State.

(2) A competent adult who resides in this State on behalf of a minor child or an incompetent adult who is a victim of unlawful conduct that occurs in this State.

(b) No court costs shall be assessed for the filing or service of the complaint, or the service of any orders.

(c) An action commenced under this Chapter may be filed in any county permitted under G.S. 1-82 or where the unlawful conduct took place.

(d) If the victim states that disclosure of the victim's address would place the victim or any member of the victim's family or household at risk for further unlawful conduct, the victim's address may be omitted from all documents filed with the court. If the victim has not disclosed an address under this subsection, the victim shall designate an alternative address to receive notice of any motions or pleadings from the opposing party. (2004-194, s. 1.)

§ 50C-3. Process for action for no-contact order.

(a) Any action for a civil no-contact order requires that a summons be issued and served. The summons issued pursuant to this Chapter shall require the respondent to answer within 10 days of the date of service. Attachments to the summons shall include the complaint for the civil no-contact order, and any temporary civil no-contact order that has been issued and the notice of hearing on the temporary civil no-contact order.

(b) Service of the summons and attachments shall be by the sheriff by personal delivery in accordance with Rule 4 of the Rules of Civil Procedure, and if the respondent cannot with due diligence be served by the sheriff by personal delivery, the respondent may be served by publication by the complainant in accordance with Rule 4(j1) of the Rules of Civil Procedure.

(c) The court may enter a civil no-contact order by default for the remedy sought in the complaint if the respondent has been served in accordance with this section and fails to answer as directed, or fails to appear on any subsequent appearance or hearing date agreed to by the parties or set by the court. (2004-194, s. 1; 2009-342, s. 3.)

Effect of Amendments. — Session Laws 2009-342, s. 3, effective for actions or motions filed on or after December 1, 2009, deleted "separate" preceding "summons" in the first sentence of subsection (a).

§ 50C-4. Hearsay exception.

In proceedings for an order or prosecutions for violation of an order under this Chapter, the prior sexual activity or the reputation of the victim is inadmissible except when it would be admissible in a criminal prosecution under G.S. 8C, Rule 412. (2004-194, s. 1.)

§ 50C-5. Civil no-contact order; remedy.

(a) Upon a finding that the victim has suffered unlawful conduct committed by the respondent, the court may issue temporary or permanent civil no-contact orders as authorized in this Chapter. In determining whether or not to issue a civil no-contact order, the court shall not require physical injury to the victim.

(b) The court may grant one or more of the following forms of relief in its orders under this Chapter:

(1) Order the respondent not to visit, assault, molest, or otherwise interfere with the victim.

(2) Order the respondent to cease stalking the victim, including at the victim's workplace.

(3) Order the respondent to cease harassment of the victim.

(4) Order the respondent not to abuse or injure the victim.

(5) Order the respondent not to contact the victim by telephone, written communication, or electronic means.

(6) Order the respondent to refrain from entering or remaining present at the victim's residence, school, place of employment, or other specified places at times when the victim is present.

(7) Order other relief deemed necessary and appropriate by the court.

(c) A civil no-contact order shall include the following notice, printed in conspicuous type: "A knowing violation of a civil no-contact order shall be punishable as contempt of court which may result in a fine or imprisonment." (2004-194, s. 1.)

§ 50C-6. Temporary civil no-contact order; court holidays and evenings.

(a) A temporary civil no-contact order may be granted ex parte, without evidence of service of process or notice, only if both of the following are shown:

(1) It clearly appears from specific facts shown by a verified complaint or affidavit that immediate injury, loss, or damage will result to the victim before the respondent can be heard in opposition.

(2) Either one of the following:

a. The complainant certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required.

b. The complainant certified to the court that there is good cause to grant the remedy because the harm that the remedy is intended to prevent would likely occur if the respondent were given any prior notice of the complainant's efforts to obtain judicial relief.

(b) Every temporary civil no-contact order granted without notice shall:

(1) Be endorsed with the date and hour of issuance.

(2) Be filed immediately in the clerk's office and entered of record.

(3) Define the injury, state why it is irreparable and why the order was granted without notice.

(4) Expire by its terms within such time after entry, not to exceed 10 days.

(5) Give notice of the date of hearing on the temporary order as provided in G.S. 50C-8(a).

(c) If the respondent appears in court for a hearing on a temporary order, the respondent may elect to file a general appearance and testify. Any resulting order may be a temporary order, governed by this section. Notwithstanding the requirements of this section, if all requirements of G.S. 50C-7 have been met, the court may issue a permanent order.

(d) When the court is not in session, the complainant may file for a temporary order before any judge or magistrate designated to grant relief under this Chapter. If the judge or magistrate finds that there is an immediate and present danger of harm to the victim and that the requirements of subsection (a) of this section have been met, the judge or magistrate may issue a temporary civil no-contact order. The chief district court judge may designate for each county at least one judge or magistrate to be reasonably available to issue temporary civil no-contact orders when the court is not in session. (2004-194, s. 1.)

§ 50C-7. Permanent civil no-contact order.

Upon a finding that the victim has suffered unlawful conduct committed by the respondent, a permanent civil no-contact order may issue if the court additionally finds that process was properly served on the respondent, the respondent has answered the complaint and notice of hearing was given, or the respondent is in default. No permanent civil no-contact order shall be issued without notice to the respondent. (2004-194, s. 1.)

§ 50C-8. Duration; extension of orders.

(a) A temporary civil no-contact order shall be effective for not more than 10 days as the court fixes, unless within the time so fixed the temporary civil no-contact order, for good cause shown, is extended for a like period or a longer period if the respondent consents. The reasons for the extension shall be stated in the temporary order. In case a temporary civil no-contact order is granted without notice and a motion for a permanent civil no-contact order is made, it shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character. When the motion for a permanent civil no-contact order comes on for hearing, the complainant may proceed with a motion for a permanent civil no-contact order, and, if the complainant fails to do so, the judge shall dissolve the temporary civil no-contact order. On two days' notice to the complainant or on such shorter notice to that party as the judge may prescribe, the respondent may appear and move its dissolution or modification. In that event the judge shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(b) A permanent civil no-contact order shall be effective for a fixed period of time not to exceed one year.

(c) Any order may be extended one or more times, as required, provided that the requirements of G.S. 50C-6 or G.S. 50C-7, as appropriate, are satisfied. The court may renew an order, including an order that previously has been renewed, upon a motion by the complainant filed before the expiration of the current order. The court may renew the order for good cause. The commission of an act of unlawful conduct by the respondent after entry of the current order is not required for an order to be renewed. If the motion for extension is uncontested and the complainant seeks no modification of the order, the order may be extended if the complainant's motion or affidavit states that there has been no material change in relevant circumstances since entry of the order and states the reason for the requested extension. Extensions may be granted only in open court and not under the provisions of G.S. 50C-6(d).

(d) Any civil no-contact order expiring on a day the court is not open for business shall expire at the close of the next court business day. (2004-194, s. 1; 2006-264, s. 41.)

CASE NOTES

No-Contact Order Appeal Moot. — Appellate court determined that the first neighbor's appeal of the trial court's issuance of the civil no-contact order entered against the first neighbor had to be dismissed, as the order had expired five months before the appeal of it had been calendared to be heard before the appellate court, and thus the matter was moot because no effective relief could be granted. Williams v. Vonderau, 181 N.C. App. 18, 638 S.E.2d 644, 2007 N.C. App. LEXIS 86 (2007).

§ 50C-9. Notice of orders.

(a) The clerk of court shall deliver on the same day that a civil no-contact order is issued, a certified copy of that order to the sheriff.

(b) Unless the respondent was present in court when the order was issued, the sheriff shall serve the order on the respondent and file proof of service in the manner provided for service of process in civil proceedings. If the summons has not yet been served upon the respondent, it shall be served with the order.

(c) A copy of the order shall be issued promptly to and retained by the police department of the municipality of the victim's residence. If the victim's residence is not located in a municipality or in a municipality with no police department, copies shall be issued promptly to and retained by the sheriff and the county police department, if any, of the county in which the victim's residence is located.

(d) Any order extending, modifying, or revoking any civil no-contact order shall be promptly delivered to the sheriff by the clerk and served by the sheriff in accordance with the provisions of this section. (2004-194, s. 1.)

§ 50C-10. Violation.

A knowing violation of an order entered pursuant to this Chapter is punishable as contempt of court. (2004-194, s. 1.)

§ 50C-11. Remedies not exclusive.

The remedies provided by this Chapter are not exclusive but are additional to other remedies provided under law. (2004-194, s. 1.)

same parties and the complainant seeks no modification of the order, the order may be extended if the complainant's motion or affidavit states that there has been no material change in relevant circumstances since entry of the order and states the reason for the requested extension. Extensions may be granted only in open court and not under the provisions of G.S. 50C-6(d).

(d) Any civil no-contact order expiring on a day the court is not open for business shall expire at the close of the next court business day. (2004-194, s. 1; 2006-[illegible], s. 4(i).)

CASE NOTES

Consent Order Appealable. — [illegible] the court determined that the [illegible] and that the appeal was not moot; [illegible] of the trial court's issuance of the [illegible] as no effective relief could be given [illegible] a consent order entered against [illegible] neighbor [illegible] to be dismissed, [illegible] expired six months before the [illegible] heard.

§ 50C-9. Notice of orders.

(a) The clerk of court shall deliver on the same day that a civil no-contact order is issued, a certified copy of that order to the sheriff.

(b) Unless the respondent was present in court when the order was issued, the sheriff shall serve the order on the respondent and file proof of service in the manner provided for service of process in civil proceedings. If the summons has not yet been served upon the respondent, it shall be served with the order.

(c) A copy of the order shall be issued promptly to and retained by the police department of the municipality of the victim's residence. If the victim's residence is not located in a municipality or in a municipality with no police department, copies shall be issued promptly to and retained by the sheriff and the county police department, if any, of the county in which the victim's residence is located.

(d) Any order extending, modifying, or revoking any civil no-contact order shall be promptly delivered to the sheriff by the clerk and served by the sheriff in accordance with the provisions of this section. (2004-194, s. 1.)

§ 50C-10. Violation.

A knowing violation of an order entered pursuant to this Chapter is punishable as contempt of court. (2004-194, s. 1.)

§ 50C-11. Remedies not exclusive.

The remedies provided by this Chapter are not exclusive but are additional to other remedies provided under law. (2004-194, s. 1.)

Chapter 51.

Marriage.

Article 1.

General Provisions.

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ARTICLE 1.

General Provisions.

§ 51-1. Requisites of marriage; solemnization.

A valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, either:

(1)a. In the presence of an ordained minister of any religious denomination, a minister authorized by a church, or a magistrate; and
   b. With the consequent declaration by the minister or magistrate that the persons are husband and wife; or

(2) In accordance with any mode of solemnization recognized by any religious denomination, or federally or State recognized Indian Nation or Tribe.

Marriages solemnized before March 9, 1909, by ministers of the gospel licensed, but not ordained, are validated from their consummation. (1871-2, c. 193, s. 3; Code, s. 1812; Rev., s. 2081; 1908, c. 47; 1909, c. 704, s. 2; c. 897; C.S., s. 2493; 1945, c. 839; 1965, c. 152; 1971, c. 1185, s. 26; 1977, c. 592, s. 1; 2000-58, ss. 1, 2; 2001-14, ss. 1, 2; 2001-62, ss. 1, 17; 2002-115, ss. 5, 6; 2002-159, s. 13(a); 2003-4, s. 1; 2005-56, s. 1; 2007-61, s. 1; 2009-13, s. 1.)

Local Modification. — Bertie: 1951, c. 852; town of Sparta: 1969, c. 1020.

Cross References. — As to divorce and alimony, see Chapter 50. As to powers and liabilities of married persons, see G.S. 52-1 et seq.

Editor's Note. — Session Laws 1998-120, s. 3, provides: "Section 2 of this act shall apply only to district court judges, who were formerly assistant district attorneys of the Thirteenth Judicial District, and shall expire on July 31, 1999."

Session Laws 2001-62, s. 16, provides: "The Administrative Office of the Courts shall develop any and all forms necessary for carrying out the purpose of this act and distribute them to the Office of the Clerk of Superior Court in each county."

Session Laws 2002-115, s. 5, effective November 25, 2002, and expiring December 1, 2002, inserted "a resident superior court judge, or an emergency superior court judge of this State" following "minister authorized by a church" in subdivision (1)a; and substituted "declaration by the minister, judge" for "declaration by the minister" in subdivision (1)b.

Session Laws 2002-115, s. 6, effective September 19, 2002, and expiring September 22, 2002, inserted "district court judge" following "minister authorized by a church" in subdivision (1)a; and substituted "declaration by the minister, judge" for "declaration by such minister" in subdivision (1)b.

Session Laws 2002-159, s. 13(b), provides: "Any marriage solemnized on or after October 1, 2001, and before the effective date of this act [approved October 11, 2002] and otherwise valid is not invalid because the minister or magistrate failed to declare the persons husband and wife."

Session Laws 2003-4, s. 1, effective March 28, 2003, and expiring March 31, 2003, in subdivision (1)a, inserted "a district court judge of this State" following "church"; and in (1)b, substituted "minister, judge," for "minister" following "declaration by the."

Session Laws 2005-56, s. 1, effective June 23, 2005, and expiring June 27, 2005, in subdivision (1)a, inserted "a district court judge of this State or of another state" following "authorized by a church"; and in (1)b, substituted "minister, district court judge," for "minister" following "consequent declaration by the."

Session Laws 2007-61, s. 1, effective June 4, 2007, and expiring June 8, 2007, inserted "district court judge of this State" following "church" in subdivision (1)a. and inserted "district court judge of this State" following "minister" in subdivision (1)b.

Session Laws 2009-13, s. 1, effective April 8, 2009, and expiring April 15, 2009, inserted "judge of the superior court" following "minister authorized by a church" in subdivision (1)a., and following "minister" in subdivision (1)b.

Legal Periodicals. — For article on common-law marriage in North Carolina, see 16 N.C.L. Rev. 259 (1938).

For comment on the enforceability of marital contracts, see 47 N.C.L. Rev. 815 (1969).

For article, "An Evolutionary Consideration of the Marriage Formalities of Licensure and Solemnization in Contemporary English and North Carolinian Statutory Law," see 10 N.C. Cent. L.J. 1 (1978).

For note on constitutional law and an illegitimate child's paternal inheritance rights, see 16 Wake Forest L. Rev. 205 (1980).

For survey of 1980 family law, see 59 N.C.L. Rev. 1194 (1981).

CASE NOTES

As to history of marriage laws, see State v. Bray, 35 N.C. 289 (1852); State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890); State v. Wilson, 121 N.C. 650, 28 S.E. 416 (1897).

There is no such thing as marriage simply by consent in this State. State v. Samuel, 19 N.C. 177 (1836); State v. Patterson, 24 N.C. 346 (1842); State v. Bray, 35 N.C. 289 (1852); Cooke v. Cooke, 61 N.C. 583 (1868); State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890); State v. Melton, 120 N.C. 591, 26 S.E. 933 (1897); State v. Wilson, 121 N.C. 650, 28 S.E. 416 (1897); State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979); State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980), decided prior to the amendment by Session Laws 2001-62, s. 1.

Essentials of This Section Must Be Followed. — While consent is essential to marriage in this State, it is not the only essential, but it must be acknowledged in the manner and before some person prescribed by this section. State v. Wilson, 121 N.C. 650, 28 S.E. 416 (1897); State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980), decided prior to the amendment by Session Laws 2001-62, s. 1.

When Marriage Is Complete. — Marriage is in law complete when parties able to contract and willing to contract have actually contracted to be man and wife, in the forms and with the solemnities required by law. Consummation by carnal knowledge is not necessary to its validity. State v. Patterson, 24 N.C. 346 (1842).

A valid marriage must be solemnized in the presence of one of three persons: (1) an ordained minister of any religious denomination; (2) a minister authorized by his church; or (3) a magistrate., rev'd on other grounds, State v. Lynch, 46 N.C. App. 608, 265 S.E.2d 491; 301 N.C. 479, 272 S.E.2d 349 (1980), decided prior to the amendment by Session Laws 2001-62, s. 1.

Instructions Defining "Church" and "Religious Denomination" Properly Refused. — In a bigamy prosecution in which the crucial determination was whether the person before whom a purported prior marriage of defendant was solemnized was an ordained minister of any religious denomination or a minister authorized by his church, the determination of whether there was a church or a religious denomination was not for the jury, since it was a matter of ecclesiastical law, and the trial court properly refused to give defendant's requested instructions defining "church" and "religious denomination." State v. Lynch, 46 N.C. App. 608, 265 S.E.2d 491, rev'd on other grounds, 301 N.C. 479, 272 S.E.2d 349 (1980).

Mail-Order Minister Not Qualified to Perform Valid Ceremony. — A ceremony solemnized by a Roman Catholic layman in the mail order business, who bought for $10.00 a mail order certificate giving him "credentials of minister" in the Universal Life Church, Inc., was not a ceremony of marriage to be recognized for purposes of a bigamy prosecution in this State. State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980). But see § 51-1.1.

For case in which church elder was held an ordained minister, authorized to celebrate the rites of matrimony, see State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890).

Impersonation of Minister. — A private citizen who impersonates an ordained minister and, with the consent of the parties, solemnizes a marriage between a man and woman is not guilty of any criminal offense known to the common or statute law. State v. Brown, 119 N.C. 825, 25 S.E. 820 (1896).

Evidence of Marriage by Justice of Peace. — It is sufficient evidence of a marriage that it was solemnized by one in the known enjoyment of the office of justice of the peace, and acting as such. His commission need not be produced. State v. Robbins, 28 N.C. 23, 44 Am. Dec. 64 (1845).

A marriage procured by force or fraud is void ab initio, and may be treated as null by every court in which its validity may be incidentally drawn in question. Scroggins v. Scroggins, 14 N.C. 535 (1832).

But a marriage contracted while under arrest for seduction is not contracted under duress. State v. Davis, 79 N.C. 603 (1878).

Sham Marriage a Nullity. — A marriage pretendedly celebrated before an unauthorized person is a nullity and not capable of being legalized by consent. State v. Wilson, 121 N.C. 650, 28 S.E. 416 (1897).

Indian Custom Held Not a Valid Marriage. — There is but one law of marriage for all the residents of this State. Hence cohabitation between an Indian man and woman according to the customs of their tribe, by which the parties were at liberty to dissolve the connection at pleasure, did not constitute a marriage. State v. Ta-cha-na-tah, 64 N.C. 614 (1870), decided prior to the amendment by Session Laws 2001-62, s. 1.

Legislature May Dispense With Formality. — The substance of marriage, the consent of the parties, existing, it was as clearly within the power of the legislature to dispense with any particular formality as it was to prescribe such. State v. Whitford, 86 N.C. 636 (1882).

Validation by Retroactive Legislation. — It is competent for the legislature by retrospective legislation to give validity to a marriage which is invalid by reason of the nonobservance of some solemnity required by statute. It is otherwise where such marriage is a nullity. Cooke v. Cooke, 61 N.C. 583 (1868).

Wife Need Not Use Husband's Surname. — There is no statutory requirement in this State that a married woman use her husband's surname. In re Mohlman, 26 N.C. App. 220, 216 S.E.2d 147 (1975).

Applied in State v. Woodruff, 99 N.C. App. 107, 392 S.E.2d 434 (1990).

Cited in Western Conference of Original Free Will Baptists v. Creech, 256 N.C. 128, 123 S.E.2d 619 (1962); In re Linville, — Bankr. —, 2005 Bankr. LEXIS 1115 (Bankr. M.D.N.C. Feb. 1, 2005).

§ 51-1.1. Certain marriages performed by ministers of Universal Life Church validated.

Any marriages performed by ministers of the Universal Life Church prior to July 3, 1981, are validated, unless they have been invalidated by a court of competent jurisdiction, provided that all other requirements of law have been met and the marriages would have been valid if performed by an official authorized by law to perform wedding ceremonies. (1981, c. 797.)

CASE NOTES

Where marriage was never invalidated, this section applied to validate it. The net effect of this section was to render the marriage valid from its inception, as it was voidable, rather than void. Fulton v. Vickery, 73 N.C. App. 382, 326 S.E.2d 354, cert. denied, 313 N.C. 599, 332 S.E.2d 178 (1985).

§ 51-1.2. Marriages between persons of the same gender not valid.

Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina. (1995 (Reg. Sess., 1996), c. 588, s. 1.)

Legal Periodicals. — For article, "Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage," see 75 N.C.L. Rev. 1501 (1997).

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Penalties for Issuance of Marriage Licenses to Individuals of Same Gender. — A register of deeds would violate North Carolina law in issuing a marriage license to persons of the same gender and if, in issuing such a license, the register of deeds operates in bad faith he may subject himself to the penalties provided in G.S. 161-27. See opinion of Attorney General to Mr. Willie L. Covington, Register of Deeds, Durham County Courthouse, 2004 N.C.A.G. 2 (3/29/04).

§ 51-2. Capacity to marry.

(a) All unmarried persons of 18 years, or older, may lawfully marry, except as hereinafter forbidden.

(a1) Persons over 16 years of age and under 18 years of age may marry, and the register of deeds may issue a license for the marriage, only after there shall have been filed with the register of deeds a written consent to the marriage, said consent having been signed by the appropriate person as follows:

(1) By a parent having full or joint legal custody of the underage party; or

(2) By a person, agency, or institution having legal custody or serving as a guardian of the underage party.

Such written consent shall not be required for an emancipated minor if a certificate of emancipation issued pursuant to Article 35 of Chapter 7B of the General Statutes or a certified copy of a final decree or certificate of emancipation from this or any other jurisdiction is filed with the register of deeds.

(b) Persons over 14 years of age and under 16 years of age may marry as provided in G.S. 51-2.1.

(b1) It shall be unlawful for any person under 14 years of age to marry.

(c) When a license to marry is procured by any person under 18 years of age by fraud or misrepresentation, a parent of the underage party, a person, agency, or institution having legal custody or serving as a guardian of the underage party, or a guardian ad litem appointed to represent the underage party pursuant to G.S. 51-2.1(b) is a proper party to bring an action to annul the marriage. (R.C., c. 68, s. 14; 1871-2, c. 193; Code, s. 1809; Rev., s. 2082; C.S., s. 2494; 1923, c. 75; 1933, c. 269, s. 1; 1939, c. 375; 1947, c. 383, s. 2; 1961, c. 186; 1967, c. 957, s. 1; 1969, c. 982; 1985, c. 608; 1998-202, s. 13(s); 2001-62, s. 2; 2001-487, s. 60.)

Cross References. — As to declaration of certain marriages as void on application of either party, see G.S. 50-4.

Editor's Note. — Session Laws 2001-62, s. 16, provides: "The Administrative Office of the Courts shall develop any and all forms necessary for carrying out the purpose of this act and distribute them to the Office of the Clerk of Superior Court in each county."

Legal Periodicals. — For comment on the 1923 amendment, see 1 N.C.L. Rev. 295 (1923).

As to annulment under the 1939 amendment, see 17 N.C.L. Rev. 353 (1939).

For comment on the 1947 amendment, see 25 N.C.L. Rev. 414 (1947).

For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

CASE NOTES

Effect of Lack of Parental Consent and Special License. — The marriage of a female between the ages of 14 and 16 (now between 16 and 18) without the written consent of her parent and without the special license required by this section, is not void but voidable. Sawyer v. Slack, 196 N.C. 697, 146 S.E. 864 (1929).

Applied in State v. Ewell, 168 N.C. App. 98, 606 S.E.2d 914, 2005 N.C. App. LEXIS 169 (2005).

Cited in Gastonia Personnel Corp. v. Rogers, 276 N.C. 279, 172 S.E.2d 19 (1970).

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Effective Date of 2001 Amendment. — A pregnant female who is less than 14 and who obtained a marriage license before October 1, 2001, may not lawfully marry after that date. See opinion of Attorney General to Ann Shaw, Randolph County Register of Deeds, 2001 N.C. AG LEXIS 36 (10/9/01).

Written Consent for Marriage of Person Who Is over 16 Years of Age and Under 18 Years of Age. — When a 14/15 year old is marrying a 16/17 year old, the register of deeds must require a court order from the 14/15 year old and the appropriate written consent from the 16/17 year old. See opinion of Attorney General to Ann Shaw, Randolph County Register of Deeds, 2001 N.C. AG LEXIS 36 (10/9/01).

§ 51-2.1. Marriage of certain underage parties.

(a) If an unmarried female who is more than 14 years of age, but less than 16 years of age, is pregnant or has given birth to a child and the unmarried female and the putative father of the child, either born or unborn, agree to marry, or if an unmarried male who is more than 14 years of age, but less than 16 years of age, is the putative father of a child, either born or unborn, and the unmarried male and the mother of the child agree to marry, the register of deeds is authorized to issue to the parties a license to marry; and it shall be lawful for them to marry in accordance with the provisions of this Chapter, only after a certified copy of an order issued by a district court authorizing the marriage is filed with the register of deeds. A district court judge may issue an order authorizing a marriage under this section only upon finding as fact and concluding as a matter of law that the underage party is capable of assuming the responsibilities of marriage and the marriage will serve the best interest of the underage party. In determining whether the marriage will serve the best interest of an underage party, the district court shall consider the following:

(1) The opinion of the parents of the underage party as to whether the marriage serves the best interest of the underage party.

(2) The opinion of any person, agency, or institution having legal custody or serving as a guardian of the underage party as to whether the marriage serves the best interest of the underage party.

(3) The opinion of the guardian ad litem appointed to represent the best interest of the underage party pursuant to G.S. 51-2.1(b) as to whether the marriage serves the best interest of the underage party.

(4) The relationship between the underage party and the parents of the underage party, as well as the relationship between the underage party and any person having legal custody or serving as a guardian of the underage party.

(5) Any evidence that it would find useful in making its determination.

There shall be a rebuttable presumption that the marriage will not serve the best interest of the underage party when all living parents of the underage party oppose the marriage. The fact that the female is pregnant, or has given birth to a child, alone does not establish that the best interest of the underage party will be served by the marriage.

(b) An underage party seeking an order granting judicial authorization to marry pursuant to this section shall file a civil action in the district court requesting judicial authorization to marry. The clerk shall collect court costs from the underage party in the amount set forth in G.S. 7A-305 for civil actions in district court. Upon the filing of the complaint, summons shall be issued in accordance with G.S. 1A-1, Rule 4, and the underage party shall be appointed a guardian ad litem in accordance with the provisions of G.S. 1A-1, Rule 17. The guardian ad litem appointed shall be an attorney and shall be governed by the provisions of subsection (d) of this section. The underage party shall serve a copy of the summons and complaint, in accordance with G.S. 1A-1, Rule 4, on the father of the underage party; the mother of the underage party; and any person, agency, or institution having legal custody or serving as a guardian of the underage party. The underage party also shall serve a copy of the complaint, either in accordance with G.S. 1A-1, Rule 4, or G.S. 1A-1, Rule 5, on the guardian ad litem appointed pursuant to this section. A party responding to the underage party's complaint shall serve his response within 30 days after service of the summons and complaint upon that person. The underage party may participate in the proceedings before the court on his or her own behalf. At the hearing conducted pursuant to this section, the court shall consider evidence, as provided in subsection (a) of this section, and shall make written findings of fact and conclusions of law.

(c) Any party to a proceeding under this section may be represented by counsel, but no party is entitled to appointed counsel, except as provided in this section.

(d) The guardian ad litem appointed pursuant to subsection (b) of this section shall represent the best interest of the underage party in all proceedings under this section and also has standing to institute an action under G.S. 51-2(c). The appointment shall terminate when the last judicial ruling rendering the authorization granted or denied is entered. Payment of the guardian ad litem shall be governed by G.S. 7A- 451(f). The guardian ad litem shall make an investigation to determine the facts, the needs of the underage party, the available resources within the family and community to meet those needs, the impact of the marriage on the underage party, and the ability of the underage party to assume the responsibilities of marriage; facilitate, when appropriate, the settlement of disputed issues; offer evidence and examine witnesses at the hearing; and protect and promote the best interest of the underage party. In fulfilling the guardian ad litem's duties, the guardian ad litem shall assess and consider the emotional development, maturity, intellect, and understanding of the underage party. The guardian ad litem has the authority to obtain any information or reports, whether or not confidential, that the guardian ad litem deems relevant to the case. No privilege other than attorney-client privilege may be invoked to prevent the guardian ad litem and the court from obtaining such information. The confidentiality of the information or reports shall be respected by the guardian ad litem, and no disclosure of any information or reports shall be made to anyone except by order of the court or unless otherwise provided by law.

(e) If the last judicial ruling in this proceeding denies the underage party judicial authorization to marry, the underage party shall not seek the authorization of any court again under this section until after one year from the date of the entry of the last judicial ruling rendering the authorization denied.

(f) Except as otherwise provided in this section, the rules of evidence in civil cases shall apply to proceedings under this section. All hearings pursuant to this section shall be recorded by stenographic notes or by electronic or mechanical means. Notwithstanding any other provision of law, no appeal of right lies from an order or judgment entered pursuant to this section. (2001-62, s. 3.)

Editor's Note. — Session Laws 2001-62, s. 16, provides: "The Administrative Office of the Courts shall develop any and all forms necessary for carrying out the purpose of this act and distribute them to the Office of the Clerk of Superior Court in each county."

The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 2001-62 having been G.S. 51-2A.

OPINIONS OF ATTORNEY GENERAL

Court Order for Marriage of 14 or 15 Year Old. — When a 14/15 year old is marrying a 16/17 year old, the register of deeds must require a court order from the 14/15 year old and the appropriate written consent from the 16/17 year old. See opinion of Attorney General to Ann Shaw, Randolph County Register of Deeds, 2001 N.C. AG LEXIS 36 (10/9/01).

§ 51-2.2. Parent includes adoptive parent.

As used in this Article, the terms "parent", "father", or "mother" includes one who has become a parent, father, or mother, respectively, by adoption. (2001-62, s. 4.)

Editor's Note. — Session Laws 2001-62, s. 16, provides: "The Administrative Office of the Courts shall develop any and all forms necessary for carrying out the purpose of this act and distribute them to the Office of the Clerk of Superior Court in each county."

The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 2001-62 having been G.S. 51-2B.

§ 51-3. Want of capacity; void and voidable marriages.

All marriages between any two persons nearer of kin than first cousins, or between double first cousins, or between a male person under 16 years of age and any female, or between a female person under 16 years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or between persons either of whom is at the time incapable of contracting from want of will or understanding, shall be void. No marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section except for bigamy. No marriage by persons either of whom may be under 16 years of age, and otherwise competent to marry, shall be declared void when the girl shall be pregnant, or when a child shall have been born to the parties unless such child at the time of the action to annul shall be dead. A marriage contracted under a representation and belief that the female partner to the marriage is pregnant, followed by the separation of the parties within 45 days of the marriage which separation has been continuous for a period of one year, shall be voidable unless a child shall have been born to the parties within 10 lunar months of the date of separation. (R.C., c. 68, ss. 7, 8, 9; 1871-2, c. 193, s. 2; Code, s. 1810; 1887, c. 245; Rev., s. 2083; 1911, c. 215, s. 2; 1913, c. 123; 1917, c. 135; C.S., s. 2495; 1947, c. 383, s. 3; 1949, c. 1022; 1953, c. 1105; 1961, c. 367; 1977, c. 107, s. 1.)

Cross References. — As to penal provisions for incest, see G.S. 14-178. As to penal provisions for bigamy, see G.S. 14-183. As to suits to nullify marriages which were entered into contrary to the provisions of this section, see G.S. 50-4.

Legal Periodicals. — For comment on the 1947 amendment, see 25 N.C.L. Rev. 414 (1947).

For comment on the 1949 amendment, see 27 N.C.L. Rev. 453 (1949).

For comment on the 1953 amendment, see 31 N.C.L. Rev. 412 (1953).

CASE NOTES

Power of Legislature to Remove Conditions. — The competency of the General Assembly to impose the restraints and conditions incident to the formation of the marriage relation and the contract which creates it implies the right to remove same. Baity v. Cranfill, 91 N.C. 293 (1884).

Void and Voidable Marriages Compared. — A voidable marriage is valid for all civil purposes until annulled by a competent tribunal in a direct proceeding, but a void marriage is a nullity and may be impeached at any time. Geitner ex rel. First Nat'l Bank v. Townsend, 67 N.C. App. 159, 312 S.E.2d 236, cert. denied, 310 N.C. 744, 315 S.E.2d 702 (1984).

The marriage of a party under the minimum age required by statute is voidable and not void. Such marriage may be ratified by the subsequent conduct of the parties. Koonce v. Wallace, 52 N.C. 194 (1859); State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890); Sawyer v. Slack, 196 N.C. 697, 146 S.E. 864 (1929); Parks v. Parks, 218 N.C. 245, 10 S.E.2d 807 (1940).

Although this section provides that all marriages "between a male person under 16 years of age and any female, or between a female person under 16 years of age and any male ... shall be void," it is well established that such marriages are voidable rather than void. This was the rule of the common law. Ivery v. Ivery, 258 N.C. 721, 129 S.E.2d 457 (1963).

But May Be Ratified by Subsequent Conduct. — A marriage which is not void ab initio, but merely voidable, because one of the parties thereto was at its date under the age at which he or she might lawfully marry, may be ratified by the subsequent conduct of the parties in recognition of the marriage. Ivery v. Ivery, 258 N.C. 721, 129 S.E.2d 457 (1963).

Bigamous Marriages Are Void. — Where a wife attempts to marry again when no valid divorce a vinculo has been obtained from her living husband, such second attempted marriage is absolutely void and may be annulled by the husband of the second attempted marriage in an action instituted for that purpose. Pridgen v. Pridgen, 203 N.C. 533, 166 S.E. 591 (1932).

The fact that a presumption which has arisen of the death of a woman's husband shields her from prosecution for bigamy upon marrying another, does not render the last marriage any the less bigamous or void if the first husband is, in fact, alive. Ward v. Bailey, 118 N.C. 55, 23 S.E. 926 (1896).

A bigamous marriage is a nullity, with no legal rights flowing from it, and can be collaterally attacked at any time. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

And Are Subject to Collateral Attack. — A marriage between parties, either of whom has a living spouse at the time of the purported marriage, is void ab initio and such a marriage being a nullity, it may be attacked collaterally at any time; no legal rights flow from it. Redfern v. Redfern, 49 N.C. App. 94, 270 S.E.2d 606 (1980).

But Second Marriage Is Presumed Valid. — When two marriages of the same person are shown and both parties to the first marriage are living at the time of the second marriage, the second marriage is presumed to be valid and the first marriage is presumed to have been dissolved by divorce. Parker v. Parker, 46 N.C. App. 254, 265 S.E.2d 237 (1980).

Wife who knowingly entered a bigamous marriage was subsequently estopped from asserting the invalidity of that marriage in order to avoid the consequences flowing from her wrongful conduct; therefore, the trial court correctly terminated husband's obligation to pay alimony under the separation agreement. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Impotency Renders Marriage Voidable. — Impotency in a husband does not render a marriage by him void ab initio, but only voidable by sentence of separation, and until such sentence, it is deeded valid and subsisting. Smith v. Morehead, 59 N.C. 360 (1863).

Marriage of One Incapable of Contracting for Want of Understanding Is Voidable. — Under the common law as modified by this section and G.S. 50-4, a marriage of a person incapable of contracting for want of understanding is not void, but voidable. Geitner ex rel. First Nat'l Bank v. Townsend, 67 N.C. App. 159, 312 S.E.2d 236, cert. denied, 310 N.C. 744, 315 S.E.2d 702 (1984).

Under the rule of the common law as modified by statute, the marriage of a person incapable of contracting for want of understanding is not void ipso facto, but if and when declared void in a legally constituted action, such marriage is void ab initio. Ivery v. Ivery, 258 N.C. 721, 129 S.E.2d 457 (1963).

What Constitutes Mental Capacity. — As to what constitutes mental capacity or incapacity to enter into a contract to marry, the general rule is that the test is the capacity of the person to understand the special nature of the contract of marriage and the duties and responsibilities which it entails, which is to be determined from the facts and circumstances of each case.

Geitner ex rel. First Nat'l Bank v. Townsend, 67 N.C. App. 159, 312 S.E.2d 236, cert. denied, 310 N.C. 744, 315 S.E.2d 702 (1984).

Knowledge of the provisions of the statutory law relating to the revocation of a will by marriage and relating to the persons who shall succeed to the estate of an intestate is not a prerequisite or necessary element of mental capacity sufficient to contract a valid marriage. Ivery v. Ivery, 258 N.C. 721, 129 S.E.2d 457 (1963).

Test of Incompetency in Guardianship Matters Compared. — Tests judicially applied for a determination of incompetency in guardianship matters differ markedly from those applied for the determination of mental capacity to contract a marriage, for even though a person may be under guardianship as an incompetent, he may in fact have sufficient mental capacity to validly contract marriage. Geitner ex rel. First Nat'l Bank v. Townsend, 67 N.C. App. 159, 312 S.E.2d 236, cert. denied, 310 N.C. 744, 315 S.E.2d 702 (1984).

Mental capacity of a party at the precise time when the marriage is celebrated controls its validity or invalidity. Geitner ex rel. First Nat'l Bank v. Townsend, 67 N.C. App. 159, 312 S.E.2d 236, cert. denied, 310 N.C. 744, 315 S.E.2d 702 (1984).

Prior adjudication of incompetency is not conclusive on the issue of later capacity to marry and does not bar a party from entering into a contract to marry. Geitner ex rel. First Nat'l Bank v. Townsend, 67 N.C. App. 159, 312 S.E.2d 236, cert. denied, 310 N.C. 744, 315 S.E.2d 702 (1984).

Burden of Persuasion as to Invalidity for Lack of Mental Capacity. — When the fact of marriage has been established by evidence, the burden of persuasion on the issue of invalidity is on the party asserting such. And even if a party's insanity is proved to be of such a chronic nature that it is presumed to continue, it does not shift the burden of the issue. Geitner ex rel. First Nat'l Bank v. Townsend, 67 N.C. App. 159, 312 S.E.2d 236, cert. denied, 310 N.C. 744, 315 S.E.2d 702 (1984).

Undue Influence. — Where an executrix had filed a case on a decedent's behalf as his guardian ad litem, seeking an annulment of the decedent's marriage while the decedent was alive, and where substantial property rights hinged on the validity of the marriage, the action did not abate on the decedent's death and the executrix was entitled to pursue it; further, as there was no evidence showing the birth of issue into the union between the decedent and the wife, G.S. 51-3 did not preclude an annulment based on undue influence. Clark v. Foust-Graham, 171 N.C. App. 707, 615 S.E.2d 398, 2005 N.C. App. LEXIS 1365 (2005).

Capacity to Marry as Affected by Guardianship. — Unlike other transactions, an insane person's capacity to marry is not necessarily affected by guardianship. Geitner ex rel. First Nat'l Bank v. Townsend, 67 N.C. App. 159, 312 S.E.2d 236, cert. denied, 310 N.C. 744, 315 S.E.2d 702 (1984).

Certain Marriages Not Voidable After Death of Party. — As to provision that marriage followed by cohabitation and birth of issue shall not be declared void after death of either party except for bigamy, see Baity v. Cranfill, 91 N.C. 293 (1884); Ward v. Bailey, 118 N.C. 55, 23 S.E. 926 (1896); Ivery v. Ivery, 258 N.C. 721, 129 S.E.2d 457 (1963).

Annulment decree rendered when children of the marriage are living is contrary to this section and improvidently entered. Scarboro v. Morgan, 233 N.C. 449, 64 S.E.2d 422 (1951).

Marriage Valid Where Celebrated Is Valid Here. — The marriage relation, if legally created elsewhere, is recognized as a valid subsisting relation when the parties come into this State from that of their former residence. Woodard v. Blue, 103 N.C. 109, 9 S.E. 492 (1889).

Attempt to Evade Provisions of Section. — The validity of a foreign marriage is not recognized here when parties having their domicile here, to evade our laws, go to a state which allows such marriage, with intent to return and keep up their domicile. Woodard v. Blue, 103 N.C. 109, 9 S.E. 492 (1889).

There is a difference between declaring a marriage valid and preventing one from asserting its invalidity. The theory behind the equitable estoppel doctrine is not to make legally valid a void divorce or to make an invalid marriage valid, but rather, to prevent one from disrupting family relations by allowing one to avoid obligations as a spouse. Mayer v. Mayer, 66 N.C. App. 522, 311 S.E.2d 659, cert. denied, 311 N.C. 760, 321 S.E.2d 140 (1984).

Equitable Estoppel to Attack Divorce. — Equitable estoppel is dependent upon events which led to the divorce or which may have occurred after the divorce. It is a personal disability of the party attacking the divorce judgment; it is not a function of the divorce decree itself. Mayer v. Mayer, 66 N.C. App. 522, 311 S.E.2d 659, cert. denied, 311 N.C. 760, 321 S.E.2d 140 (1984).

Husband who encouraged his wife to obtain a divorce from her prior spouse was estopped from questioning its validity. This problem most commonly arises when a man persuades a married woman to divorce her husband so that she will be free to marry him. When he does so, or even when he merely marries her with full knowledge of the circumstances surrounding the divorce, he is estopped to question the validity of the divorce, since he has engaged in conduct calculated to induce reliance on the divorce, and indeed, he has relied on it himself. Mayer v. Mayer, 66 N.C. App. 522, 311 S.E.2d 659, cert. denied, 311 N.C. 760, 321 S.E.2d 140 (1984).

Applied in Goins v. Trustees Indian Training School, 169 N.C. 736, 86 S.E. 629 (1915); Wiseman v. Wiseman, 68 N.C. App. 252, 314 S.E.2d 566 (1984); Heiser v. Heiser, 71 N.C. App. 223, 321 S.E.2d 479 (1984), cert. denied, 474 U.S. 824, 106 S. Ct. 80, 88 L. Ed. 2d 66 (1985); Hawkins v. Hawkins, — N.C. App. —, 664 S.E.2d 616, 2008 N.C. App. LEXIS 1520 (2008).

Cited in Chance v. Board of Educ., 224 F. Supp. 472 (E.D.N.C. 1963); Swann v. Charlotte-Mecklenburg Bd. of Educ., 318 F. Supp. 786 (W.D.N.C. 1970); Armstrong v. Armstrong, 41 N.C. App. 168, 254 S.E.2d 209 (1979); Fungaroli v. Fungaroli, 53 N.C. App. 270, 280 S.E.2d 787 (1981).

§ 51-3.1. Interracial marriages validated.

All interracial marriages that were declared void by statute or a court of competent jurisdiction prior to March 24, 1977, are hereby validated. The parties to such interracial marriages are deemed to be lawfully married, provided that the provisions of this Chapter have been complied with. (1977, c. 107, s. 2.)

§ 51-3.2. Marriage licensed and solemnized by a federally recognized Indian Nation or Tribe.

(a) Subject to the restriction provided in subsection (b), a marriage between a man and a woman licensed and solemnized according to the law of a federally recognized Indian Nation or Tribe shall be valid and the parties to the marriage shall be lawfully married.

(b) When the law of a federally recognized Indian Nation or Tribe allows persons to obtain a marriage license from the register of deeds and the parties to a marriage do so, Chapter 51 of the General Statutes shall apply and the marriage shall be valid only if the issuance of the license and the solemnization of the marriage is conducted in compliance with this Chapter. (2001-62, s. 5.)

Editor's Note. — Session Laws 2001-62, s. 16, provides: "The Administrative Office of the Courts shall develop any and all forms necessary for carrying out the purpose of this act and distribute them to the Office of the Clerk of Superior Court in each county."

§ 51-4. Prohibited degrees of kinship.

When the degree of kinship is estimated with a view to ascertain the right of kinspeople to marry, the half-blood shall be counted as the whole-blood: Provided, that nothing herein contained shall be so construed as to invalidate any marriage heretofore contracted in case where by counting the half-blood as the whole-blood the persons contracting such marriage would be nearer of kin than first cousins; but in every such case the kinship shall be ascertained by counting relations of the half-blood as being only half so near kin as those of the same degree of the whole-blood. (1879, c. 78; Code, s. 1811; Rev., s. 2084; C.S., s. 2496.)

§ 51-5. Marriages between slaves validated.

Persons, both or one of whom were formerly slaves, who have complied with the provisions of section five, Chapter 40, of the acts of the General Assembly, ratified March 10, 1866, shall be deemed to have been lawfully married. (1866, c. 40, s. 5; Code, s. 1842; Rev., s. 2085; C.S., s. 2497.)

CASE NOTES

Section Is Valid. — As to the validity of this section, see Cooke v. Cooke, 61 N.C. 583 (1868); State v. Harris, 63 N.C. 1 (1868); State v. Adams, 65 N.C. 537 (1871); State v. Whitford, 86 N.C. 636 (1882); Long v. Barnes, 87 N.C. 329 (1882); Baity v. Cranfill, 91 N.C. 293 (1884).

For other cases decided under the statute, see Woodard v. Blue, 103 N.C. 109, 9 S.E. 492 (1889); State v. Melton, 120 N.C. 591, 26 S.E. 933 (1897); Bettis v. Avery, 140 N.C. 184, 52 S.E. 584 (1905).

Declarations as to Paternity. — Where a marriage was validated by this section, declarations as to the paternity of a child born subsequent to the marriage, made anti litem motam by the alleged father and mother, were admissible in evidence without regard to G.S. 49-12, which legitimates children born out of wedlock whose parents subsequently intermarry. Family tradition or pedigree is a recognized exception to the rule which generally excludes hearsay evidence. Bowman v. Howard, 182 N.C. 662, 110 S.E. 98 (1921).

ARTICLE 2.

Marriage Licenses.

§ 51-6. Solemnization without license unlawful.

No minister, officer, or any other person authorized to solemnize a marriage under the laws of this State shall perform a ceremony of marriage between a man and woman, or shall declare them to be husband and wife, until there is delivered to that person a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage license was issued or by a lawful deputy or assistant. There must be at least two witnesses to the marriage ceremony.

Whenever a man and woman have been lawfully married in accordance with the laws of the state in which the marriage ceremony took place, and said marriage was performed by a magistrate or some other civil official duly authorized to perform such ceremony, and the parties thereafter wish to confirm their marriage vows before an ordained minister or minister authorized by a church, or in a ceremony recognized by any religious denomination, federally or State recognized Indian Nation or Tribe, nothing herein shall be deemed to prohibit such confirmation ceremony; provided, however, that such confirmation ceremony shall not be deemed in law to be a marriage ceremony, such confirmation ceremony shall in no way affect the validity or invalidity of the prior marriage ceremony performed by a civil official, no license for such confirmation ceremony shall be issued by a register of deeds, and no record of such confirmation ceremony may be kept by a register of deeds. (1871-2, c. 193, s. 4; Code, s. 1813; Rev., s. 2086; C.S., s. 2498; 1957, c. 1261; 1959, c. 338; 1967, c. 957, ss. 6, 9; 1977, c. 592, s. 2; 2001-62, s. 6.)

Editor's Note. — Session Laws 2001-62, s. 16, provides: "The Administrative Office of the Courts shall develop any and all forms necessary for carrying out the purpose of this act and distribute them to the Office of the Clerk of Superior Court in each county."

Legal Periodicals. — For article, "An Evolutionary Consideration of the Marriage Formalities of Licensure and Solemnization in Contemporary English and North Carolinian Statutory Law," see 10 N.C. Cent. L.J. 1 (1978).

CASE NOTES

Failure to procure a license will not invalidate a marriage otherwise good. State v. Robbins, 28 N.C. 23 (1845); State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890); Maggett v. Roberts, 112 N.C. 71, 16 S.E. 919 (1893); Wooley v. Bruton, 184 N.C. 438, 114 S.E. 628 (1922).

A marriage is not invalid because solemnized under an illegal license. Maggett v. Roberts, 112 N.C. 71, 16 S.E. 919 (1893);

Wooley v. Bruton, 184 N.C. 438, 114 S.E. 628 (1922).

Actual Delivery of License Required. — This section requires an actual delivery; constructive delivery will not suffice. So performance of the ceremony by a justice after a telephone communication informing him that the license had been mailed would subject him to the penalty prescribed by G.S. 51-7. Wooley v. Bruton, 184 N.C. 438, 114 S.E. 628 (1922).

Officer or Minister Penalized. — The only effect of marrying a couple without a legal license is to subject the officer or minister to the penalty of $200.00 prescribed by G.S. 51-7. State v. Robbins, 28 N.C. 23 (1845); State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890); Maggett v. Roberts, 112 N.C. 71, 16 S.E. 919 (1893).

Cited in State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980).

§ 51-7. Penalty for solemnizing without license.

Every minister, officer, or any other person authorized to solemnize a marriage under the laws of this State, who marries any couple without a license being first delivered to that person, as required by law, or after the expiration of such license, or who fails to return such license to the register of deeds within 10 days after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two hundred dollars ($200.00) to any person who sues therefore, and shall also be guilty of a Class 1 misdemeanor. (R.C., c. 68, ss. 6, 13; 1871-2, c. 193, s. 8; Code, s. 1817; Rev., ss. 2087, 3372; C.S., s. 2499; 1953, c. 638, s. 1; 1967, c. 957, s. 5; 1993, c. 539, s. 415; 1994, Ex. Sess., c. 24, s. 14(c); 2001-62, s. 7.)

Editor's Note. — Session Laws 2001-62, s. 16, provides: "The Administrative Office of the Courts shall develop any and all forms necessary for carrying out the purpose of this act and distribute them to the Office of the Clerk of Superior Court in each county."

CASE NOTES

Marriage Not Affected. — Failure to comply with statutory requirements as to the license subjects the officer or minister to the penalty under this section, but the marriage is nevertheless good for every intent and purpose. State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890).

Statute of Limitations. — Where a summons was issued to recover the penalty against an officer, under this section, for performing marriage ceremony without the delivery of the license therefor to him, within less than a year from the time he had performed it, it was held that the plea of the statute of limitations, G.S. 1-54, subdivision (2), could not be sustained. Wooley v. Bruton, 184 N.C. 438, 114 S.E. 628 (1922).

Cited in In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976); State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980).

§ 51-8. License issued by register of deeds.

Every register of deeds shall, upon proper application, issue a license for the marriage of any two persons who are able to answer the questions regarding age, marital status, and intention to marry, and, based on the answers, the register of deeds determines the persons are authorized to be married in accordance with the laws of this State. In making a determination as to whether or not the parties are authorized to be married under the laws of this State, the register of deeds may require the applicants for the license to marry to present certified copies of birth certificates or such other evidence as the register of deeds deems necessary to the determination. The register of deeds may administer an oath to any person presenting evidence relating to whether or not parties applying for a marriage license are eligible to be married pursuant to the laws of this State. Each applicant for a marriage license shall provide on the application the applicant's social security number. If an applicant does not have a social security number and is ineligible to obtain one, the applicant shall present a statement to that effect, sworn to or affirmed before an officer authorized to administer oaths. Upon presentation of a sworn or affirmed statement, the register of deeds shall issue the license, provided all other requirements are met, and retain the statement with the register's copy of the license. The register of deeds shall not issue a marriage license unless all of the requirements of this section have been met. (1871-2, c. 193, s. 5; Code, s. 1814; 1887, c. 331; Rev., s. 2088; C.S., s. 2500; 1957, c. 506, s. 1; 1967, c. 957, s. 2; 1997-433, s. 4.5; 1998-17, s. 1; 1999-375, s. 1; 2001-62, s. 8; 2002-159, s. 14.)

Cross References. — For decisions relating to this section and G.S. 51-17, see note to G.S. 51-17.

Editor's Note. — Session Laws 2001-62, s. 16, provides: "The Administrative Office of the Courts shall develop any and all forms necessary for carrying out the purpose of this act and distribute them to the Office of the Clerk of Superior Court in each county."

CASE NOTES

This section and § 51-17 are in pari materia and should be construed together. Bowles v. Cochran, 93 N.C. 398 (1885); Joyner v. Harris, 157 N.C. 295, 72 S.E. 970 (1911).

Defense to Breach of Promise of Marriage. — The fact that at the time of the breach of promise of marriage, a license for the marriage of the parties could not have been lawfully issued under this section, was a defense to an action for damages for breach of promise of marriage. Winders v. Powers, 217 N.C. 580, 9 S.E.2d 131 (1940), decided under former former health certification requirement.

Effect of Noncompliance. — Failure to file a health certificate as required by former G.S. 51-14 did not invalidate an otherwise legal marriage, but such failure to comply with the statute in this respect did make the parties subject to indictment, and if they were convicted, to the penalty or penalties provided by this section. Hall v. Hall, 250 N.C. 275, 108 S.E.2d 487 (1959), decided under former former health certification requirement.

Cited in State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980).

OPINIONS OF ATTORNEY GENERAL

Aliens. — Where the register of deeds is satisfied that an applicant is an alien who has not come to the United States for the purpose of establishing a permanent residence or for the purpose of engaging in employment, and who otherwise meets the lawful requirements for a marriage license, the register of deeds should issue the license even though the alien is ineligible for a social security number. See opinion of Attorney General to The Honorable Katherine Lee Payne, Guilford County Register of Deeds, Guilford County Courthouse, 1998 N.C.A.G. 36 (8/14/98).

§ 51-8.1: Repealed by Session Laws 1967, c. 53.

§ 51-8.2. Issuance of marriage license when applicant is unable to appear.

If an applicant for a marriage license is over 18 years of age and is unable to appear in person at the register of deeds' office, the other party to the planned marriage must appear in person on behalf of the applicant and submit a sworn and notarized affidavit in lieu of the absent applicant's personal appearance.

The affidavit shall be in the following or some equivalent form:

________, [applicant] appearing before the undersigned notary and being duly sworn, says that:

1. I, ________, [applicant's name] am applying for a license in ________ County, North Carolina, to marry ________ [name of other applicant] in North Carolina within the next 60 days and I am authorized under G.S. 51-8.2 to complete this Affidavit in Lieu of Personal Appearance for Marriage License Application.

I attach: (1) documentation that I am over 18 years of age as required in county of issuance; and (2) documentation of divorce as required by county of issuance.

2. I submit the following information in applying for a marriage license:

Name: ______________________________________
First Middle Last
Residence: __________________________________
State County City or Town
____
Street and Number
Inside City Limits (Yes or No): ________________
Birthplace: _________________________________
County & State or Country
Birth Date: ___________________ Age: ______
Father: ____________________________________
Name State of Birth
____
Address (if living) or Deceased
Mother: ____________________________________
Name State of Birth
____
Address (if living) or Deceased
Race (Optional): _____________________________
Number of this marriage: 1st, 2nd, etc. __________
Last Marriage Ended by: _______________________
Death, Divorce, Annulment
Date Marriage Ended: __________________________
Specify Highest Grade Completed in School (Optional): ______
Social Security # ____________________ (If applicant does not have Social Security number, attach affidavit of ineligibility)

I hereby make application to the Register of Deeds for a Marriage License and solemnly swear that all of the statements contained in the above application are true and I further make oath that there is no legal impediment to such marriage.

____
Signature of Applicant

Sworn to (or affirmed) and subscribed before me this ____ day of __________, ________.

____
[Seal] Notary Public
My commission expires: ________

[Notary's typed or printed name].

(2001-62, s. 9.)

Editor's Note. — Session Laws 2001-62, s. 16, provides: "The Administrative Office of the Courts shall develop any and all forms necessary for carrying out the purpose of this act and distribute them to the Office of the Clerk of Superior Court in each county."

§§ 51-9 through 51-11: Repealed by Session Laws 1994, c. 647, ss. 1-3.

§ 51-12: Repealed by Session Laws 1985, c. 589, s. 27.

§ 51-13: Repealed by Session Laws 1994, c. 647, s. 4.

Editor's Note. — The repealed section was amended by Session Laws 1993, c. 539, s. 416, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), effective October 1, 1994. The section is set out above as repealed.

§ 51-14: Repealed by Session Laws 1967, c. 957, s. 3.

§ 51-15. Obtaining license by false representation misdemeanor.

If any person shall obtain, or aid and abet in obtaining, a marriage license by misrepresentation or false pretenses, that person shall be guilty of a Class 1 misdemeanor. (1885, c. 346; Rev., s. 3371; C.S., s. 2501; 1967, c. 957, s. 4; 1993, c. 539, s. 417; 1994, Ex. Sess., c. 24, s. 14(c); 2001-62, s. 10.)

Cross References. — As to false pretenses generally, see G.S. 14-100 et seq.

Editor's Note. — Session Laws 2001-62, s. 16, provides: "The Administrative Office of the Courts shall develop any and all forms necessary for carrying out the purpose of this act and distribute them to the Office of the Clerk of Superior Court in each county."

§ 51-16. Form of license.

License shall be in the following or some equivalent form:

To any ordained minister of any religious denomination, minister authorized by a church, any magistrate, or any other person authorized to solemnize a marriage under the laws of this State: A.B. having applied to me for a license for the marriage of C.D. (the name of the man to be written in full) of (here state his residence), aged ________ years (race, as the case may be), the son of (here state the father and mother, if known; state whether they are living or dead, and their residence, if known; if any of these facts are not known, so state), and E.F. (write the name of the woman in full) of (here state her residence), aged ________ years (race, as the case may be), the daughter of (here state names and residences of the parents, if known, as is required above with respect to the man). (If either of the parties is under 18 years of age, the license shall here contain the following:) And the written consent of G.H., father (or mother, etc., as the case may be) to the proposed marriage having been filed with me, and there being no legal impediment to such marriage known to me, you are hereby authorized, at any time within 60 days from the date hereof, to celebrate the proposed marriage at any place within the State. You are required within 10 days after you shall have celebrated such marriage, to return this license to me at my office with your signature subscribed to the certificate under this license, and with the blanks therein filled according to the facts, under penalty of forfeiting two hundred dollars ($200.00) to the use of any person who shall sue for the same.

Issued this ________ day of ________, ________

________________ L.M.

Register of Deeds of ________ County

Every register of deeds shall, at the request of an applicant, designate in a marriage license issued the race of the persons proposing to marry by inserting in the blank after the word "race" the words "white," "black," "African-American," "American Indian," "Alaska Native," "Asian Indian," "Chinese," "Filipino," "Japanese," "Korean," "Vietnamese," "Other Asian," "Native Hawaiian," "Guamarian," "Chamorro," "Samoan," "Other Pacific Islander," "Mexican," "Mexican-American," "Chicano," "Puerto Rican," "Cuban," "Other Spanish/Hispanic/Latino," or "other," as the case may be. The certificate shall be filled out and signed by the minister, officer, or other authorized individual celebrating the marriage, and also be signed by two witnesses present at the marriage, who shall add to their names their place of residence, as follows:

I, N.O., an ordained or authorized minister or other authorized individual of (here state to what religious denomination, or magistrate, as the case may be), united in matrimony (here name the parties), the parties licensed above, on the ______ day of ____________, ______, at the house of P.R., in (here name the town, if any, the township and county), according to law.

_______________ N.O.

Witness present at the marriage:
S.T., of (here give residence).
(1871-2, c. 193, s. 6; Code, s. 1815; 1899, c. 541, ss. 1, 2; Rev., s. 2089; 1909, c. 704, s. 3; 1917, c. 38; C.S., s. 2502; 1953, c. 638, s. 2; 1967, c. 957, s. 7; 1971, c. 1072; c. 1185, s. 27; 1999-456, s. 59; 2001-62, s. 11.)

Local Modification. — Bladen: 1941, c. 95.

Editor's Note. — Session Laws 2001-62, s. 16, provides: "The Administrative Office of the Courts shall develop any and all forms necessary for carrying out the purpose of this act and distribute them to the Office of the Clerk of Superior Court in each county."

CASE NOTES

License Not Issued Until Filled Out. — A blank marriage license, though signed by the register of deeds, is not issued until it is filled out and handed to the person who is to be married, or to someone for him, and if at the time of such issuance the register has become functus officio, the failure to record it does not render him liable to the penalty imposed by G.S. 51-18 and 51-19 for failure to record the substance of each marriage license issued. Maggett v. Roberts, 112 N.C. 71, 16 S.E. 919 (1893).

Cited in Swann v. Charlotte-Mecklenburg Bd. of Educ., 318 F. Supp. 786 (W.D.N.C. 1970).

§ 51-16.1. Form of license for Address Confidentiality Program participant.

If a person submits to the local register of deeds a current and valid Address Confidentiality Program authorization card issued pursuant to the provisions of Chapter 15C of the General Statutes, the local register of deeds shall use the substitute address designated by the Address Confidentiality Program when creating a new marriage license. (2002-171, s. 3.)

§ 51-17. Penalty for issuing license unlawfully.

Every register of deeds who knowingly or without reasonable inquiry, personally or by deputy, issues a license for the marriage of any two persons to which there is any lawful impediment, or where either of the persons is under the age of 18 years, without the consent required by law, shall forfeit and pay two hundred dollars ($200.00) to any parent, guardian, or other person standing in loco parentis, who sues for the same: Provided, that requiring a party to a proposed marriage to present a certified copy of his or her birth certificate, or a certified copy of his or her birth record in the form of a birth registration card as provided in G.S. 130-102, in accordance with the provisions of G.S. 51-8, shall be considered a reasonable inquiry into the matter of the age of such party. (R.C., c. 68, s. 13; 1871-2, c. 193, s. 7; Code, s. 1816; 1895, c. 387; 1901, c. 722; Rev., s. 2090; C.S., s. 2503; 1957, c. 506, s. 2.)

Editor's Note. — Section 130-102, referred to in this section, was repealed by Session Laws 1983, c. 891, s. 1, effective January 1, 1984. As to birth registration, see now G.S. 130A-101 et seq.

CASE NOTES

I. In General.
II. Action for Penalty.

I. IN GENERAL.

Editor's Note. — *Section 51-8 and this section have generally been construed together, as they relate to the same subject. Therefore, the cases decided under both sections have been treated in the note to this section.*

Purpose. — The statute is a wise and beneficent one, the object being to prevent hasty and improvident marriages. Joyner v. Harris, 157 N.C. 295, 72 S.E. 970 (1911). See also Trolinger v. Boroughs, 133 N.C. 312, 45 S.E. 662 (1903); Gray v. Lentz, 173 N.C. 346, 91 S.E. 1024 (1917).

The statute is remedial in its nature. Gray v. Lentz, 173 N.C. 346, 91 S.E. 1024 (1917).

This section and § 51-8 are in pari materia and should be construed together. Bowles v. Cochran, 93 N.C. 398 (1885); Joyner v. Harris, 157 N.C. 295, 72 S.E. 970 (1911); Gray v. Lentz, 173 N.C. 346, 91 S.E. 1024 (1917).

Duties of Register Are Highly Important. — The duties of the register of deeds in issuing marriage licenses are most important and solemn. He must exercise them carefully and conscientiously, and not as a mere matter of form. Agent v. Willis, 124 N.C. 29, 32 S.E. 322 (1899); Trolinger v. Boroughs, 133 N.C. 312, 45 S.E. 662 (1903); Julian v. Daniels, 175 N.C. 549, 95 S.E. 907 (1918).

Duties Cannot Be Delegated. — A register of deeds cannot delegate to another the duty of making the required reasonable inquiry into the legal competency of persons applying for a license to marry. Cole v. Laws, 108 N.C. 185, 12 S.E. 985 (1891).

Inquiry by Deputy Will Not Excuse Register. — If a party to a marriage is under the age authorized by law, the register cannot excuse himself from liability because his deputy or agent made proper inquiry, if he did not make the inquiry himself. The trust is personal to him. Maggett v. Roberts, 112 N.C. 71, 16 S.E. 919 (1893).

Delivery of License to Third Party Prohibited. — The register is not authorized to permit the completed license to pass from the office and beyond his control into the hands of any applicant acting for a party to the proposed marriage. Coley v. Lewis, 91 N.C. 21 (1884).

Where the register delivered a license complete in form to one with instructions not to give it to the parties until the mother's consent in writing was given, and the license was never presented to the mother nor was her consent obtained, but the marriage ceremony was performed under it, it was held that the register was liable to the penalty. Coley v. Lewis, 91 N.C. 21 (1884).

"Reasonable Inquiry". — By reasonable inquiry is meant such inquiry as renders it probable that no impediment to the marriage exists. Bowles v. Cochran, 93 N.C. 398 (1885).

It would seem that "reasonable inquiry" involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register. This is the rule upon which banks act in paying checks, and surely in the matter of such grave importance as issuing a marriage license the register should not be excused upon a less degree of care. Trolinger v. Boroughs, 133 N.C. 312, 45 S.E. 662 (1903); Furr v. Johnson, 140 N.C. 157, 52 S.E. 664 (1905); Joyner v. Harris, 157 N.C. 295, 72 S.E. 970 (1911); Gray v. Lentz, 173 N.C. 346, 91 S.E. 1024 (1917).

The requirement of reasonable inquiry is not merely a formal matter, which is met by taking the oaths of the husband or other parties unknown to the register, but it is expressive of a sound principle of public policy designed to protect immature persons from hasty and ill-advised marriages, made without the consent of their parents or guardians or those properly having the care over them. Julian v. Daniels, 175 N.C. 549, 95 S.E. 907 (1918).

Reasonable Inquiry Precludes Liability. — The register is not liable to the penalty when he has made reasonable inquiry and has been deceived, without laches on his part. Williams v. Hodges, 101 N.C. 300, 7 S.E. 786 (1888); Cole v. Laws, 104 N.C. 651, 10 S.E. 172 (1889); Agent v. Willis, 124 N.C. 29, 32 S.E. 322 (1899); Laney v. Mackey, 144 N.C. 630, 57 S.E. 386 (1907); Gray v. Lentz, 173 N.C. 346, 91 S.E. 1024 (1917).

Examination under Oath Discretionary. — Section 51-8 does not require that the register shall make inquiry by examination of the applicant under oath, but merely declares that he shall have "the power to do so." His using, or failing to use, such discretionary power is merely a circumstance to be considered by the jury. Furr v. Johnson, 140 N.C. 157, 52 S.E. 664 (1905); Joyner v. Harris, 157 N.C. 295, 72 S.E. 970 (1911).

Sworn Statements of Unknown Persons Insufficient. — It is not sufficient that the register takes the sworn statements of the parties or their friends not known to him. Snipes v. Wood, 179 N.C. 349, 102 S.E. 619 (1920).

Instances of Reasonable Inquiry. — When a reliable man of good character applied for a license, and produced to the register a written statement purporting to give to age of the female as over 18 years, and also the name and residence of the parents, and the person producing the statement said it was true, though no name was signed to it, it was held that the register had made such inquiry as was required of him, and was not liable for the penalty. Bowles v. Cochran, 93 N.C. 398 (1885).

For other cases where inquiry was held reasonable, see Walker v. Adams, 109 N.C. 481, 13 S.E. 907 (1891); Harcum v. Marsh, 130 N.C. 154, 41 S.E. 6 (1902).

Instances of Lack of Reasonable Inquiry. — When the register issued a license for the marriage of a woman under 18 years of age, without the assent of her parents, upon the application of one of whose general character for reliability he was ignorant, and who falsely stated the age of the woman, without making any further inquiry as to his sources of information, it was held that he had not made such reasonable inquiry into the facts as the law required, and he incurred the penalty for the neglect of his duty in that respect. Cole v. Laws, 104 N.C. 651, 10 S.E. 172 (1889).

To the same effect are the following cases: Williams v. Hodges, 101 N.C. 300, 7 S.E. 786 (1888); Trolinger v. Boroughs, 133 N.C. 312, 45 S.E. 662 (1903); Morrison v. Teague, 143 N.C. 186, 55 S.E. 521 (1906); Laney v. Mackey, 144 N.C. 630, 57 S.E. 386 (1907); Joyner v. Harris, 157 N.C. 295, 72 S.E. 970 (1911); Julian v. Daniels, 175 N.C. 549, 95 S.E. 907 (1918); Snipes v. Wood, 179 N.C. 349, 102 S.E. 619 (1920).

Written Consent Prerequisite to Issuance of Certain Licenses. — A register of deeds is not permitted to issue a marriage license where one of the parties is under 18 years of age, until the consent in writing of the person under whose charge he or she is shall be delivered to the register. The written consent is a condition precedent to the issuance of the license. Coley v. Lewis, 91 N.C. 21 (1884).

As to requirement under former law of consent of father, if living, see Littleton v. Haar, 158 N.C. 566, 74 S.E. 12 (1912); Owens v. Munden, 168 N.C. 266, 84 S.E. 257 (1915).

The word "father" used in the former statute did not include "stepfather," and the written consent of the mother, the father being dead, would authorize the issuing of the license. Owens v. Munden, 168 N.C. 266, 84 S.E. 257 (1915).

Violation of Section. — Issuance of a marriage license by a register of deeds in violation of the section is not an indictable offense, unless the illegal act is done mala fide. State v. Snuggs, 85 N.C. 541 (1881).

II. ACTION FOR PENALTY.

As to jurisdiction, see Joyner v. Roberts, 112 N.C. 111, 16 S.E. 917 (1893); Dixon v. Haar, 158 N.C. 341, 74 S.E. 1 (1912).

Venue. — An action for the penalty under this section should be tried in the county wherein the cause of action arises, and if brought in the wrong county, it should be removed and not dismissed. Dixon v. Haar, 158 N.C. 341, 74 S.E. 1 (1912).

Effect of Register's Death. — Under former G.S. 1-74, it was held that an action for a penalty against a register of deeds and the surety on his official bond abated on the death of the officer. Wallace v. McPherson, 139 N.C. 297, 51 S.E. 897 (1905). For present provisions as to abatement of actions, see § 1A-1, Rule 25.

Allegations in Complaint. — In an action under this section, it is essential that the complaint should allege that the register issued the license knowingly or without reasonable inquiry. Maggett v. Roberts, 108 N.C. 174, 12 S.E. 890 (1891).

Burden of Proof. — The burden of proof is upon the plaintiff to show that the officer issued the license when he knew of the impediment to the marriage, or that it was forbidden by the law, or when he had not made reasonable inquiry. Trolinger v. Boroughs, 133 N.C. 312, 45 S.E. 662 (1903); Furr v. Johnson, 140 N.C. 157, 52 S.E. 664 (1905); Joyner v. Harris, 157 N.C. 295, 72 S.E. 970 (1911).

Presumption as to Time of Issuance. — The presumption is that a marriage license, signed by a register of deeds, was issued during his term of office. The burden of proving the contrary is on the party asserting it. Maggett v. Roberts, 112 N.C. 71, 16 S.E. 919 (1893).

Evidence. — In a civil suit against a register, evidence of nolo contendere pleaded by the husband in a criminal action was not admissible. Snipes v. Wood, 179 N.C. 349, 102 S.E. 619 (1920).

Proof of the officer's failure to administer the oath to the applicant for the license is admissible to show a lack of reasonable inquiry. Laney v. Mackey, 144 N.C. 630, 57 S.E. 386 (1907).

The testimony of a witness as to the age of the woman, depending solely upon her statements to him which he repeated to the register when the license was applied for, was not substantive evidence of her age. Joyner v. Harris, 157 N.C. 295, 72 S.E. 970 (1911).

"Reasonable Inquiry" as Question of Law. — It is well-settled that the facts being admitted or found by the jury, the question as to what is "reasonable inquiry" is one of law for the court. Joyner v. Roberts, 114 N.C. 389, 19 S.E. 645 (1894); Trolinger v. Boroughs, 133 N.C. 312, 45 S.E. 662 (1903); Julian v. Daniels, 175 N.C. 549, 95 S.E. 907 (1918); Snipes v. Wood, 179 N.C. 349, 102 S.E. 619 (1920).

"Reasonable Inquiry" as Question for Jury. — Where there is a conflict of evidence, whether there has been "reasonable inquiry" is to be submitted to the jury upon all the evidence under proper instructions. Joyner v. Roberts, 114 N.C. 389, 19 S.E. 645 (1894); Harcum v. Marsh, 130 N.C. 154, 41 S.E. 6 (1902); Furr v. Johnson, 140 N.C. 157, 52 S.E. 664 (1905).

The fact that the register administered an oath to the applicant and his friend did not, of itself, exonerate him. He was permitted by the statute to do so, so that he might better elicit the facts, and his doing so or failing to do so would be but a circumstance for the jury to consider. Gray v. Lentz, 173 N.C. 346, 91 S.E. 1024 (1917).

If the evidence is conflicting as to the reasonableness of the inquiry made by the register, the question should be submitted to the jury, and a judgment as of nonsuit thereon is erroneously entered. Lemmons v. Sigman, 181 N.C. 238, 106 S.E. 764 (1921).

Instructions. — If the facts are admitted, it is the duty of the court to instruct the jury whether they are sufficient to constitute "reasonable inquiry"; if they are in controversy, it is the duty of the court to instruct the jury that certain facts to be determined from the evidence do or do not constitute "reasonable inquiry." Spencer v. Saunders, 189 N.C. 183, 126 S.E. 420 (1925).

§ 51-18. Record of licenses and returns; originals filed.

The register of deeds shall maintain a separate index for marriage licenses and returns thereto. Each marriage license shall be indexed alphabetically according to the name of the proposed husband and proposed wife. Each index entry shall include, but not be limited to, the full name of the intended husband and wife, the date the marriage ceremony was performed, and the location of the original license and the return thereon. The original license and return shall be filed and preserved. (1871-2, c. 193, s. 9; Code, s. 1818; 1899, c. 541, s. 3; Rev., s. 2091; C.S., s. 2504; 1963, c. 429; 1967, c. 957, s. 8; 1979, c. 636, s. 1; 1983, c. 699, s. 2.)

§ 51-18.1. Correction of errors in application or license; amendment of names in application or license.

(a) When it shall appear to the register of deeds of any county in this State that information is incorrectly stated on an application for a marriage license, or upon a marriage license issued thereunder, or upon a return or certificate of an officiating officer, the register of deeds is authorized to correct such record or records upon being furnished with an affidavit signed by one or both of the applicants for the marriage license, accompanied by affidavits of at least two other persons who know the correct information.

(b) When the name of a party to a marriage has been changed by court order as a result of a legitimation action or other cause of action, and the party whose name is changed presents a signed affidavit to the register of deeds indicating the name change and requesting that the application for a marriage license, the marriage license, and the marriage certificate of the officiating officer be amended by substituting the changed name for the original name, the register of deeds may amend the records as requested by the party, provided the other party named in the records consents to the amendment. (1953, c. 797; 1959, c. 344; 1987, c. 576; 2001-62, s. 12.)

Editor's Note. — Session Laws 2001-62, s. 16, provides: "The Administrative Office of the Courts shall develop any and all forms necessary for carrying out the purpose of this act and distribute them to the Office of the Clerk of Superior Court in each county."

§ 51-19. Penalty for failure to record.

Any register of deeds who fails to record, in the manner above prescribed, the substance of any marriage license issued by him, or who fails to record, in the manner above prescribed, the substance of any return made thereon, within 10 days after such return made, shall forfeit and pay two hundred dollars ($200.00) to any person who sues for the same. (1871-2, c. 193, s. 10; Code, s. 1819; Rev., s. 2092; C.S., s. 2505.)

CASE NOTES

Jurisdiction. — A plaintiff may unite several causes of action for several penalties against the same party, in the same complaint, and if the aggregate amount thereof exceeds the requisite amount, the superior court will have jurisdiction. Maggett v. Roberts, 108 N.C. 174, 12 S.E. 890 (1891).

The penalty given by this section is in the alternative, either for failure to record the substance of the license issued or for failure to record the substance of the return. Maggett v. Roberts, 108 N.C. 174, 12 S.E. 890 (1891).

Prosecution in Name of Person Suing for Penalty. — An action against a register of deeds to recover the penalties imposed for failure to comply with the provisions of the statute in relation to issuing marriage licenses under this section must be prosecuted in the name of the person who sues therefor, and not in the name of the State. Maggett v. Roberts, 108 N.C. 174, 12 S.E. 890 (1891).

No Penalty for Not Recording Invalid License. — If the filling up and handing of the paper previously signed to the party proposing to be married was done not by the register but by an agent, and at the time the register was functus officio, the paper would be equally invalid because lacking the signature of a de facto register, and there could be no penalty for not recording it. Maggett v. Roberts, 112 N.C. 71, 16 S.E. 919 (1893).

A statute relieving the register from the penalty imposed by this section, passed after an action was brought to recover the penalty, but before judgment, was held constitutional. Bray v. Williams, 137 N.C. 387, 49 S.E. 887 (1905).

§ 51-20: Repealed by Session Laws 1969, c. 80, s. 6.

§ 51-21. Issuance of delayed marriage certificates.

In all those cases where a minister or other person authorized by law to perform marriage ceremonies has failed to file his return thereof in the office of the register of deeds who issued the license for such marriage, the register of deeds of such county is authorized to issue a delayed marriage certificate upon being furnished with one or more of the following:

(1) The affidavit of at least two witnesses to the marriage ceremony;

(2) The affidavit of one or both parties to the marriage, accompanied by the affidavit of at least one witness to the marriage ceremony;

(3) The affidavit of the minister or other person authorized by law who performed the marriage ceremony, accompanied by the affidavit of one or more witnesses to the ceremony or one of the parties thereto.

(4) When proof as required by the three methods set forth in subdivisions (1), (2), and (3) above is not available with respect to any marriage alleged to have been performed prior to January 1, 1935, the register of deeds is authorized to accept the affidavit of any one of the persons named in subdivisions (1), (2), and (3) and in addition thereto such other proof in writing as he may deem sufficient to establish the marriage and any facts relating thereto; provided, however, that if the evidence offered under this paragraph is insufficient to convince the register of deeds that the marriage ceremony took place, or any of the pertinent facts relating thereto, the applicants may bring a special proceeding before the clerk of superior court of the county in which the purported marriage ceremony took place. The said clerk of the superior court is authorized to hear the evidence and make findings as to whether or not the purported ceremony took place and as to any pertinent facts relating thereto. If the clerk finds that the marriage did take place as alleged, he is to certify such findings to the register of deeds who is to then issue a delayed marriage certificate in accordance with the provisions of this section.

The certificate issued by the register of deeds under authority of this section shall contain the date of the delayed filing, the date the marriage ceremony was actually performed, and all such certificates issued pursuant to this section shall have the same evidentiary value as any other marriage certificates issued pursuant to law. (1951, c. 1224; 1955, c. 246; 1967, c. 957, s. 10; 1969, c. 80, s. 12.)

The certificate issued by the register of deeds under authority of this section shall contain the date of the delayed filing, the date the marriage ceremony was actually performed, and all such certificates issued pursuant to this section shall have the same evidentiary value as any other marriage certificates issued pursuant to law. (1953, c. 224; 1955, c. 246; 1967, c. 957, s. 10; 1969, c. 80, s. 12.)

Jurisdiction. — A plaintiff may unite several causes of action for several penalties against the same party in the same complaint, and if the aggregate amount claimed exceeds the requisite amount, the superior court will have jurisdiction. Maggett v. Roberts, 108 N.C. 174, 12 S.E. 890 (1891).

The penalty given by this section is in the alternative, either for failure to record the substance of the license issued or for failure to record the substance of the return. Maggett v. Roberts, 108 N.C. 174, 12 S.E. 890 (1891).

Prosecutions by Name of Person Suing for Penalty. — An action against a register of deeds to recover the penalties imposed for failing to comply with the provisions of this statute in relation to issuing marriage licenses must [illegible] be prosecuted in the name of the person who sues therefor, and not in the name of the State. Maggett v. Roberts, 108 N.C. 174, 12 S.E. 890 (1891).

No Penalty for Not Recording Invalid License. — If the filling up and handing of the paper previously signed to the party proposing to be married was done not by the register but by an agent, and at the time the register was absent from office, the paper would be equally invalid because lacking the signature of a de facto register, and there could be no penalty for not recording it. Maggett v. Roberts, 112 N.C. 71, 16 S.E. 919 (1893).

A statute relieving the register from the penalty imposed by this section, passed after an action was brought to recover the penalty, but before judgment, was held constitutional. Gray v. Williams, 137 N.C. 287, 49 S.E. 807 (1905).

§ 51-20. Repealed by Session Laws 1969, c. 80, s. 9.

§ 51-21. Issuance of delayed marriage certificates.

In all those cases where a minister or other person authorized by law to perform marriage ceremonies has failed to file his return thereof in the office of the register of deeds who issued the license for such marriage, the register of deeds of such county is authorized to issue a delayed marriage certificate upon being furnished with one or more of the following:

(1) The affidavit of at least two witnesses to the marriage ceremony;

(2) The affidavit of one or both parties to the marriage, accompanied by the affidavit of at least one witness to the marriage ceremony;

(3) The affidavit of the minister or other person authorized by law who performed the marriage ceremony, accompanied by the affidavit of one or more witnesses to the ceremony or one of the parties thereto.

(4) When proof as required by the three methods set forth in subdivisions (1), (2), and (3) above is not available with respect to any marriage alleged to have been performed prior to January 1, 1955, the register of deeds is authorized to accept the affidavit of any one of the persons named in subdivisions (1), (2), and (3) and in addition thereto such other proof in writing as he may deem sufficient to establish the marriage and any facts relating thereto; provided, however, that if the evidence offered under this paragraph is insufficient to convince the register of deeds that the marriage ceremony took place, or any of the pertinent facts relating thereto, the applicants may bring a special proceeding before the clerk of superior court of the county in which the purported marriage ceremony took place. The said clerk of the superior court is authorized to hear the evidence and make findings as to whether or not the purported ceremony took place and as to any pertinent facts relating thereto. If the clerk finds that the marriage did take place as alleged, he is to certify such findings to the register of deeds who is to then issue a delayed marriage certificate in accordance with the provisions of this section.

Chapter 52.

Powers and Liabilities of Married Persons.

Sec.
52-1. Property of married persons secured.
52-2. Capacity to contract.
52-3. Married person may insure spouse's life.
52-4. Earnings and damages.
52-5. Torts between husband and wife.
52-5.1. Tort actions between husband and wife arising out of acts occurring outside State.
52-6. [Repealed.]
52-7. Validation of certificates of notaries public as to contracts or conveyances between husband and wife.
52-8. Validation of contracts failing to comply with provisions of former § 52-6.
Sec.
52-9. Effect of absolute divorce decree on certificate failing to comply with former § 52-6.
52-10. Contracts between husband and wife generally; releases.
52-10.1. Separation agreements.
52-10.2. Resumption of marital relations defined.
52-11. Antenuptial contracts and torts.
52-12. Postnuptial crimes and torts.
52-13. Procedures in causes of action for alienation of affection and criminal conversation.

§ 52-1. Property of married persons secured.

The real and personal property of any married person in this State, acquired before marriage or to which he or she may after marriage become in any manner entitled, shall be and remain the sole and separate estate and property of such married person and may be devised, bequeathed and conveyed by such married person subject to G.S. 50-20 and such other regulations and limitations as the General Assembly may prescribe. (Const., Art. X, s. 6; Rev., s. 2093; C.S., s. 2506; 1965, c. 878, s. 1; 1981, c. 815, s. 3.)

Cross References. — For constitutional provision as to property of married women, see N.C. Const., Art. X, § 4. As to conveyances by husband and wife, see G.S. 39-7 et seq. As to contracts of married persons, see G.S. 52-2.

Editor's Note. — Session Laws 1965, c. 878, s. 1, repealed and rewrote Chapter 52 of the General Statutes. Where present provisions are similar to prior statutory provisions, the historical citations from the former sections have been added to the new sections. Former G.S. 52-1 applied to married women only.

Annotations to present Chapter 52 construing provisions of the former Chapter have been retained where it is thought they will be helpful.

Legal Periodicals. — For comment on the enforceability of marital contracts, see 47 N.C.L. Rev. 815 (1969).

For comment on the tax effects of equitable distribution upon divorce, see 18 Wake Forest L. Rev. 555 (1982).

CASE NOTES

Editor's Note. — *Most of the cases below were decided under former statutory provisions relating to the property of married women.*

History. — For a discussion of the history of this legislation and of many of the earlier cases construing it, see Ball v. Paquin, 140 N.C. 83, 52 S.E. 410 (1905).

Common Law. — At common law, marriage was an absolute gift to the husband of all the personal property of the wife in possession, and the same became his property instantly on the marriage; and it was a qualified gift of all the personal property adversely held, and all the choses in action of the wife, which became the husband's absolutely upon his reduction of the same into possession, during coverture, with the right in case the wife died to administer on her estate, and in that character to collect, and after payment of her debts to hold the surplus to his own use, without obligation to distribute to anyone. O'Connor v. Harris, 81 N.C. 279 (1879).

At common law it was competent to the husband having choses in action "jure mariti" to assign the same for value, or as a security to pay his debts, and the assignment availed to pass the right to the assignee to collect and have the proceeds as his absolute property, if collected during coverture, just as the husband might have done if he had kept and reduced it into possession himself. O'Connor v. Harris, 81 N.C. 279 (1879).

The legislature may abolish all the incapacities of married women, and give them full power to contract as femes sole. Pippen v. Wesson, 74 N.C. 437 (1876).

Chapter Abridges Common-Law Rights of Husband. — The provisions of this Chapter, insofar as the husband is concerned, constitute in the main abridgements of rights he had as to his wife's property under the common law, and do not purport to create in him, as against her, rights he did not have at common law. Scholtens v. Scholtens, 230 N.C. 149, 52 S.E.2d 350 (1949).

Section Applies to Property Not Secured to Wife by Act of Parties. — This section does not apply to cases where the property is secured to the wife by marriage settlement or deed of gift or will. The property is thereby secured to her by act of the parties. The object of the section is to secure the property to the wife by act of law when it has not been done by act of the parties, who may make restrictions and limitations over. Cooper v. Landis, 75 N.C. 526 (1876).

Vested Rights Protected. — Where a husband's right to receive and appropriate to his own use his wife's distributive share in her mother's estate was vested under the law then in force, no subsequent legislation could deprive him of it without his consent. Morris v. Morris, 94 N.C. 613 (1886).

Husband Without Vested Interest in Wife's Real Property. — The real property of the wife, whether acquired before or after marriage, remains her sole and separate property under N.C. Const., Art. X, § 4, and therein the husband has no vested interest. Vann v. Edwards, 135 N.C. 661, 47 S.E. 784 (1904); Kilpatrick v. Kilpatrick, 176 N.C. 182, 96 S.E. 988 (1918).

Wife May Hold Legal as Well as Equitable Estate. — Since the adoption of the Constitution of 1868, a married woman has or can have the legal as well as the equitable estate. Sanderlin v. Sanderlin, 122 N.C. 1, 29 S.E. 55 (1898).

Prior to the adoption of the Constitution of 1868 it was held that deeds by which property was conveyed to a trustee for the sole and separate use of a married woman created an active trust in the trustee, and this was held because otherwise the statute would execute the use, and the husband would, as husband, become vested with rights in and control over his wife's property. But by the Constitution of 1868, as declared in Walker v. Long, 109 N.C. 510, 14 S.E. 299, 1891, the wife's property was rendered secure to her, and not subject to the control of, or to the debts or obligations of, her husband. Thus, it was no longer necessary to invoke the fiction of the law in order to protect the wife's property from the husband or his creditors in deeds made subsequent to the adoption of that Constitution. Freeman v. Lide, 176 N.C. 434, 97 S.E. 402 (1918). See also Pippen v. Wesson, 74 N.C. 437 (1876).

Conveyance of Separate Property. — Where a married person conveys separate property without permission or joinder of the spouse and the non-owner spouse survives the owner spouse, the conveyed property is subject to the non-owner spouse's elective life estate. Melvin v. Mills-Melvin, 126 N.C. App. 543, 486 S.E.2d 84 (1997).

Disposition of Personalty. — There is no restriction whatever upon the right of a married woman to dispose of her personalty as fully and freely as if she had remained unmarried, either in the Constitution or by any statute. Vann v. Edwards, 135 N.C. 661, 47 S.E. 784 (1904); Ball v. Paquin, 140 N.C. 83, 52 S.E. 410 (1905); Rea v. Rea, 156 N.C. 529, 72 S.E. 873 (1911).

Money from Sale of Wife's Realty. — Money received by the husband from a sale of the wife's lands before the adoption of the Constitution in 1868 belonged to him absolutely, unless at the time he received it he agreed to invest it for her in some other way. But if the wife acquired the title and the marriage occurred prior to 1868, and the sale was made subsequent to that time, the proceeds would be her separate estate; and if the husband purchased other lands with such proceeds and took title in his own name, in the absence of any special agreement to the contrary, he would become a trustee for her. Kirkpatrick v. Holmes, 108 N.C. 206, 12 S.E. 1037 (1891).

Mechanic's Lien on Married Woman's Property. — For all debts contracted for work and labor done, a lien is given upon the property of a married woman. Ball v. Paquin, 140 N.C. 83, 52 S.E. 410 (1905).

Presumption as to Property Delivered to Husband. — Under the change made in the law of married women's property rights by this section and N.C. Const., Art. X, § 4, where a married woman receives checks from her parents as personal gifts to her, which she endorses and delivers to her husband, there is a presumption that he receives the money in trust for her, and in the absence of evidence that it was a gift, she may recover the same in her action against him, or, after his death, against his personal representative. Etheredge v. Cochran, 196 N.C. 681, 146 S.E. 711 (1929).

Statute of Limitations. — Since a wife may now maintain an action without the joinder of her husband, when it concerns her separate property, and against her husband when it is between the husband and wife, and there is no exception in favor of the wife when she holds a claim against him, the statute of limitation will run against a note thus held by her. Graves v.

Howard, 159 N.C. 594, 75 S.E. 998 (1912). See § 1-18.

Cited in Heller v. Heller, 7 N.C. App. 120, 171 S.E.2d 335 (1969).

§ 52-2. Capacity to contract.

Subject to the provisions of G.S. 52-10 or 52-10.1, G.S. 39-7 and other regulations and limitations now or hereafter prescribed by the General Assembly, every married person is authorized to contract and deal so as to affect his or her real and personal property in the same manner and with the same effect as if he or she were unmarried. (1871-2, c. 193, s. 17; Code, s. 1826; Rev., s. 2094; 1911, c. 109; C.S., s. 2507; 1945, c. 73, s. 16; 1965, c. 878, s. 1; 1977, c. 375, s. 13.)

Cross References. — As to conveyances by husband and wife, see G.S. 39-7 et seq. As to repeal of laws requiring private examination of married women, see G.S. 47-14.1.

Editor's Note. — Former G.S. 52-2 applied to married women only.

Laws 1871-1872, c. 193, s. 17, known as the Marriage Act, was the first legislation directly regulating the power of a married woman to make contracts. It seems that the only change made by this act was that the consent of the husband in writing was required in order to allow her to charge her separate estate. See Arrington v. Bell, 94 N.C. 247 (1886). However, a subsequent statute, known as the Martin Act, was passed March 6, 1911, and entirely changed the law. See 13 N.C.L. Rev. 62. The present section, except insofar as it is not limited to married women, is similar to the Martin Act.

Legal Periodicals. — For note on right of husband to recover medical expenses of wife from tort-feasor, see 37 N.C.L. Rev. 82 (1958).

For comment on the enforceability of marital contracts, see 47 N.C.L. Rev. 815 (1969).

For note on the presumption of a wife's gratuitous services, see 16 Wake Forest L. Rev. 235 (1980).

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the state in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

For article, "A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?," see 18 Campbell L. Rev. 203 (1996).

CASE NOTES

I. In General.
II. Decisions Under Former Law.
  A. Generally.
  B. Powers Conferred.
  C. Liabilities Incurred.
  D. Remedies for Breach.

I. IN GENERAL.

The trust relationship existing between the parties may be revealed to alter the otherwise absolute obligation of the signers. Grimes v. Grimes, 47 N.C. App. 353, 267 S.E.2d 372 (1980).

Where wife executes a promissory note as a comaker, she is primarily liable thereunder. Grimes v. Grimes, 47 N.C. App. 353, 267 S.E.2d 372 (1980).

Comaker's right to contribution is unaffected by the marital relationship of the parties to a note. Grimes v. Grimes, 47 N.C. App. 353, 267 S.E.2d 372 (1980).

Wife is liable for necessary medical expenses provided for husband. North Carolina Baptist Hosps. v. Harris, 319 N.C. 347, 354 S.E.2d 471 (1987).

Conveyance of Separate Property. — Where a married person conveys separate property without permission or joinder of the spouse and the non-owner spouse survives the owner spouse, the conveyed property is subject to the non-owner spouse's elective life estate. Melvin v. Mills-Melvin, 126 N.C. App. 543, 486 S.E.2d 84 (1997).

Cited in United States v. Yazell, 382 U.S. 341, 86 S. Ct. 500, 15 L. Ed. 2d 404 (1966); Heller v. Heller, 7 N.C. App. 120, 171 S.E.2d 335 (1969).

II. DECISIONS UNDER FORMER LAW.

A. Generally.

Editor's Note. *— The cases below were decided under former statutory provisions relat-*

ing to the capacity of married women to contract.

Common Law. — At common law, the contract of a married woman was void, but it was held in equity that she might have an estate settled to her separate use, and that although she had no power to bind herself personally, she might with the concurrence of the trustee specifically charge her separate estate, and the courts of equity would enforce the charge against the property. But her contracts, in order to create a charge, had to refer expressly, or by necessary implication, to the separate estate as a means of payment, this being in the nature of an appointment or appropriation. Frazier v. Brownlow, 38 N.C. 237 (1844); Knox v. Jordan, 58 N.C. 175 (1859); Pippen v. Wesson, 74 N.C. 437 (1876); Sanderlin v. Sanderlin, 122 N.C. 1, 29 S.E. 55 (1898).

The common-law rule continued to be the law in this State until the adoption of the Constitution of 1868. Pippen v. Wesson, 74 N.C. 437 (1876).

Legislature Has Power to Remove Restraints. — The restraints upon a married woman's power to contract rest upon statute, not upon the Constitution, and of course can be removed by statute. There is no prohibition upon the legislature to do so, and indeed the Supreme Court in many instances has indicated to the legislature that justice might be facilitated by more liberal legislation in that regard. Finger v. Hunter, 130 N.C. 529, 41 S.E. 890 (1902).

This section operated prospectively and did not apply to contracts made prior to its adoption. Stephens v. Hicks, 156 N.C. 239, 72 S.E. 313 (1911).

Section Does Not Apply to Estates Held by the Entirety. — The doctrine of title by entireties between husband and wife as it existed at common law remains unchanged by statute in this State. And this section has been construed in Jones v. Smith, 149 N.C. 318, 62 S.E. 1092 (1908), as not affecting estates held by husband and wife as tenants by the entirety. Davis v. Bass, 188 N.C. 200, 124 S.E. 566 (1924); In re City of Durham Annexation Ordinance No. 5791, 66 N.C. App. 472, 311 S.E.2d 898 (1984).

Statute providing that earnings and damages from personal injury are wife's property (see now G.S. 52-4) should be read in light of this section. Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945), overruled on other grounds, Nicholson v. Hugh Chatham Mem. Hosp., 300 N.C. 295, 266 S.E.2d 818 (1980).

B. Powers Conferred.

Married Women Made Sui Juris. — The effect of the Martin Act was to take married women out of the classification which the law recognized, prior to its enactment, and to make them, with respect to capacity to contract, sui juris. Lipinsky v. Revell, 167 N.C. 508, 83 S.E. 820 (1914); Royal v. Southerland, 168 N.C. 405, 84 S.E. 708 (1915); Warren v. Dail, 170 N.C. 406, 87 S.E. 126 (1915); Thrash v. Ould, 172 N.C. 728, 90 S.E. 915 (1916); Satterwhite v. Gallagher, 173 N.C. 525, 92 S.E. 369 (1917); Dorsey v. Corbett, 190 N.C. 783, 130 S.E. 842 (1925); Tise v. Hicks, 191 N.C. 609, 132 S.E. 560 (1926); Taft v. Covington, 199 N.C. 51, 153 S.E. 597 (1930). See Davis v. Cockman, 211 N.C. 630, 191 S.E. 322 (1937); Etheridge v. Wescott, 244 N.C. 637, 94 S.E.2d 846 (1956).

By virtue of this section, a married woman may make contracts affecting her personal and real property as though she were unmarried, except that the requirements of former G.S. 52-6 had to be met in contracts between her and her husband. Martin v. Bundy, 212 N.C. 437, 193 S.E. 831 (1937). See §§ 39-7 et seq., 52-6, and notes thereto.

This section should be held to mean what it plainly says, that, except as to contracts with her husband, in which the forms required by former G.S. 52-6 had to be observed, a married woman can now make any and all contracts so as to affect her real and personal property, in the same manner and to the same effect as if she were unmarried. Lipinsky v. Revell, 167 N.C. 508, 83 S.E. 820 (1914); Warren v. Dail, 170 N.C. 406, 87 S.E. 126 (1915); Everett v. Ballard, 174 N.C. 16, 93 S.E. 385 (1917); Taft v. Covington, 199 N.C. 51, 153 S.E. 597 (1930). See also, Davis v. Cockman, 211 N.C. 630, 191 S.E. 322 (1937); Cruthis v. Steele, 259 N.C. 701, 131 S.E.2d 344 (1963).

This section practically constitutes married women free traders as to all their ordinary dealings. Price v. Charlotte Elec. Ry., 160 N.C. 450, 76 S.E. 502 (1912); Croom v. Goldsboro Lumber Co., 182 N.C. 217, 108 S.E. 735 (1921).

Former § 52-6 Not Affected. — This section did not alter the effect of former G.S. 52-6, requiring certain findings and conclusions by the probate officer to accompany a conveyance of wife's lands directly to her husband, and wife's deed not probated accordingly was void. Singleton v. Cherry, 168 N.C. 402, 84 S.E. 698 (1916); Butler v. Butler, 169 N.C. 584, 86 S.E. 507 (1915).

Husband and Wife May Form Business Partnership. — This section has been held to vest the wife with the power to contract with the husband so as to create a business partnership. Eggleston v. Eggleston, 228 N.C. 668, 47 S.E.2d 243 (1948).

Oral Agreement to Hold Land in Trust for Husband. — A married woman is under no legal handicap which would prevent her from entering into an oral agreement with her husband to hold title to real estate for his benefit or for their joint benefit. Carlisle v. Carlisle, 225 N.C. 462, 35 S.E.2d 418 (1945).

C. Liabilities Incurred.

Liability for Breach of Contract. — When the legislature authorized a married woman to contract and deal so as to affect her real and personal property in the same manner, and with the same effect, as if she were unmarried, it authorized contracts for breach of which she would be liable as fully as if she had remained unmarried. Everett v. Ballard, 174 N.C. 16, 93 S.E. 385 (1917).

On a breach of a married woman's contract to convey her land, she may be held responsible in damages, as in other contracts by which she is properly bound. Warren v. Dail, 170 N.C. 406, 87 S.E. 126 (1915).

Under the former law it was held that a married woman whose husband was an alien and never visited or resided in the United States was personally liable on her contracts. Levi v. Marsha, 122 N.C. 565, 29 S.E. 832 (1898).

Liability of Wife Where Husband Acts as Her Agent. — Under this section, a wife may appoint her husband as her agent for doing in her behalf work which may be of such dangerous character as to be a menace to the safety of others, and is liable with him for his negligence. Richardson v. Libes, 188 N.C. 112, 123 S.E. 306 (1924).

Liability as Partner or Surety. — Since the passage of the Martin Act, a wife has been held liable jointly and severally on her contracts whenever a partner or a surety. Bristol Grocery Co. v. Bails, 177 N.C. 298, 98 S.E. 768 (1919).

Liability Where Wife Is Surety for Husband. — A wife, by becoming surety on the obligations of her husband, creates a direct and separate liability to the creditor of the husband which makes her personally responsible, under this section, without requiring the statutory formalities necessary to the validity of certain contracts made directly between the wife and her husband. Royal v. Southerland, 168 N.C. 405, 84 S.E. 708 (1915).

Estoppel. — Since, in this State, the common-law disabilities of a married woman to contract, with certain exceptions, have been removed, she is bound by an estoppel the same as any other person. Tripp v. Langston, 218 N.C. 295, 10 S.E.2d 916 (1940). See also, Builders' Sash & Door Co. v. Joyner, 182 N.C. 518, 109 S.E. 259 (1921), wherein the question whether the doctrine of title by estoppel applies to a married woman was raised but not decided; Cruthis v. Steele, 259 N.C. 701, 131 S.E.2d 344 (1963).

Husband Still Liable for Funeral Expenses and Necessaries. — The common-law rule that the husband is liable for the funeral expenses of his deceased wife and for "necessaries" during their married life is not affected by this section, when there is nothing to show an express promise to pay on her part, or that the articles were sold on her credit or under such circumstances as to make her exclusively or primarily liable according to the equitable principles of indebitatus assumpsit. Bowen v. Daugherty, 168 N.C. 242, 84 S.E. 265 (1915).

D. Remedies for Breach.

Specific Performance. — When a married woman makes an executory contract to convey land and the requirements of G.S. 39-7, regarding instruments affecting a married woman's title, are not complied with, she can only be held in damages, and specific performance may not be enforced. Warren v. Dail, 170 N.C. 406, 87 S.E. 126 (1915).

Judgment Against Wife as Surety for Husband. — In Royal v. Southerland, 168 N.C. 405, 84 S.E. 708 (1915), it was held that under this section a judgment could be rendered against a wife upon her obligation as surety to her husband. Thrash v. Ould, 172 N.C. 728, 90 S.E. 915 (1916).

Judgment Enforced by Execution. — It was held in Lipinsky v. Revell, 167 N.C. 508, 83 S.E. 820 (1914), that judgment could be rendered against a married woman upon her contracts and enforced by execution, though she had not specifically charged her property with payment thereof. Thrash v. Ould, 172 N.C. 728, 90 S.E. 915 (1916).

Wife May Claim Personal Property Exemption. — Under the provisions of N.C. Const., Art. X, § 1, and of this section, the wife could claim her personal property exemption from the assets of a partnership with her husband when the validity of the partnership contract was not questioned by them under the provisions of former G.S. 52-6, and each had consented that such exemption should be allowed to the other therefrom. Bristol Grocery Co. v. Bails, 177 N.C. 298, 98 S.E. 768 (1919).

§ 52-3. Married person may insure spouse's life.

Any married person in his or her own name, or in the name of a trustee with his assent, may cause to be insured for any definite time the life of his or her spouse, for his or her sole and separate use, and may dispose of the interest in the same by will. (Rev., s. 2099; C.S., s. 2512; 1965, c. 878, s. 1.)

Cross References. — As to right of an individual to insure his or her life for the benefit of spouse and children, see N.C. Const., Art. X, § 5.

Editor's Note. — Former G.S. 52-3 related to the capacity of a married woman to draw checks.

CASE NOTES

Insurable Interest in Spouse's Life. — This section does not create in a wife an insurable interest in the life of her husband. She has such an interest without the benefit of the section. Cook v. Bankers Life & Cas. Co., 329 N.C. 488, 406 S.E.2d 848 (1991).

Right to Insure Spouse's Life Without Consent. — This section gives married persons the right to insure their spouses' lives without their consent. Cook v. Bankers Life & Cas. Co., 329 N.C. 488, 406 S.E.2d 848 (1991), distinguishing Acme Mfg. Co. v. McCormick, 175 N.C. 277, 95 S.E. 555 (1918).

§ 52-4. Earnings and damages.

The earnings of a married person by virtue of any contract for his or her personal service, and any damages for personal injuries, or other tort sustained by either, can be recovered by such person suing alone, and such earnings or recovery shall be his or her sole and separate property. (1913, c. 13, s. 1; C.S., s. 2513; 1965, c. 878, s. 1.)

Cross References. — For constitutional provision as to property of married women, see N.C. Const., Art. X, § 4.

Editor's Note. — Former G.S. 52-4 related to husband's joinder in conveyance or lease of wife's land.

Legal Periodicals. — For comment on this section, see 29 N.C.L. Rev. 178 (1951).

For note on equitable distribution law as it relates to personal injury awards in divorce actions, see 65 N.C.L. Rev. 1332 (1987).

For note relating to revocation of the marital presumption and adoption of the analytic approach to the classification of personal injury settlements, in light of Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1986), see 22 Wake Forest L. Rev. 931 (1987).

For article, "A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?," see 18 Campbell L. Rev. 203 (1996).

CASE NOTES

Editor's Note. — *Most of the cases below were decided under former statutory provisions relating to married women.*

Basis of Section. — In the concurring opinion in Patterson v. Franklin, 168 N.C. 75, 84 S.E. 18 (1915), Clark, C.J., states that this section was passed as a result of the decision in Price v. Charlotte Elec. Co., 160 N.C. 450, 76 S.E. 502 (1912). To the same effect, see 301 N.C. 728, 274 S.E.2d 230 (1981).

This section is not inconsistent with or repugnant to § 50-20. Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1986).

This section governs legal interests in property during an ongoing marriage, while G.S. 50-20 governs its disposition after divorce. Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1986).

Section Read in Light of Constitution and § 52-2. — This section should be read in the light of N.C. Const., Art. X, § 4, which protects a married woman in the sole ownership of her property, and also in connection with G.S. 52-2, which seeks to secure to her the free use of her property. Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945), overruled on other grounds, Nicholson v. Hugh Chatham Mem. Hosp., 300 N.C. 295, 266 S.E.2d 818 (1980).

Husband Deprived of Former Rights. — By virtue of the statutes giving married women separate property rights and the right to sue for injuries, the husband is deprived of his former rights in his wife's property and choses in action. Hinnant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925), overruled on other grounds, Nicholson v. Hugh Chatham Mem. Hosp., 300 N.C. 295, 266 S.E.2d 818 (1980).

Marital Rights and Duties Unaffected. — The mutual rights and duties growing out of the marital relationship are not affected by this and the following sections. Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945).

A married woman is still a feme covert with the rights, privileges and obligations incident to such status under the law. Coley v. Dalrymple, 225 N.C. 67, 33 S.E.2d 477 (1945). See also Buford v. Mochy, 224 N.C. 235, 29 S.E.2d 729 (1944).

This section does not relieve a married woman of her marital obligations or deny to her the privilege of sharing in the family duties and aiding in such work as the helpmate of her husband, when minded so to do. Coley v. Dalrymple, 225 N.C. 67, 33 S.E.2d 477 (1945).

Spouses May Sue Each Other in Tort. — The common-law disability of spouses to sue each other in tort actions has been completely removed in this State. Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965).

A married woman has the fullest power to bring actions, even against her husband, and in all cases whatever. Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920); In re Will of Witherington, 186 N.C. 152, 119 S.E. 11 (1923).

Wife's right to sue her husband extends to tort actions. Crowell v. Crowell, 181 N.C. 66, 106 S.E. 149 (1921).

In this jurisdiction a wife may maintain an action against her husband for negligent injury, or if such injury results in death, her personal representative may maintain such action. King v. Gates, 231 N.C. 537, 57 S.E.2d 765 (1950); First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

Nonresident Wife Has Right of Action for Husband's Tort. — The right of a married woman to maintain an action against her husband to recover for negligent injury is not limited to residents of this State, and a nonresident wife may maintain an action here against her nonresident husband on a transitory cause of action which arises in this State, and she is entitled to any recovery as her separate property. Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941).

Impairment of Capacity to Work and Earn Money. — This section is in accord with the realistic trend of the modern decisions, which recognize the fact that a wife, as an individual, has a personal right to work and earn money, whether she is gainfully employed at the time or engaged merely in the performance of household duties; and where her capacity to work and earn money is impaired by injury, she has suffered a definite, substantial loss. Johnson v. Lewis, 251 N.C. 797, 112 S.E.2d 512 (1960).

A person is not deprived of the right to recover damages because of inability to labor or transact business in the future, because of the fact that at the time of the injury he is not engaged in any particular employment. The fact that a woman attends merely to household duties will not deprive her of a right to recover for loss of earning capacity. Johnson v. Lewis, 251 N.C. 797, 112 S.E.2d 512 (1960).

Services Rendered to Husband. — For a wife to recover for services rendered to her husband in his business, or outside of her domestic duties, while living with him under the marital relation, there must be either an express or an implied promise on his part to pay for them; and the relationship of marriage, nothing else appearing, negatives an implied promise on his part to pay. Dorsett v. Dorsett, 183 N.C. 354, 111 S.E. 541, 23 A.L.R. 15 (1922).

Husband and Wife Employed Together. — Since the passage of the Martin Act and this section, the separate earnings of a married woman belong to her, and she may sue and recover them alone; and where the evidence tends only to establish the fact that the employer was to pay husband and wife each a certain and different amount for services, the husband could not recover the whole upon the theory that the amount he was to receive was augmented by what wife was to receive for her separate services. Croom v. Goldsboro Lumber Co., 182 N.C. 217, 108 S.E. 735 (1921).

Services rendered by a married woman outside the home, and not within the scope of her household or domestic duties, would properly be recoverable on implied assumpsit or quantum meruit in her own name. Coley v. Dalrymple, 225 N.C. 67, 33 S.E.2d 477 (1945).

Recovery for Loss of Consortium. — It is now well settled in practically every jurisdiction that wife has a right to the consortium of her husband and can recover when there has been an intentional and direct invasion or breach of the marital relations. In every case, however, the recovery was allowed only where there was an intentional invasion. The right of the wife to recover in North Carolina for a direct and intentional invasion is clearly settled. Brown v. Brown, 124 N.C. 19, 32 S.E. 320 (1899). See also, 3 N.C.L. Rev. 100 (1925).

Recovery for Loss of Consortium Allowed in Negligence Cases. — Wife has cause of action for loss of consortium resulting from a negligent injury to her husband. Nicholson v. Hugh Chatham Mem. Hospital, 300 N.C. 295, 266 S.E.2d 818 (1980).

Married women's legislation in North Carolina gave a wife the equal right to sue for loss of her husband's consortium. Nicholson v. Hugh Chatam Mem. Hospital, 300 N.C. 295, 266 S.E.2d 818 (1980).

But Action for Loss of Consortium Must Be Joined With Injured Spouse's Action. — A spouse may maintain a cause of action for loss of consortium due to the negligent actions of third parties so long as that action for loss of consortium is joined with any suit the other spouse may have instituted to recover for his or her personal injuries. Nicholson v. Hugh

Chatam Mem. Hospital, 300 N.C. 295, 266 S.E.2d 818 (1980).

"Consortium" defined. — While consortium is difficult to define, better view is that it embraces service, society, companionship, sexual gratification and affection. Nicholson v. Hugh Chatam Mem. Hospital, 300 N.C. 295, 266 S.E.2d 818 (1980).

Action of Wife for Tort to Husband. — Under the former wording of this section, the husband could not sue to recover his wife's earnings or damages for tort committed to her and there was no reason why she could sue for tort or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband. Hipp v. Dupont, 182 N.C. 9, 108 S.E. 318 (1921).

Action Against Seducer. — Under the provisions of this section, a married woman who had been seduced could, in proper instances, maintain her action for damages against her seducer without joinder of her husband as a party. Hayatt v. McCoy, 194 N.C. 25, 138 S.E. 405 (1927).

Joinder of Husband. — Since the passage of this section, a married woman may sue without joining her husband to recover damages she has sustained by reason of a personal injury wrongfully inflicted. Kirkpatrick v. Crutchfield, 178 N.C. 348, 100 S.E. 602 (1919).

While husband is not a necessary party to wife's action to recover for the value of her services rendered upon a quantum meruit, under this section, his joinder therein as a party plaintiff is not improper; and where he has alleged an independent cause of action upon a quantum meruit, the Supreme Court, on appeal, in the exercise of its discretion, may remand the cause with direction that the allegations of the complaint as to the statement of the husband's cause be stricken out and the action of the wife proceeded with. Shore v. Holt, 185 N.C. 312, 117 S.E. 165 (1923).

The law formerly prevailing allowed the husband the earnings of his wife and the proceeds of her labor, but the husband could confer upon the wife the right to her earnings, upon which they became her separate estate, giving her a right of action to recover them in her own name. Patterson v. Franklin, 168 N.C. 75, 84 S.E. 18 (1915).

Applied in Owens v. Kelly, 240 N.C. 770, 84 S.E.2d 163 (1954); Burton v. Dixon, 259 N.C. 473, 131 S.E.2d 27 (1963).

Cited in Nicholson v. Hugh Chatham Mem. Hosp., 300 N.C. 295, 266 S.E.2d 818 (1980); State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544, 2001 N.C. App. LEXIS 1234 (2001).

§ 52-5. Torts between husband and wife.

A husband and wife have a cause of action against each other to recover damages sustained to their person or property as if they were unmarried. (1951, c. 263; 1965, c. 878, s. 1.)

Legal Periodicals. — For comment on this section, see 29 N.C.L. Rev. 395 (1951).

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

For comment on adverse marital testimony in criminal actions after the modification of the common-law rule by State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981), see 60 N.C.L. Rev. 874 (1982).

For note, "It's Time to Abolish North Carolina's Parent-Child Immunity, But Who's Going to Do It?—Coffey v. Coffey and North Carolina General Statutes Section 1-539.21," see 68 N.C. L. Rev. 1317 (1990).

For article, "A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?," see 18 Campbell L. Rev. 203 (1996).

For note and comment, "Liner v. Brown: Where Should We Go From Here—Two Different Approaches for North Carolina," see 19 Campbell L. Rev. 447 (1997).

CASE NOTES

Purpose of Section. — This section was intended to change for the future the result reached in Scholtens v. Scholtens, 230 N.C. 149, 52 S.E.2d 350 (1949); Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963). See also, 29 N.C.L. Rev. 359.

The legislature by statute modified the common law and permitted the wife to sue the husband for injuries tortiously inflicted. Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963); Ayers v. Ayers, 269 N.C. 443, 152 S.E.2d 468 (1967).

This section permits one spouse to maintain an action against the other for injuries caused by his or her tort. Cox v. Shaw, 263 N.C. 361, 139 S.E.2d 676 (1965).

The common-law disability of spouses to sue each other in tort actions has been completely removed in this State. Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965).

A wife may maintain an action against her husband for assault and battery. Ayers v. Ayers, 269 N.C. 443, 152 S.E.2d 468 (1967).

Or for Personal Injuries from His Negligence. — In this jurisdiction a wife has the right to sue her husband and recover damages for personal injuries inflicted by his actionable negligence. First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

Husband May Recover from Wife Medical Expenses He Paid for Daughter Negligently Injured by Wife. — By virtue of the express provisions of this section, plaintiff father was entitled to recover from defendant mother the medical expenses expended by him on behalf of his daughter for injuries to her caused by defendant's actionable negligence in the operation of an automobile. Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965).

Plaintiff's action to recover necessary medical expenses expended by him for his infant daughter is within the fair intent and meaning of this section imposing liability for damages sustained to property. Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965).

Marriage does not automatically preclude an action for trespass. Miller v. Brooks, 123 N.C. App. 20, 472 S.E.2d 350 (1996).

And Wrongful Death Action May Be Maintained Against Husband for Wife's Death. — If a husband's negligence results in the death of his wife, her personal representative may maintain an action against him for her wrongful death. Cox v. Shaw, 263 N.C. 361, 139 S.E.2d 676 (1965); First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

Since this section provides that an injured wife has a cause of action against her husband for damages for personal injury, the administrator of her estate may maintain an action for wrongful death when she does not survive. Cummings v. Locklear, 12 N.C. App. 572, 183 S.E.2d 832 (1971).

Conflict of Laws. — In cases involving intra-family immunity, the law of the state where the wrong took place applies instead of the law of the state of the parties' residence. Henry v. Henry, 29 N.C. App. 174, 223 S.E.2d 564, aff'd, 291 N.C. 156, 229 S.E.2d 158 (1976). But see § 52-5.1.

Cited in Coffey v. Coffey, 94 N.C. App. 717, 381 S.E.2d 467 (1989); State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544, 2001 N.C. App. LEXIS 1234 (2001).

§ 52-5.1. Tort actions between husband and wife arising out of acts occurring outside State.

A husband and wife shall have a cause of action against each other to recover damages for personal injury, property damage or wrongful death arising out of acts occurring outside of North Carolina, and such action may be brought in this State when both were domiciled in North Carolina at the time of such acts. (1967, c. 855.)

Legal Periodicals. — For article on "Conflict of Spousal Immunity Laws: The Legislature Takes a Hand," discussing this section, see 46 N.C.L. Rev. 506 (1968).

For note on the "greatest interest rule" as a choice-of-law conflicts rule, see 47 N.C.L. Rev. 407 (1969).

For note on choice-of-law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

CASE NOTES

Former Law. — Before the passage of this section, it was held that the legislature did not intend in G.S. 52-5 to extend its enactment beyond State borders and create in a spouse a right of action against the other for acts done beyond the borders of North Carolina. Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963).

This section was designed by the legislature to enable a North Carolina resident to sue in the courts of this State, notwithstanding the rule that the law of the state wherein the injury occurred determines the right of the injured spouse to bring an action for damages. Henry v. Henry, 291 N.C. 156, 229 S.E.2d 158 (1976).

The legislature, by the enactment of this section, rescinded the rule with reference to the right of a wife domiciled in North Carolina to maintain, in the courts of this State, an action for damages for injuries proximately caused by the negligence of her husband in another state. Henry v. Henry, 291 N.C. 156, 229 S.E.2d 158 (1976).

This section left untouched the rule with reference to the right of a nonresident wife to sue her husband in the courts of North Carolina to recover damages for injuries inflicted in this State and proximately caused by his negligence. Henry v. Henry, 291 N.C. 156, 229 S.E.2d 158 (1976).

§ 52-6: Repealed by Session Laws 1977, c. 375, s. 1.

Cross References. — As to contracts between husband and wife, see now G.S. 52-10.

§ 52-7. Validation of certificates of notaries public as to contracts or conveyances between husband and wife.

Any contract between husband and wife coming within the provisions of G.S. 52-6, executed prior to the first day of January, 1955, acknowledged before a notary public and containing a certificate of the notary public of his conclusions and findings of fact that such conveyance is not unreasonable or injurious to the wife, is hereby in all respects validated and confirmed, to the same extent as though said certifying officer were one of the officers named in G.S. 52-6. (1955, c. 380; 1965, c. 878, s. 1.)

Editor's Note. — Section 52-6, referred to in this section, was repealed by Session Laws 1977, c. 375, s. 1.

Former G.S. 52-7 prohibited conveyance or lease of wife's land by husband without her consent. The provisions of present G.S. 52-7 are almost identical to those of former G.S. 52-12.1.

§ 52-8. Validation of contracts failing to comply with provisions of former § 52-6.

Any contract between husband and wife coming within the provisions of G.S. 52-6 executed between January 1, 1930, and January 1, 1978, which does not comply with the requirement of a private examination of the wife or with the requirements that there be findings that such a contract between a husband and wife is not unreasonable or injurious to the wife and which is in all other respects regular is hereby validated and confirmed to the same extent as if the examination of the wife had been separate and apart from the husband. This section shall not affect pending litigation. (1957, c. 1178; 1959, c. 1306; 1965, c. 207; c. 878, s. 1; 1967, c. 1183, s. 1; 1971, c. 101; 1973, c. 1387, s. 1; 1975, c. 495, s. 1; 1977, c. 375, s. 15; 1981, c. 599, s. 16.)

Editor's Note. — Section 52-6, referred to in this section, was repealed by Session Laws 1977, c. 375, s. 1, effective January 1, 1978.

Former G.S. 52-8 related to the capacity of a married woman to make a will. The provisions of present G.S. 52-8 are similar to those of former G.S. 52-12.2.

Legal Periodicals. — For note discussing purchase money resulting trust doctrine in North Carolina, see 12 N.C. Cent. L.J. 526 (1981).

CASE NOTES

This section is a curative statute. Hutchins v. Hutchins, 260 N.C. 628, 133 S.E.2d 459 (1963).

This section was amended in 1981 in an attempt to cure deeds which lack the certification that the transaction was not unreasonable or injurious to the wife. West v. Hays, 82 N.C. App. 574, 346 S.E.2d 690 (1986).

Legislative Intent. — In enacting this section, the legislative intent was to validate contracts made void by former G.S. 52-6, except for those in pending litigation. Murphy v. Davis, 61 N.C. App. 597, 300 S.E.2d 871, cert. denied and appeal dismissed, 309 N.C. 192, 305 S.E.2d 735 (1983), overruled on other grounds, Dunn v. Pate, 334 N.C. 115, 431 S.E.2d 178 (1993).

Applicability of Section. — This section was not applicable where not only was the private examination of the wife required by former G.S. 52-6 not taken, but there was no finding by the certifying officer of the officer's conclusions and findings of fact as to whether or not the deed was unreasonable or injurious to the wife as required by former G.S. 52-6(b) and the certifying officer was not one of those authorized by former G.S. 52-6(c) to make the required certificate. Boone v. Brown, 11 N.C. App. 355, 181 S.E.2d 157 (1971).

Deed executed in 1947, which was void because the then applicable provisions of former G.S. 47-39 and 52-12 were not complied with, in that the clerk of court failed to find that the transaction was not "unreasonable or injurious" to grantor's wife, could not be cured by this section as amended in 1981, where the rights of wife's devisees in the property vested in 1978 upon her death. West v. Hays, 82 N.C. App. 574, 346 S.E.2d 690 (1986).

This section would not operate to cure a deed which was void for failure to comply with former version of G.S. 52-12, relating to a private examination of a married woman grantor and a finding that the conveyance was not unreasonable or injurious to the wife. Dunn v. Pate, 98 N.C. App. 351, 390 S.E.2d 712 (1990).

This section purports to cure the execution of a trust agreement not acknowledged by the wife as required by former G.S. 52-6. Godwin v. Wachovia Bank & Trust Co., 259 N.C. 520, 131 S.E.2d 456 (1963).

Conveyance Not Complying with Former § 52-6 Void Unless Validated. — A wife's deed purporting to convey property to her husband, without complying with former G.S. 52-6, and not validated by this section, was void. Murphy v. Davis, 61 N.C. App. 597, 300 S.E.2d 871, cert. denied and appeal dismissed, 309 N.C. 192, 305 S.E.2d 735 (1983), overruled on other grounds, Dunn v. Pate, 334 N.C. 115, 431 S.E.2d 178 (1993).

A contract between a husband and wife to make a joint will was void as to the wife where it was not executed by her in accordance with former G.S. 52-6, and its invalidity was not affected by this curative statute and G.S. 39-13.1(b), where both curative statutes were enacted after the rights of the parties under the contract vested upon the death of the husband, and the contract was not "in all other respects regular" except for the failure to privately examine the wife as required by the curative statutes. Mansour v. Rabil, 277 N.C. 364, 177 S.E.2d 849 (1970).

Postnuptial agreement executed in 1977 could not be set aside due to any alleged noncompliance with former G.S. 52-6 (repealed 1977) or G.S. 52-10 (amended 1977). Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994).

Use of Section to Validate Separation Agreement Precluded. — Where a wife's acknowledgment of a separation agreement was fatally defective under former G.S. 52-6 because there was no private examination of the wife and thus no finding as to whether the agreement was unreasonable or injurious to the wife, and because the acknowledgment was certified by a Judge Advocate in the Marine Corps who did not qualify as a "certifying officer" under former G.S. 52-6(c) since his position was not that of an "equivalent or corresponding officer" of the jurisdiction where the examination and acknowledgment were to be made, the omission of the private examination and the lack of authority on the part of the certifying officer precluded the use of curative statutes, this section and G.S. 47-81.2, to validate the agreement. DeJaager v. DeJaager, 47 N.C. App. 452, 267 S.E.2d 399 (1980).

Cited in Spencer v. Spencer, 430 F. Supp. 683 (M.D.N.C. 1977); Spencer v. Spencer, 37 N.C. App. 481, 246 S.E.2d 805 (1978); Tarkington v. Tarkington, 45 N.C. App. 476, 263 S.E.2d 294 (1980).

§ 52-9. Effect of absolute divorce decree on certificate failing to comply with former § 52-6.

Whenever it appears that, since the execution of a contract between a husband and wife in which the certificate of acknowledgment thereof fails to comply with the requirements of G.S. 52-6, a valid decree of absolute divorce between said husband and wife has been rendered, no action shall be maintained by her or anyone claiming under her for the recovery of the possession of, or to establish title to any interest in any property described in such contract unless such action is commenced within seven years after such decree of absolute divorce has become final or unless such action is commenced before January 1, 1978, whichever date is earlier. (1957, c. 1260; 1965, c. 878, s. 1; 1977, c. 375, s. 14.)

Editor's Note. — Section 52-6, referred to in this section, was repealed by Session Laws 1977, c. 375, s. 1, effective January 1, 1978.

Provisions similar to former G.S. 52-9 are now contained in present G.S. 52-3. The provisions of present G.S. 52-9 are almost identical to those of former G.S. 52-12.3.

§ 52-10. Contracts between husband and wife generally; releases.

(a) Contracts between husband and wife not inconsistent with public policy are valid, and any persons of full age about to be married and married persons may, with or without a valuable consideration, release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released. No contract or release between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of either spouse, or the accruing income thereof for a longer time than three years next ensuing the making of such contract or release, unless it is in writing and is acknowledged by both parties before a certifying officer.

(b) Such certifying officer shall be a notary public, or a justice, judge, magistrate, clerk, assistant clerk or deputy clerk of the General Court of Justice, or the equivalent or corresponding officers of the state, territory or foreign country where the acknowledgment is made. Such officer must not be a party to the contract.

(c) This section shall not apply to any judgment of the superior court or other State court of competent jurisdiction, which, by reason of its being consented to by a husband and wife, or their attorneys, may be construed to constitute a contract or release between such husband and wife. (1871-2, c. 193, s. 28; Code, s. 1836; Rev., s. 2108; C.S., s. 2516; 1959, c. 879, s. 12; 1965, c. 878, s. 1; 1977, c. 375, s. 2.)

Cross References. — As to abolition of dower and curtesy, see G.S. 29-4. As to right of surviving spouse to elect life estate in lieu of intestate share, see G.S. 29-30. As to distribution by court of marital property upon divorce, see G.S. 50-20 and 50-21. As to separation agreements, see G.S. 52-10.1. As to antenuptial contracts, see G.S. 52B-1 et seq.

Editor's Note. — Provisions similar to former G.S. 52-10 are now contained in present G.S. 52-4. The provisions of present G.S. 52-10 are similar to those of former G.S. 52-13.

Legal Periodicals. — For comment on the enforceability of marital contracts, see 47 N.C.L. Rev. 815 (1969).

For article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the state in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

For 1984 survey, "Property Settlement or Separation Agreement: Perpetuating the Confusion," see 63 N.C.L. Rev. 1166 (1985).

For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

For note on contractual agreements as a means of avoiding equitable distribution, in light of Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984), see 21 Wake Forest L. Rev. 213 (1985).

For article, "The Regulation of Contractual Change: A Guide to No Oral Modification Clauses for North Carolina Lawyers," see 81 N.C.L. Rev. 2239 (2003).

CASE NOTES

Common Law. — At common law the husband and wife were regarded as so entirely one as to be incapable of either contracting with or suing one another, but in equity it was always otherwise, and there many of their contracts with each other were recognized and enforced. George v. High, 85 N.C. 99 (1881).

Construction With Other Provisions. — This section and G.S. 52-10.1 are distinguishable in that a separation agreement may affect support rights whereas this section refers only to "rights … in property"; further, as indicated by the terms requiring formalities for contracts entered into "during coverture," a contract under this section may be entered into at any time during marriage, not only in contemplation of separation or divorce. Williams v. Williams, 120 N.C. App. 707, 463 S.E.2d 815 (1995), aff'd per curium, 343 N.C. 299, 469 S.E.2d 553 (1996).

The validity of a separation agreement as it related to a waiver of alimony was not to be judged in the context of this section, but executed pursuant to G.S. 52-10.1. Napier v. Napier, 135 N.C. App. 364, 520 S.E.2d 312 (1999).

Those contracts between spouses which conflict with public policy are void. Williams v. Williams, 120 N.C. App. 707, 463 S.E.2d 815 (1995), aff'd per curium, 343 N.C. 299, 469 S.E.2d 553 (1996).

Legislature Did Not Intend to Reduce Marriage to Commercial Basis. — While in ordinary transactions married women are permitted to deal with their earnings and property practically as they please or as free traders, the General Assembly did not intend to reduce the institution of marriage, or the obligations of family life, to a commercial basis. Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945).

Sections 52-10 and 52-10.1 were enacted without providing women any extra protection not offered to men; therefore, a separation agreement should be viewed today like any other bargained-for exchange between parties who are presumably on equal footing. Knight v. Knight, 76 N.C. App. 395, 333 S.E.2d 331 (1985).

Same rules which govern interpretation of contracts generally apply to separation agreements. Blount v. Blount, 72 N.C. App. 193, 323 S.E.2d 738 (1984), cert. denied, 313 N.C. 506, 329 S.E.2d 389 (1985).

What Contracts Included. — This section clearly refers throughout to contracts between the husband and the wife, and does not and was not intended to affect contracts between husband and wife and third parties. Jackson v. Beard, 162 N.C. 105, 78 S.E. 6 (1913); Brawley v. Brawley, 87 N.C. App. 545, 361 S.E.2d 759, cert. denied, 321 N.C. 471, 364 S.E.2d 918 (1987).

Postnuptial agreement executed in 1977 could not be set aside due to any alleged noncompliance with former G.S. 52-6 (repealed 1977) or G.S. 52-10 (amended 1977). Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994).

Antenuptial Agreement. — A woman in contemplation of marriage was expressly authorized by this section to release by valid contract her former right of dower in the lands of her intended husband. Turner v. Turner, 242 N.C. 533, 89 S.E.2d 245 (1955).

It is well settled in this jurisdiction that a man and woman contemplating marriage may enter into a valid contract with respect to the property and property rights of each after the marriage, and such contracts will be enforced as written. In re Estate of Loftin, 285 N.C. 717, 208 S.E.2d 670 (1974).

Antenuptial contracts, when properly executed and acknowledged, are not against public policy and may act as a bar to the wife's right to dissent and to petition for a year's allowance. In re Estate of Loftin, 285 N.C. 717, 208 S.E.2d 670 (1974).

In the absence of contrary provisions in an antenuptial agreement, or of special statutory provisions, a separation and reconciliation between husband and wife will not affect or extinguish property rights under such an agreement. Turner v. Turner, 242 N.C. 533, 89 S.E.2d 245 (1955).

Prenuptial agreement. — Trial court did not err by allowing equitable distribution of property acquired during the parties' marriage, as the parties' prenuptial agreement, G.S. 52-10(a), did not waive their claims to equitable distribution; based on the former husband's stated intentions regarding the creation of the agreement, his discussions with an attorney, and the actual language of the agreement, the trial court could properly find that the agreement constituted a "free trader" agreement that did not waive the parties' rights to equitable distribution. McIntyre v. McIntyre, 188 N.C. App. 26, 654 S.E.2d 798, 2008 N.C. App. LEXIS 85 (2008).

When one person provides purchase money to pay for real property and the title is taken in the name of another a resulting trust commensurate with his interest arises in favor of the one furnishing the consideration. Such a trust is not dependent upon any agreement between the parties. Rather, it functions to effectuate the intention, at the time of transfer, of the party furnishing the purchase money and such intention is to be determined from all the attendant facts and circumstances. Tiryakian v. Tiryakian, 91 N.C. App. 128, 370 S.E.2d 852 (1988).

Section Inapplicable to Support Obligation. — This section, which authorizes postnuptial interspousal agreements not inconsistent with public policy that affect the spouses' marital property interests, is construed not to apply to the husband's (supporting spouse's) obligation, and the wife's (dependent spouse's) right, to support. Gray v. Snyder, 704 F.2d 709 (4th Cir. 1983).

This section relates to the release of an interest in property, but has no bearing whatever on the right of a wife to support. Motley v. Motley, 255 N.C. 190, 120 S.E.2d 422 (1961).

Duty of Support May Be Discharged under Separation Agreement. — North Carolina law has long recognized that the husband's (supporting spouse's) duty of support may be discharged by a valid separation agreement between the spouses under which fixed benefits are provided the wife (dependent spouse) in consideration of the discharge. To be valid, such a discharge of support agreement must (1) be made between spouses either actually separated or intending immediately to separate; and (2) be executed in accordance with statutory formality requirements. Gray v. Snyder, 704 F.2d 709 (4th Cir. 1983).

Separation Agreement Not Against Public Policy. — A deed of separation executed by husband and wife is not against the policy of this State, when properly made. Archbell v. Archbell, 158 N.C. 408, 74 S.E. 327 (1912).

Construction of Separation Agreement. — The language of a separation agreement that the husband released "all rights" that he might have "in any estate" of his wife at her death was sufficient to support the conclusion that a release of his former right of tenancy by the curtesy was intended. The word "estate" was comprehensive enough to include land. Blankenship v. Blankenship, 234 N.C. 162, 66 S.E.2d 680 (1951).

Assuming that a provision in a separation agreement was intended by the husband and the wife to address their right to exclusive sexual intercourse with the other, the provision related only to the spouses' rights against each other, and, as a matter of law, the provision did not waive the parties' rights, with respect to third parties, for purposes of a criminal conversation claim. Nunn v. Allen, 154 N.C. App. 523, 574 S.E.2d 35, 2002 N.C. App. LEXIS 1522 (2002), cert. denied, 356 N.C. 675, 577 S.E.2d 630 (2003).

Where the terms of a separation agreement are plain and explicit, the court will determine the legal effect and enforce it as written by the parties. Blount v. Blount, 72 N.C. App. 193, 323 S.E.2d 738 (1984), cert. denied, 313 N.C. 506, 329 S.E.2d 389 (1985).

To be valid, a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Until deed of separation is rescinded, defendant cannot attack the legality of the separation or obtain alimony from plaintiff. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

As to attack on deed of separation by married woman, see Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968); In re Estate of Loftin, 21 N.C. App. 627, 205 S.E.2d 574, aff'd, 285 N.C. 717, 208 S.E.2d 670 (1974).

Agreement as to Alimony. — Parties to a divorce may enter into a valid agreement settling the question of alimony, and unless the court then orders alimony to be paid, the terms of the agreement are binding and can only be modified by the consent of both parties. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Mutual Releases Do Not Bar Wife's Right to Temporary Alimony. — Mutual releases between husband and wife of their interests in each other's separate property do not bar the wife from making application for temporary alimony and attorneys' fees in a subsequent suit for divorce. Bailey v. Bailey, 127 N.C. 474, 37 S.E. 502 (1900).

Binding Arbitration as to Spousal Support. — Since the parties may settle spousal support by agreement, there exists no prohibition to their entering into binding arbitration to settle the issue of spousal support. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Release and Quitclaim of Property Rights. — This section allows husband and wife to enter a separation agreement which releases and quitclaims any property rights acquired by marriage, and that a release will bar any later claim on the released property. Such a valid separation agreement is an enforceable contract between husband and wife. Blount v. Blount, 72 N.C. App. 193, 323 S.E.2d 738 (1984), cert. denied, 313 N.C. 506, 329 S.E.2d 389 (1985).

A release by a husband of his former right of tenancy by the curtesy in his wife's lands by properly executed contract with his wife was expressly authorized by this section, with the added provision that such release could be pleaded in bar of any proceeding to recover the rights released. Blankenship v. Blankenship, 234 N.C. 162, 66 S.E.2d 680 (1951).

Prior Agreement as Bar to Equitable Distribution. — When a prior separation agreement fully disposes of the spouses' property rights arising out of the marriage, it acts as a bar to equitable distribution. Blount v. Blount, 72 N.C. App. 193, 323 S.E.2d 738 (1984), cert. denied, 313 N.C. 506, 329 S.E.2d 389 (1985).

A separation agreement which contained no specific references to any real property, but only to personal property, held to have nevertheless fully disposed of the parties' property rights arising out of the marriage and thus to act as a bar to equitable distribution. Hartman v. Hartman, 80 N.C. App. 452, 343 S.E.2d 11 (1986).

Separation agreement which released each spouse from the common law rights incident to marriage (dower, curtesy, inheritance, descent, and distribution), as well as "all other rights arising out of the marital relationship in and to any and all property," fully disposed of the parties' property rights arising out of the marriage and thus acted as a bar to equitable distribution. Hagler v. Hagler, 319 N.C. 287, 354 S.E.2d 228 (1987).

Agreement as Bar to Pension Rights. — Separation agreement entered into on August

2, 1982, which contained no reference to defendant-husband's military pension, but specifically provided that each party was forever barred from any or all rights or claims not therein reserved which arose out of the marital relation and that each released and relinquished all claims or interest in and to all property of the other, whether then owned or subsequently acquired, barred an award to plaintiff-wife under the Equitable Distribution Act of a share in defendant-husband's military pension; the subsequent amendment of the act effective August 1, 1983, to include military pensions as marital property did not permit plaintiff-wife to avoid the release provisions of the agreement. Morris v. Morris, 79 N.C. App. 386, 339 S.E.2d 424, cert. denied, 316 N.C. 733, 345 S.E.2d 390 (1986).

Husband's failure to pay his wife money on the day of their marriage as stipulated in a premarital agreement was not a failure to meet a condition precedent and did not invalidate the premarital agreement entered into between the parties; equitable distribution of marital property was therefore inappropriate. Harllee v. Harllee, 151 N.C. App. 40, 565 S.E.2d 678, 2002 N.C. App. LEXIS 687 (2002).

Money Lent to Husband Recoverable. — In a suit brought by a wife against the administrator of her deceased husband for money "advanced and lent" to him during coverture, where the marriage took place after the adoption of the Constitution of 1868, it was held that the contract between them was not inconsistent with public policy, and was, therefore, valid. George v. High, 85 N.C. 99 (1881).

Rent Notes Given Wife by Husband Valid. — Where a husband occupied his wife's land for 9 years, during the whole of which period he received the rents therefrom, under an express agreement with his wife to account to her for such rents, and each year gave his wife a note for the rent, it was held that the notes constituted a valid indebtedness on the part of the husband to his wife. Battle v. Mayo, 102 N.C. 413, 9 S.E. 384 (1897).

Acts Sufficient to Qualify as an Acknowledgment. — When defendant and wife signed a separation agreement in front of a notary, the defendant performed acts sufficient to qualify as an acknowledgment under the statute, since no rights of creditors or third parties were involved. Lawson v. Lawson, 321 N.C. 274, 362 S.E.2d 269 (1987).

A certificate of acknowledgment may be subsequently affixed to a separation agreement if the agreement was valid under the appropriate statute, no rights of creditors or third parties being involved. Lawson v. Lawson, 321 N.C. 274, 362 S.E.2d 269 (1987).

Acknowledgment in Premarital Agreements. — Since this section requires acknowledgment only during coverture, the period of marriage, it does not require acknowledgment for premarital agreements. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990).

The validity of a premarital agreement is not affected by the lack of acknowledgment. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990).

Husband's attorney, who was a notary, could acknowledge property settlement agreements under this section; this section merely provides that persons acknowledging the marital contract must not be a party to the contract. Small v. Small, 93 N.C. App. 614, 379 S.E.2d 273, cert. denied, 325 N.C. 273, 384 S.E.2d 519 (1989).

Handwritten agreement which was not acknowledged before a certifying officer as defined in subsection (b) of this section was not binding upon the court, and the court was free to distribute the property, pursuant to G.S. 50-20. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), petition allowed as to additional issues, 322 N.C. 112, 367 S.E.2d 912, aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

To impeach a notary's certification, there must be more than a bare allegation that no acknowledgment occurred, and where plaintiff never asserted that the actual signature on an agreement was other than his own, but suggested only a technical violation of G.S. 52-10.1, he did not bring forth sufficient evidence to overcome the presumption created in favor of the validity of the acknowledgment. Moore v. Moore, 108 N.C. App. 656, 424 S.E.2d 673, aff'd per curiam, 334 N.C. 684, 435 S.E.2d 71 (1993).

Failure to Make Full Disclosure Held to Invalidate Antenuptial Agreement. — Where the husband failed to make a full disclosure of his financial status, and that the wife was presented with an agreement drawn by the husband's attorney which she signed without knowledge of its contents and without seeking independent legal advice, absent any voluntary waiver, especially considering the confidential relationship between prospective spouses, husband's failure to fully disclose his financial status was grounds for invalidating an antenuptial agreement. Tiryakian v. Tiryakian, 91 N.C. App. 128, 370 S.E.2d 852 (1988).

Resulting Trust Held Established. — Where the evidence showed that $10,000 check was delivered into the wife's hands, that it was made out to her maiden name, that she deposited it in her separate bank account before marriage, and that the husband testified that the funds were the wife's to do with as she pleased, and she gave it to her husband to purchase a condominium, a $10,000 resulting trust was properly established in the wife's favor upon divorce. Tiryakian v. Tiryakian, 91 N.C. App. 128, 370 S.E.2d 852 (1988).

Order Holding Agreement for Post-Separation Support Enforceable was Error. — Trial court erred by holding that a support agreement was governed by G.S. 52-10 and was enforceable because the agreement was made while the parties were separated, and concerned post-separation spousal support; thus, it was a separation agreement for spousal support, and, because it was uncertified, it failed to comply with G.S. 52-10.1 and was unenforceable. Sluder v. Sluder, — N.C. App. —, 679 S.E.2d 435, 2009 N.C. App. LEXIS 1166 (July 21, 2009).

Applied in Nye v. United States, 407 F. Supp. 1345 (M.D.N.C. 1975); McLeod v. McLeod, 74 N.C. App. 144, 327 S.E.2d 910 (1985); Beroth v. Beroth, 87 N.C. App. 93, 359 S.E.2d 512 (1987); Hill v. Hill, 94 N.C. App. 474, 380 S.E.2d 540 (1989); In re Estate of Tucci, 94 N.C. App. 428, 380 S.E.2d 782 (1989); Rabon v. Rabon, 102 N.C. App. 452, 402 S.E.2d 461 (1991); In re Estate of Potts, 186 N.C. App. 460, 651 S.E.2d 297, 2007 N.C. App. LEXIS 2188 (2007).

Cited in Heller v. Heller, 7 N.C. App. 120, 171 S.E.2d 335 (1969); Spencer v. Spencer, 37 N.C. App. 481, 246 S.E.2d 805 (1978); Wright v. Wright, 305 N.C. 345, 289 S.E.2d 347 (1982); Biesecker v. Biesecker, 62 N.C. App. 282, 302 S.E.2d 826 (1983); Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984); Peak v. Peak, 82 N.C. App. 700, 348 S.E.2d 353 (1986); Lawson v. Lawson, 84 N.C. App. 51, 351 S.E.2d 794 (1987); Collar v. Collar, 86 N.C. App. 105, 356 S.E.2d 407 (1987); Brimley v. Logging, 93 N.C. App. 467, 378 S.E.2d 52 (1989); Lee v. Lee, 93 N.C. App. 584, 378 S.E.2d 554 (1989); Small v. Small, 93 N.C. App. 614, 379 S.E.2d 273 (1989); Hamby v. Hamby, 143 N.C. App. 635, 547 S.E.2d 110, 2001 N.C. App. LEXIS 337 (2001); State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544, 2001 N.C. App. LEXIS 1234 (2001).

§ 52-10.1. Separation agreements.

Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects; provided, that the separation agreement must be in writing and acknowledged by both parties before a certifying officer as defined in G.S. 52-10(b). Such certifying officer must not be a party to the contract. This section shall not apply to any judgment of the superior court or other State court of competent jurisdiction, which, by reason of its being consented to by a husband and wife, or their attorneys, may be construed to constitute a separation agreement between such husband and wife. (1965, c. 803; 1977, c. 375, s. 3.)

Cross References. — As to distribution by court of marital property upon divorce, see G.S. 50-20 and 50-21. As to antenuptial contracts, see G.S. 52B-1 et seq.

Editor's Note. — The act inserting this section designated it as G.S. 52-13.1, to follow former G.S. 52-13 in Article 1 of Chapter 52 prior to the repeal and revision of that Chapter by Session Laws 1965, c. 878. This section was redesignated as G.S. 52-10.1, since the provisions of present G.S. 52-10 are similar to those of former G.S. 52-13.

Legal Periodicals. — For comment on the enforceability of marital contracts, see 47 N.C.L. Rev. 815 (1969).

For note on specific performance of separation agreements, see 58 N.C.L. Rev. 867 (1980).

For note on enforcement of separation agreements by specific performance, see 16 Wake Forest L. Rev. 117 (1980).

For note on voiding separation agreements by isolated acts of sexual intercourse, see 16 Wake Forest L. Rev. 137 (1980).

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the state in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

For 1984 survey, "Property Settlement or Separation Agreement: Perpetuating the Confusion," see 63 N.C.L. Rev. 1166 (1985).

For note on contractual agreements as a means of avoiding equitable distribution, in light of Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984), see 21 Wake Forest L. Rev. 213 (1985).

For note on post-separation sexual intercourse precluding enforcement of agreement requiring parties to live separate and apart, see 11 Campbell L. Rev. 73 (1988).

For article, "Semantics as Jurisprudence: The Elevation of Form Over Substance in the Treatment of Separation Agreements in North Carolina," see 69 N.C.L. Rev. 319 (1991).

For survey on the award of attorneys' fees for breach of a separation agreement, see 70 N.C.L. Rev. 2016 (1992).

For note, "The Diploma Dilemma: An Inequitable Result Under North Carolina's Equitable Distribution Statute — Kuder v. Schroeder," see 17 Campbell L. Rev. 361 (1995).

For article, "Bromhal v. Stott: Revisiting the Court's Role in Separation Agreements in the Context of Attorneys' Fees," see 74 N.C.L. Rev. 2151 (1996).

For case note, "Nunn v. Allen, Living Separate and Apart in North Carolina, Separation Agreements, Sex, the Meaning of Unmarried, and Liability of Third Parties," 25 N.C. Cent. L.J. 242 (2003).

For article, "The Regulation of Contractual Change: A Guide to No Oral Modification Clauses for North Carolina Lawyers," see 81 N.C.L. Rev. 2239 (2003).

CASE NOTES

Construction With Other Sections. — The validity of a separation agreement as it related to a waiver of alimony was not to be judged in the context of G.S. 52-10, but executed pursuant to this section. Napier v. Napier, 135 N.C. App. 364, 520 S.E.2d 312 (1999).

Section 52-10 and this section are distinguishable in that a separation agreement may affect support rights whereas G.S. 52-10 refers only to "rights ... in property"; further, as indicated by the terms requiring formalities for contracts entered into "during coverture," a contract under G.S. 52-10 may be entered into at any time during marriage, not only in contemplation of separation or divorce. Williams v. Williams, 120 N.C. App. 707, 463 S.E.2d 815 (1995), aff'd per curium, 343 N.C. 299, 469 S.E.2d 553 (1996).

Cases applying G.S. 52-10.1 and G.S. 52-10.2 are instructive in determining what constitutes marital rights, duties, and obligations under G.S. 50-16.9. Oakley v. Oakley, 165 N.C. App. 859, 599 S.E.2d 925, 2004 N.C. App. LEXIS 1511 (2004).

Separation Agreements Binding. — Under this section separation agreements are binding in all respects so long as they are not inconsistent with public policy and parties may, in settling disputes, agree to the payment of attorney's fees. Bromhal v. Stott, 116 N.C. App. 250, 447 S.E.2d 481 (1994), petition denied as to additional issues, 339 N.C. 609, 454 S.E.2d 246, aff'd, 341 N.C. 702, 462 S.E.2d 219 (1995).

Parties May Enter Agreement to Settle Question of Alimony. — Both parties to a divorce may enter into an agreement to settle the question of alimony, and the terms of the agreement are binding and may be modified only with the consent of both parties. Edwards v. Edwards, 102 N.C. App. 706, 403 S.E.2d 530, cert. denied, 329 N.C. 787, 408 S.E.2d 518 (1991).

Agreement Did Not Waive Alimony Rights. — Defendant's execution of a separation agreement which stated that it was executed with "the express understanding" and "in full satisfaction of all obligations" did not constitute an express waiver of her alimony rights within the meaning of this section or G.S. 50-16.6 where the preamble to the agreement referred to G.S. 50-20, an equitable distribution statute, thus excluding issues of spousal support. Napier v. Napier, 135 N.C. App. 364, 520 S.E.2d 312 (1999).

No Waiver of a Husband's Right to Assert a Criminal Conversation Claim. — Assuming that a provision in a separation agreement was intended by the husband and the wife to address their right to exclusive sexual intercourse with the other, the provision related only to the spouses' rights against each other, and, as a matter of law, the provision did not waive the parties' rights, with respect to third parties, for purposes of a criminal conversation claim. Nunn v. Allen, 154 N.C. App. 523, 574 S.E.2d 35, 2002 N.C. App. LEXIS 1522 (2002), cert. denied, 356 N.C. 675, 577 S.E.2d 630 (2003).

Both Parents Have Duty to Support Children. — It is the policy of this State that both parents have a duty to support their minor children. Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151, cert. denied, 329 N.C. 499, 407 S.E.2d 538 (1991).

Sections 52-10 and 52-10.1 were enacted without providing women any extra protection not offered to men; therefore, a separation agreement should be viewed today like any other bargained-for exchange between parties who are presumably on equal footing. Knight v. Knight, 76 N.C. App. 395, 333 S.E.2d 331 (1985).

Duty of Support May Be Discharged under Separation Agreement. — North Carolina law has long recognized that the husband's (supporting spouse's) duty of support may be discharged by a valid separation agreement between the spouses under which fixed benefits are provided the wife (dependent spouse) in consideration of the discharge. To be valid, such a discharge of support agreement must (1) be made between spouses either actually separated or intending immediately to separate; and (2) be executed in accordance with statutory formality requirements. Gray v. Snyder, 704 F.2d 709 (4th Cir. 1983).

When examining whether both parties freely entered into separation agreement, trial courts should use considerable care because contracts between husbands and wives are special agreements. Stegall v. Stegall, 100 N.C. App. 398, 397 S.E.2d 306 (1990), cert. denied, 328 N.C. 274, 400 S.E.2d 461 (1991).

This section requires that a separation

agreement be in writing and be acknowledged by both parties before a certifying officer, not a party to the contract, as defined by statute. Greene v. Greene, 77 N.C. App. 821, 336 S.E.2d 430 (1985).

To be valid a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Relationship between husband and wife is the most confidential of all relationships, and transactions between them, to be valid, must be fair and reasonable. Separation agreement must have been entered into without coercion. Stegall v. Stegall, 100 N.C. App. 398, 397 S.E.2d 306 (1990), cert. denied, 328 N.C. 274, 400 S.E.2d 461 (1991).

Actual Fraud Need Not Be Shown. — Courts have thrown cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably. To warrant equity's intervention, no actual fraud need to be shown, for relief will be granted if settlement is manifestly unfair to spouse because of other's overreaching. Stegall v. Stegall, 100 N.C. App. 398, 397 S.E.2d 306 (1990), cert. denied, 328 N.C. 274, 400 S.E.2d 461 (1991).

There was nothing inconsistent with public policy in an indemnity clause within a separation agreement where the clause read: "If either party hereto for any reason fails to perform his or her financial or other obligations to the other party or their child, and as a result thereof incurs any expense, including reasonable attorney's fees, to collect the same or otherwise enforce his or her rights with respect thereto, the defaulting party shall indemnify and hold the other harmless from any such expense." Edwards v. Edwards, 102 N.C. App. 706, 403 S.E.2d 530, cert. denied, 329 N.C. 787, 408 S.E.2d 518 (1991).

Duty to Pay Child Support Not Dependent upon Compliance with Other Provisions. — A spouse's obligation under the terms of a separation agreement to pay child support is not dependent upon plaintiff's compliance with visitation, non-harassment, or non-cohabitation provisions, or other provisions unrelated to the financial support of the children. Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151, cert. denied, 329 N.C. 499, 407 S.E.2d 538 (1991).

Provisions Dependent upon Compliance with Other Provisions in Agreement. — Whether a spouse's right to alimony or maintenance and support is dependent upon that spouse's compliance with other provisions in the separation agreement is determined by the construction of the contract between the parties. Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151, cert. denied, 329 N.C. 499, 407 S.E.2d 538 (1991).

Where a separation agreement is silent on the question of whether the provisions for alimony and visitation are dependent of each other, the trial court must determine whether defendant's payment of alimony is dependent upon the plaintiff's complying with the provisions of the agreement dealing with visitation, non-cohabitation and non-harassment. The burden of proof of integration of the provisions is on the defendant. Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151, cert. denied, 329 N.C. 499, 407 S.E.2d 538 (1991).

Breach of Provisions. — If the trial court finds provisions in a separation agreement relating to alimony and visitation are dependent, the trial court must then determine whether plaintiff breached the pertinent provisions, and, if so, whether those breaches were of a substantial nature. Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151, cert. denied, 329 N.C. 499, 407 S.E.2d 538 (1991).

Modification of Separation Agreement Must Be Pursuant to This Section. — In North Carolina, the modification of an original separation agreement must be made pursuant to the formalities and requirements of this section. Greene v. Greene, 77 N.C. App. 821, 336 S.E.2d 430 (1985).

An attempt to orally modify a separation agreement would fail to meet the formalities and requirements of this section. Therefore, the findings of the trial court would not support, much less require, a conclusion that the parties modified their separation agreement when plaintiff told defendant, upon learning of his remarriage, that she was making him a wedding present of the payments under the agreement. Greene v. Greene, 77 N.C. App. 821, 336 S.E.2d 430 (1985).

Equitable Distribution Barred by Agreement. — Separation agreement which released each spouse from the common law rights incident to marriage (dower, curtesy, inheritance, descent, and distribution), as well as "all other rights arising out of the marital relationship in and to any and all property," fully disposed of the parties' property rights arising out of the marriage and thus acted as a bar to equitable distribution. Hagler v. Hagler, 319 N.C. 287, 354 S.E.2d 228 (1987).

Agreement Was Valid Waiver of Property Rights. — In response to plaintiff's complaint for divorce, equitable distribution and alimony, defendant alleged a valid separation/property settlement agreement waived all of plaintiff's marital rights to equitable distribution and alimony and requested the agreement be incorporated in the court's final judgment; as valid contractual waivers of these rights are enforceable in this State, defendant's allegation of the agreement was properly characterized as a plea in bar to plaintiff's complaint. Garris v. Garris, 92 N.C. App. 467, 374 S.E.2d 638 (1988).

Agreement Not Signed by Wife Was Invalid and Did Not Bar Equitable Distribution. — Having determined that a separation agreement was not valid and enforceable under North Carolina law because only the husband acknowledged the execution of the separation agreement before the certifying officer and further, that the parties intended North Carolina law to govern, although the agreement was executed in Maryland, the Court of Appeals of North Carolina held that the agreement was invalid and did not bar the wife's claim for equitable distribution under G.S. 50-21. Morton v. Morton, 76 N.C. App. 295, 332 S.E.2d 736, cert. denied and appeal dismissed, 314 N.C. 667, 337 S.E.2d 582 (1985).

Agreement Held Not Unconscionable. — Wife failed to show agreements were unconscionable where evidence in record plainly showed that she considered the agreements equitable when she entered into them and knowingly chose to bring an end to the continuing aggravation and stress associated with the outstanding equitable distribution claim. Hill v. Hill, 94 N.C. App. 474, 380 S.E.2d 540 (1989).

Agreements did not involve constructive fraud where the fiduciary obligation normally existing between parties to a marriage had long been extinguished; not only were the parties divorced before the agreements were entered, but each had employed independent counsel to represent them in the equitable distribution action and the settlement negotiations, and through counsel, they hammered out the terms of property settlement. Hill v. Hill, 94 N.C. App. 474, 380 S.E.2d 540 (1989).

Acts Sufficient to Qualify as an Acknowledgment. — When defendant and wife signed a separation agreement in front of a notary the defendant performed acts sufficient to qualify as an acknowledgment under the statute, since no rights of creditors or third parties were involved. Lawson v. Lawson, 321 N.C. 274, 362 S.E.2d 269 (1987).

A certificate of acknowledgment may be subsequently affixed to a separation agreement if the agreement was valid under the appropriate statute, no rights of creditors or third parties being involved. Lawson v. Lawson, 321 N.C. 274, 362 S.E.2d 269 (1987).

A wife's acknowledgment of a separation agreement was fatally defective under former G.S. 52-6 where there was no private examination of the wife and thus no finding as to whether the agreement was unreasonable or injurious to the wife, and where the acknowledgment was certified by a Judge Advocate in the Marine Corps who did not qualify as a "certifying officer" under former G.S. 52-6(c) because his position was not that of an "equivalent or corresponding officer" of the jurisdiction where the examination and acknowledgment were to be made; and the omission of the private examination and the lack of authority on the part of the certifying officer precluded the use of curative statutes, G.S. 52-8 and 47-81.2, to validate the agreement. DeJaager v. DeJaager, 47 N.C. App. 452, 267 S.E.2d 399 (1980).

Presumption of Validity of Acknowledgment. — To impeach a notary's certification, there must be more than a bare allegation that no acknowledgment occurred, and where plaintiff never asserted that the actual signature on an agreement was other than his own, but suggested only a technical violation of this section, he did not bring forth sufficient evidence to overcome the presumption created in favor of the validity of the acknowledgment. Moore v. Moore, 108 N.C. App. 656, 424 S.E.2d 673, aff'd per curiam, 334 N.C. 684, 435 S.E.2d 71 (1993).

Proper notary. — Parties' separation agreement not set aside where the court (1) rejected the husband's claim of fraud, because the existence of a relationship of confidence and trust did not operate as an exception to the general rule that fraud could not be premised upon a misrepresentation of law, (2) found that since the parties' distribution scheme differed from that established by North Carolina law constituted merely a bare mistake of law, the court rejected the husband's request to reform the agreement, and (3) found that contrary to the husband's assertion, the record contained a copy of the agreement bearing a notary stamp for the signatures of both the wife and husband. Dalton v. Dalton, 164 N.C. App. 584, 596 S.E.2d 331, 2004 N.C. App. LEXIS 978 (2004).

Attorney's Fees. — The public policy of this state encourages settlement agreements and supports the inclusion of a provision for the recovery of attorney's fees in settlement agreements. Bromhal v. Stott, 341 N.C. 702, 462 S.E.2d 219 (1995).

Provision for recovery of attorney's fees in separation agreement was not inconsistent with public policy and was legal, valid, and binding under this section. Bromhal v. Stott, 341 N.C. 702, 462 S.E.2d 219 (1995).

Agreement as to Alimony. — Parties to a divorce may enter into a valid agreement settling the question of alimony, and unless the court then orders alimony to be paid, the terms of the agreement are binding and can only be modified by the consent of both parties. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Renunciation under Separation Agreement. — Where a husband executed a will devising and bequeathing all his property to his wife, and the spouses thereafter entered into a separation agreement in which each waived and renounced all rights under any previously executed will of the other, and the husband subsequently died without having revoked or modified his will, the separation agreement constituted a valid renunciation which adeemed the devise and bequest to the wife. Sedberry v. Johnson, 62 N.C. App. 425, 302 S.E.2d 924, cert. denied, 309 N.C. 322, 307 S.E.2d 167 (1983).

Breach of Separation Agreement. — Breach by husband of a part of a separation agreement requiring him to pay the difference in the federal and state income tax that wife was required to pay by virtue of being unable to make a deduction for attorneys' fees was not the breach of a personal contract provision which would allow recovery of special damages for mental anguish. Stanback v. Stanback, 37 N.C. App. 324, 246 S.E.2d 74, aff'd in part and rev'd in part, 297 N.C. 181, 254 S.E.2d 611 (1979).

Enforcement of Separation Agreement by Specific Performance. — A separation agreement that has not been incorporated into a divorce judgment may be equitably enforced by an order of specific performance. Harris v. Harris, 50 N.C. App. 305, 274 S.E.2d 489, cert. denied and appeal dismissed, 302 N.C. 397, 279 S.E.2d 351 (1981).

A separation agreement not incorporated into a final divorce decree may be enforced through the equitable remedy of specific performance. Edwards v. Edwards, 102 N.C. App. 706, 403 S.E.2d 530, cert. denied, 329 N.C. 787, 408 S.E.2d 518 (1991).

Defendant Held Able to Specifically Perform Agreement. — Where defendant's current wife's background was in the administrative sphere of her company, and the consulting work performed by defendant was indispensable to that company, the court was incorrect in concluding that the company was a joint venture for defendant and his wife and that defendant chose not to receive a salary in order to depress his income; therefore, the evidence in the record supported the conclusion that defendant was financially able to specifically perform the separation agreement. Brandt v. Brandt, 92 N.C. App. 438, 374 S.E.2d 663 (1988), aff'd, 325 N.C. 429, 383 S.E.2d 656 (1989).

As to attack on deed of separation by married woman, see Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Until deed of separation is rescinded, defendant cannot attack the legality of the separation or obtain alimony from plaintiff. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Binding Arbitration as to Spousal Support. — Since the parties may settle spousal support by agreement, there exists no prohibition to their entering into binding arbitration to settle the issue of spousal support. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Separation agreements may not by their own terms promote objectives which are offensive to public policy. Sethness v. Sethness, 62 N.C. App. 676, 303 S.E.2d 424 (1983).

Because a separation agreement does not specifically prohibit "illicit intercourse" and cohabitation and may, by implication, even condone such acts, it does not therefore follow that the agreement promotes such acts. Whether the silence of a separation agreement on such issues renders it void as against public policy is a matter of legislative, not judicial, determination. Sethness v. Sethness, 62 N.C. App. 676, 303 S.E.2d 424 (1983).

Separation Agreement Not Shown. — Where document recited that on the date of execution, the parties were "living separate and apart", however, it further provided that the parties may desire to resume cohabitation in an effort to reconcile and that the parties were considering the resumption of cohabitation, the express and unambiguous language of the agreement declared that the parties were not contemplating living "separate and apart forever." Thus, the agreement was not a separation agreement under this section. Williams v. Williams, 120 N.C. App. 707, 463 S.E.2d 815 (1995), aff'd per curium, 343 N.C. 299, 469 S.E.2d 553 (1996).

Failure of Court to Follow Dictates of Agreement. — Although signed by the parties and the court and filed with the clerk of the court, a custody and child support agreement was vacated because the trial court did not read its terms to the parties and inquire into the parties' understanding of and voluntary consent to the terms, as provided in the agreement. Tevepaugh v. Tevepaugh, 135 N.C. App. 489, 521 S.E.2d 117, 1999 N.C. App. LEXIS 1149 (1999).

Summary Judgment Held Improper. — Plaintiff's affidavit stated she was forced to sign the separation agreement under duress and coercion, and defendant denied allegation, therefore, taking plaintiff's affidavit as true, there was a genuine issue of material fact on question of duress and coercion concerning the separation agreement, and grant of summary judgment was error. Stegall v. Stegall, 100 N.C. App. 398, 397 S.E.2d 306 (1990), cert. denied, 328 N.C. 274, 400 S.E.2d 461 (1991).

Where separation agreement provided for percentage adjustments in the amount of alimony and child support based on the "Consumer Price Index for Consumer Goods," but did not specify which "Consumer Price Index," trial court erred by granting summary judgment on amount of arrearages. The court must decide what index the parties intended when they signed the agreement. Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151, cert. denied, 329 N.C. 499, 407 S.E.2d 538 (1991).

The law in North Carolina strongly favors enforcing contracts as written, wherever they may be entered into. Policy does not favor allowing spouses to escape their lawful support obligations simply by crossing state lines. White v. Graham, 72 N.C. App. 436, 325 S.E.2d 497 (1985).

Uncertifed Agreement Unenforceable. — Trial court erred by holding that a support agreement was governed by G.S. 52-10 and was enforceable because the agreement was made while the parties were separated, and concerned post-separation spousal support; thus, it was a separation agreement for spousal support, and, because it was uncertified, it failed to comply with G.S. 52-10.1 and was unenforceable. Sluder v. Sluder, — N.C. App. —, 679 S.E.2d 435, 2009 N.C. App. LEXIS 1166 (July 21, 2009).

Applied in White v. Graham, 72 N.C. App. 436, 325 S.E.2d 497 (1985); McLeod v. McLeod, 74 N.C. App. 144, 327 S.E.2d 910 (1985); Brandt v. Brandt, 92 N.C. App. 438, 374 S.E.2d 663 (1988).

Cited in Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984); Peak v. Peak, 82 N.C. App. 700, 348 S.E.2d 353 (1986); Collar v. Collar, 86 N.C. App. 105, 356 S.E.2d 407 (1987); Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989); Moyer v. Moyer, 122 N.C. App. 723, 471 S.E.2d 676 (1996).

§ 52-10.2. Resumption of marital relations defined.

"Resumption of marital relations" shall be defined as voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances. Isolated incidents of sexual intercourse between the parties shall not constitute resumption of marital relations. (1987, c. 664, s. 1.)

Legal Periodicals. — For note on post-separation sexual intercourse precluding enforcement of agreement requiring parties to live separate and apart, see 11 Campbell L. Rev. 73 (1988).

CASE NOTES

Construction With Other Sections. — Cases applying G.S. 52-10.1 and G.S. 52-10.2 are instructive in determining what constitutes marital rights, duties, and obligations under G.S. 50-16.9. Oakley v. Oakley, 165 N.C. App. 859, 599 S.E.2d 925, 2004 N.C. App. LEXIS 1511 (2004).

During a separation, the surviving spouse and the decedent prepared a separation agreement containing a provision wherein they waived the right to inheritance rights from each others' estates, but the couple thereafter reconciled and lived together until the decedent's death; thus, the surviving spouse had a right to claim an elective share under G.S. 30-3.1 because the waiver of inheritance rights was rescinded and canceled under G.S. 52-10.2 by the reconciliation of the decedent and the surviving spouse. In re Estate of Archibald, 183 N.C. App. 274, 644 S.E.2d 264, 2007 N.C. App. LEXIS 1046 (2007).

There are two lines of cases regarding resumption of marital relations: those which present the question of whether the parties hold themselves out as man and wife as a matter of law, and those involving conflicting evidence such that mutual intent becomes an essential element; these two lines of cases establish two alternative methods by which a trial court may find that separated spouses have reconciled. Schultz v. Schultz, 107 N.C. App. 366, 420 S.E.2d 186 (1992), cert. denied, 333 N.C. 347, 426 S.E.2d 710 (1993).

Future, but Not Existing, Alimony Obligations Cease upon Reconciliation. — When the parties resumed marital relations, appellant's obligations to pay alimony in the future ceased. His duty under the consent judgment to pay alimony up to the date of reconciliation, however, as an executed portion of the consent judgment, remained enforceable through the court's contempt power. Schultz v. Schultz, 107 N.C. App. 366, 420 S.E.2d 186 (1992), cert. denied, 333 N.C. 347, 426 S.E.2d 710 (1993).

Reconciliation Not Shown. — Four hours on each of six evenings spent together in the former marital home eating dinner and visiting with the parties' children in combination with three or four isolated acts of sexual intercourse did not constitute reconciliation as a matter of law. Fletcher v. Fletcher, 123 N.C. App. 744, 474 S.E.2d 802 (1996).

Section Not Applied Retroactively. — Testimony of plaintiff and defendant alike showed that the parties had sexual intercourse several times between the execution of Separation Agreement and Property Settlement and June 1, 1985, and under the law that existed when the acts of intercourse occurred, they rendered null and void the unperformed obligations of the agreement; furthermore, plaintiff's position was not aided by this section, as that enactment became effective October 1, 1987, more than two years after the occurrences involved. Moser v. Moser, 96 N.C. App. 273, 385 S.E.2d 160 (1989), cert. denied, 326 N.C. 483, 392 S.E.2d 93 (1990).

Cited in Higgins v. Higgins, 321 N.C. 482, 364 S.E.2d 426 (1988); Wells v. Wells, 92 N.C. App. 226, 373 S.E.2d 879 (1988); Miller v. Brooks, 123 N.C. App. 20, 472 S.E.2d 350 (1996).

§ 52-11. Antenuptial contracts and torts.

The liability of a married person for any debts owing, or contracts made or damages incurred before marriage shall not be impaired or altered by such marriage. No person shall by marriage incur any liability for any debts owing, or contracts made, or for wrongs done by his or her spouse before the marriage. (1871-2, c. 193, ss. 13, 14; Code, ss. 1822, 1823; Rev., ss. 2101, 2106; C.S., s. 2517; 1965, c. 878, s. 1.)

Editor's Note. — Former § 52-11 was repealed by Session Laws 1943, c. 543. The provisions of present G.S. 52-11 are similar to those of former G.S. 52-14.

Legal Periodicals. — For case law survey on tort law, see 43 N.C.L. Rev. 906 (1965).

For comment on enforceability of marital contracts, see 47 N.C.L. Rev. 816 (1969).

For article, "A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?," see 18 Campbell L. Rev. 203 (1996).

CASE NOTES

Wife May Appoint Husband as Agent. — A wife may appoint her husband to act as her agent to settle her antenuptial debts in the same manner as one sui juris may appoint an agent, and compliance with the requirements of former G.S. 52-6 was not necessary. Stout v. Perry, 152 N.C. 312, 67 S.E. 757 (1910).

Where prior to marriage wife incurs liability for negligent injury to husband, the subsequent marriage does not affect her liability. Shirley v. Ayers, 201 N.C. 51, 158 S.E. 840 (1931).

§ 52-12. Postnuptial crimes and torts.

No married person shall be liable for damages accruing from any tort committed by his or her spouse, or for any costs or fines incurred in any criminal proceeding against such spouse. (1871-2, c. 193, s. 25; Code, s. 1833; Rev., s. 2105; C.S., s. 2518; 1921, c. 102; 1965, c. 878, s. 1.)

Editor's Note. — Provisions similar to former G.S. 52-12 were contained in the G.S. 52-6 repealed by Session Laws 1977, c. 375, s. 1. The provisions of present G.S. 52-12 are similar to those of former G.S. 52-15.

CASE NOTES

Common Law. — At common law, husband was liable for the tort of his wife, although committed without his knowledge or consent and in his absence, and although husband and wife were living separate at the time, on the ground that as her legal existence was incorporated in that of her husband, she could not be sued alone, and if the husband was protected from responsibility the injured party would be without redress. Roberts v. Lisenbee, 86 N.C. 136 (1882).

For cases decided under former law, see Roberts v. Lisenbee, 86 N.C. 136 (1882); Presnell v. Moore, 120 N.C. 390, 27 S.E. 27 (1897); Brittingham v. Stadiem, 151 N.C. 299, 66 S.E. 128 (1909); Young v. Newsome, 180 N.C. 315, 104 S.E. 660 (1920).

Applied in Burton v. Dixon, 259 N.C. 473, 131 S.E.2d 27 (1963); Hinson v. Jarvis, 190 N.C. App. 607, 660 S.E.2d 604, 2008 N.C. App. LEXIS 990 (2008).

Cited in Lawson v. Lawson, 321 N.C. 274, 362 S.E.2d 269 (1987); State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544, 2001 N.C. App. LEXIS 1234 (2001).

§ 52-13. Procedures in causes of action for alienation of affection and criminal conversation.

(a) No act of the defendant shall give rise to a cause of action for alienation of affection or criminal conversation that occurs after the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent.

(b) An action for alienation of affection or criminal conversation shall not be commenced more than three years from the last act of the defendant giving rise to the cause of action.

(c) A person may commence a cause of action for alienation of affection or criminal conversation against a natural person only. (2009-400, s. 1.)

Editor's Note. — Session Laws 2009-400, s. 2, made this section effective October 1, 2009, and applicable to actions arising from acts occurring on or after that date.

Chapter 52A.

Uniform Reciprocal Enforcement of Support Act.

§§ 52A-1 through 52A-32: Repealed by Session Laws 1995, c. 538, s. 7(a).

Cross References. — For the Uniform Interstate Family Support Act, see Chapter 52C.

Chapter 52B.

Uniform Premarital Agreement Act.

Sec.
52B-1. Short title.
52B-2. Definitions.
52B-3. Formalities.
52B-4. Content.
52B-5. Effect of marriage.
52B-6. Amendment, revocation.
52B-7. Enforcement.
52B-8. Enforcement: void marriage.
52B-9. Limitation of actions.
52B-10. Application and construction.
52B-11. Severability.

Editor's Note. — The official commentary to this Act has been printed with the permission of the National Conference of Commissioners on Uniform State Laws, and copies of the Uniform Act may be ordered from them at 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611, (312) 915-0195.

PREFATORY NOTE

The number of marriages between persons previously married and the number of marriages between persons each of whom is intending to continue to pursue a career is steadily increasing. For these and other reasons, it is becoming more and more common for persons contemplating marriage to seek to resolve by agreement certain issues presented by the forthcoming marriage. However, despite a lengthy legal history for these premarital agreements, there is a substantial uncertainty as to the enforceability of all, or a portion, of the provisions of these agreements and a significant lack of uniformity of treatment of these agreements among the states. The problems caused by this uncertainty and nonuniformity are greatly exacerbated by the mobility of our population. Nevertheless, this uncertainty and nonuniformity seem reflective not so much of basic policy differences between the states but rather a result of spasmodic, reflexive response to varying factual circumstances at different times. Accordingly, uniform legislation conforming to modern social policy which provides both certainty and sufficient flexibility to accommodate different circumstances would appear to be both a significant improvement and a goal realistically capable of achievement.

This Act is intended to be relatively limited in scope. Section 1 defines a "premarital agreement" as "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage." Section 2 requires that a premarital agreement be in writing and signed by both parties. Section 4 provides that a premarital agreement becomes effective upon the marriage of the parties. These sections establish significant parameters. That is, the Act does not deal with agreements between persons who live together but who do not contemplate marriage or who do not marry. Nor does the Act provide for postnuptial or separation agreements or with oral agreements.

On the other hand, agreements which are embraced by the act are permitted to deal with a wide variety of matters and Section 3 provides an *illustrative* list of those matters, including spousal support, which may properly be dealt with in a premarital agreement.

Section 6 is the key operative section of the Act and sets forth the conditions under which a premarital agreement is not enforceable. An agreement is not enforceable if the party against whom enforcement is sought proves that (a) he or she did not execute the agreement voluntarily or that (b) the agreement was unconscionable when it was executed and, before execution of the agreement, he or she (1) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party, (2) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided, *and* (3) did not have, or reasonably could not have had, an adequate knowledge of the property and financial obligations of the other party.

Even if these conditions are not proven, if a provision of a premarital agreement modifies or eliminates spousal support, and that modification or elimination would cause a party to be eligible for support under a program of public assistance at the time of separation, marital dissolution, or death, a court is authorized to order the other party to provide support to the extent necessary to avoid that eligibility.

These sections form the heart of the Act; the remaining sections deal with more tangential issues. Section 5 prescribes the manner in which a premarital agreement may be amended or revoked; Section 7 provides for very limited enforcement where a marriage is subsequently determined to be void; and Section 8 tolls any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement during the parties' marriage.

§ 52B-1. Short title.

This Chapter may be cited as the "Uniform Premarital Agreement Act". (1987, c. 473, s. 1.)

Editor's Note. — Session Laws 1987, c. 473, s. 3 made this Chapter effective July 1, 1987, and applicable to any premarital agreement executed on or after that date.

Legal Periodicals. — For article, "North Carolina's Uniform Premarital Agreement Act, A Contract Perspective," see 12 Campbell L. Rev. 221 (1990).

For comment, "The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage," see 28 Wake Forest L. Rev. 1037 (1993).

For note, "The Diploma Dilemma: An Inequitable Result Under North Carolina's Equitable Distribution Statute — Kuder v. Schroeder," see 17 Campbell L. Rev. 361 (1995).

CASE NOTES

Summary judgment was appropriate where a premarital agreement signed by the parties irrefutably barred the wife's claims for postseparation support, alimony and equitable distribution; the language in the subject agreement—drafted by the wife's attorney—was sufficiently "express" to constitute a valid and enforceable waiver of the wife's claims for postseparation support pursuant to G.S. 50-16.2A and alimony pursuant to G.S. 50-16.3A. Stewart v. Stewart, 141 N.C. App. 236, 541 S.E.2d 209, 2000 N.C. App. LEXIS 1439 (2000).

Cited in Huntley v. Huntley, 140 N.C. App. 749, 538 S.E.2d 239, 2000 N.C. App. LEXIS 1269 (2000); McIntyre v. McIntyre, 188 N.C. App. 26, 654 S.E.2d 798, 2008 N.C. App. LEXIS 85 (2008).

§ 52B-2. Definitions.

As used in this Chapter:

(1) "Premarital agreement" means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.

(2) "Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings. (1987, c. 473, s. 1.)

OFFICIAL COMMENT

The definition of "premarital agreement" set forth in subsection (1) is limited to an agreement between prospective spouses made in contemplation of and to be effective upon marriage. Agreements between persons living together but not contemplating marriage (see Marvin v. Marvin, 18 Cal.3d 660 (1976), judgment after trial modified, 122 Cal.App.3d 871 (1981)) and postnuptial or separation agreements are outside the scope of this Act. Formal requirements are prescribed by Section 2. An illustrative list of matters which may be included in an agreement is set forth in Section 3.

Subsection (2) is designed to embrace all forms of property and interests therein. These may include rights in a professional license or practice, employee benefit plans, pension and retirement accounts, and so on. The reference to income or earnings includes both income from property and earnings from personal services.

CASE NOTES

Applied in Roberts v. Roberts, 173 N.C. App. 354, 618 S.E.2d 761, 2005 N.C. App. LEXIS 2030 (2005).

Cited in King v. King, 114 N.C. App. 454, 442 S.E.2d 154 (1994); Stewart v. Stewart, 141 N.C. App. 236, 541 S.E.2d 209, 2000 N.C. App. LEXIS 1439 (2000).

§ 52B-3. Formalities.

A premarital agreement must be in writing and signed by both parties. It is enforceable without consideration. (1987, c. 473, s. 1.)

OFFICIAL COMMENT

This section restates the common requirement that a premarital agreement be reduced to writing and signed by both parties (see Ariz. Rev. Stats. § 25-201; Ark. Stats. § 55-310; Cal.Civ.C. § 5134; 13 Dela.Code 1974 § 301; Idaho Code § 32-917; Ann.Laws Mass. ch. 209, § 25; Minn.Stats.Ann. § 519.11; Montana Rev.C. § 36-123; New Mex. Stats.Ann.1978 40-2-4; Ore.Rev.Stats. § 108.140; Vernon's Texas Codes Ann. § 5.44; Vermont Stats. Ann. Title 12, § 181). Many states also require other formalities, including notarization or an acknowledgement (see, e.g., Arizona, Arkansas, California, Idaho, Montana, New Mexico) but may then permit the formal statutory requirement to be avoided or satisfied subsequent to execution (see In re Marriage of Cleveland, 76 Cal.App.3d 357 (1977) (premarital agreement never acknowledged but "proved" by sworn testimony of parties in dissolution proceeding)). This act dispenses with all formal requirements except a writing signed by both parties. Although the section is framed in the singular, the agreement may consist of one or more documents intended to be part of the agreement and executed as required by this section.

Section 2 also restates what appears to be the almost universal rule regarding the marriage as consideration for a premarital agreement (see, e.g., Ga. Code § 20-303; Barnhill v. Barnhill, 386 So.2d 749 (Ala. Civ. App. 1980); Estate of Gillilan v. Estate of Gillilan, 406 N.E.2d 981 (Ind.App.1980); Friedlander v. Friedlander, 494 P.2d 208 (Wash.1972); but cf. Wilson v. Wilson, 170 A.2d 679, 685 (Me.1961)). The primary importance of this rule has been to provide a degree of mutuality of benefits to support the enforceability of a premarital agreement. A marriage is a prerequisite for the effectiveness of a premarital agreement under this act (see Section 4). This requires that there be a ceremonial marriage. Even if this marriage is subsequently determined to have been void, Section 7 may provide limits of enforceability of an agreement entered into a contemplation of that marriage. Consideration as such is not required and the standards for enforceability are established by Sections 6 and 7. Nevertheless, this provision is retained here as a desirable, if not essential, restatement of the law. On the other hand, the fact that marriage is deemed to be consideration for the purpose of this act does not change the rules applicable in other areas of law (see, e.g., 26 U.S.C.A. § 2043 (release of certain marital rights not treated as consideration for federal estate tax, 2512); Merrill v. Fahs, 324 U.S. 308, rehearing denied 324 U.S. 888 (release of marital rights in premarital agreement not adequate and full consideration for purposes of federal gift tax).)

Finally, a premarital agreement is a contract. As required for any other contract, the parties must have the capacity to contract in order to enter into a binding agreement. Those persons who lack the capacity to contract but who under other provisions of law are permitted to enter into a binding agreement may enter into premarital agreement under those other provisions of law.

CASE NOTES

Acknowledgment Not Required. — The Uniform Premarital Agreement Act does not require acknowledgment of premarital agreements. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990).

Applied in Roberts v. Roberts, 173 N.C. App. 354, 618 S.E.2d 761, 2005 N.C. App. LEXIS 2030 (2005).

Cited in Harllee v. Harllee, 151 N.C. App. 40, 565 S.E.2d 678, 2002 N.C. App. LEXIS 687 (2002).

§ 52B-4. Content.

(a) Parties to a premarital agreement may contract with respect to:

(1) The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;

(2) The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;

(3) The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;

(4) The modification or elimination of spousal support;

(5) The making of a will, trust, or other arrangement to carry out the provisions of the agreement;

(6) The ownership rights in and disposition of the death benefit from a life insurance policy;

(7) The choice of law governing the construction of the agreement; and

(8) Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

(b) The right of a child to support may not be adversely affected by a premarital agreement. (1987, c. 473, s. 1.)

OFFICIAL COMMENT

Section 3 permits the parties to contract in a premarital agreement with respect to any matter listed and any other matter not in violation of public policy or any statute imposing a criminal penalty. The matters are intended to be illustrative, not exclusive. Paragraph (4) of subsection (a) specifically authorizes the parties to deal with spousal support obligations. There is a split in authority among the states as to whether a premarital agreement may control the issue of spousal support. Some few states do not permit a premarital agreement to control this issue (see, e.g., In re Marriage of Winegard, 278 N.W.2d 505 (Iowa 1979); Fricke v. Fricke, 42 N.W.2d 500 (Wis.1950)). However, the better view and growing trend is to permit a premarital agreement to govern this matter if the agreement and the circumstances of its execution satisfy certain standards (see, e.g., Newman v. Newman, 653 P.2d 728 (Colo.Sup.Ct.1982); Parniawski v. Parniawski, 359 A.2d 719 (Conn.1976); Volid v. Volid, 286 N.E.2d 42 (Ill.1972); Osborne v. Osborne, 428 N.E.2d 810 (Mass.1981); Hudson v. Hudson, 350 P.2d 596 (Okla.1960); Unander v. Unander, 506 P.2d 719 (Ore.1973)) (see Sections 7 and 8).

Paragraph (8) of subsection (a) makes clear that the parties may also contract with respect to other matters, including personal rights and obligations, not in violation of public policy or a criminal statute. Hence, subject to this limitation, an agreement may provide for such matters as the choice of abode, the freedom to pursue career opportunities, the upbringing of children, and so on. However, subsection (b) of this section makes clear that an agreement may not adversely affect what would otherwise be the obligation of a party to a child.

NORTH CAROLINA COMMENT

If the parties contract with respect to the ownership rights in and disposition of the death benefit from a life insurance policy and the provisions of the premarital contract conflict with the provisions of the life insurance policy, the provisions of the life insurance policy shall prevail with respect to payment by the insurance company but not with respect to the rights of the parties to the premarital agreement.

Legal Periodicals. — For article, "A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?," see 18 Campbell L. Rev. 203 (1996).

CASE NOTES

Relinquishment of Equitable Distribution Rights. — The trial court erred in allowing the husband an equitable distribution of the marital property where a valid prenuptial agreement, in which the parties relinquished all such rights, existed pursuant to this section. Huntley v. Huntley, 140 N.C. App. 749, 538 S.E.2d 239, 2000 N.C. App. LEXIS 1269 (2000).

The appellant-wife effectively waived her rights to the husband's retirement accounts under this section, and her waiver was not subject to the spousal waiver requirements of ERISA. Stewart v. Stewart, 141 N.C. App. 236, 541 S.E.2d 209, 2000 N.C. App. LEXIS 1439 (2000).

Waiver of Alimony in Foreign Agreement Valid. — Because the premarital agreement executed in California was valid at the time of execution and alimony waivers were not void against North Carolina's public policy when the parties relocated to North Carolina, the trial court erred in voiding the alimony waivers. Muchmore v. Trask, — N.C. App. —, 666 S.E.2d 667, 2008 N.C. App. LEXIS 1649 (2008).

§ 52B-5. Effect of marriage.

A premarital agreement becomes effective upon marriage. (1987, c. 473, s. 1.)

OFFICIAL COMMENT

This section establishes a marriage as a prerequisite for the effectiveness of a premarital agreement. As a consequence, the act does not provide for a situation where persons live together without marrying. In that situation, the parties must look to the other law of the jurisdiction (see Marvin v. Marvin, 18 Cal.3d 660 (1976); judgment after trial modified, 122 Cal.App.3d 871 (1981)).

CASE NOTES

Relinquishment of Equitable Distribution Rights. — The trial court erred in allowing the husband an equitable distribution of the marital property where a valid prenuptial agreement, in which the parties relinquished all such rights, existed pursuant to G.S. 52B-4. Huntley v. Huntley, 140 N.C. App. 749, 538 S.E.2d 239, 2000 N.C. App. LEXIS 1269 (2000).

Cited in Stewart v. Stewart, 141 N.C. App. 236, 541 S.E.2d 209, 2000 N.C. App. LEXIS 1439 (2000).

§ 52B-6. Amendment, revocation.

After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration. (1987, c. 473, s. 1.)

OFFICIAL COMMENT

This section requires the same formalities of execution for an amendment or revocation of a premarital agreement as are required for its original execution (cf. Estate of Gillilan v. Estate of Gillilan, 406 N.E.2d 981 (Ind.App.1980) (agreement may be altered by subsequent agreement but not simply by inconsistent acts).

Legal Periodicals. — For article, "The Regulation of Contractual Change: A Guide to No Oral Modification Clauses for North Carolina Lawyers," see 81 N.C.L. Rev. 2239 (2003).

CASE NOTES

Oral Rescission Not Valid under This Section. — The trial court violated the principles of this section in declaring a prenuptial agreement void based on its finding that a paragraph was orally rescinded; the husband, who had failed to convey half of his residence to the wife as promised in the agreement, presented no evidence that the parties ever entered into a written agreement amending or revoking the original prenuptial agreement. Huntley v. Huntley, 140 N.C. App. 749, 538 S.E.2d 239, 2000 N.C. App. LEXIS 1269 (2000).

A cancellation of wedding plans does not automatically nullify the provisions of a prenuptial agreement in the event the parties subsequently reconcile and marry. In re Estate of Pate, 119 N.C. App. 400, 459 S.E.2d 1 (1995).

§ 52B-7. Enforcement.

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

(1) That party did not execute the agreement voluntarily; or

(2) The agreement was unconscionable when it was executed and, before execution of the agreement, that party:

a. Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

b. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

c. Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility. Before the court orders support under this subsection, the court must find that the party for whom support is ordered is a dependent spouse, as defined by G.S. 50-16.1A, and that the requirements of G.S. 50-16.2A regarding postseparation support or G.S. 50-16.3A regarding alimony have been met.

(c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law. (1987, c. 473, s. 1; 1995, c. 319, s. 11; 1997-456, s. 27.)

OFFICIAL COMMENT

This section sets forth the conditions which must be proven to avoid the enforcement of a premarital agreement. If prospective spouses enter into a premarital agreement and their subsequent marriage is determined to be void, the enforceability of the agreement is governed by Section 7.

The conditions stated under subsection (a) are comparable to concepts which are expressed in the statutory and decisional law of many jurisdictions. Enforcement based on disclosure and voluntary execution is perhaps most common (see, e.g, Ark. Stats. § 55-309; Minn.Stats.Ann. § 519.11; In re Kaufmann's Estate, 171 A.2d 48 (Pa.1961) (alternate holding)). However, knowledge or reason to know, together with voluntary execution, may also be sufficient (see, e.g., Tenn.Code Ann. § 36-606; Barnhill v. Barnhill, 386 So.2d 479 (Ala. Civ. App. 1980); Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla.1962); Coward and Coward, 582 P.2d 834 (Or.App. 1978); but see Matter of Estate of Lebsock, 618 P.2d 683 (Colo.App.1980)) and so may a voluntary, knowing waiver (see Hafner v. Hafner, 295 N.W.2d 567 (Minn.1980)). In each of these situations, it should be underscored that execution must have been voluntary (see Lutgert v. Lutgert, 338 So.2d 1111 (Fla.1976); see also 13 Dela.Code 1974 § 301 (10 day waiting period)). Finally, a premarital agreement is enforceable if enforcement would not have been unconscionable at the time the agreement was executed (cf. Hartz v. Hartz, 234 A.2d 865 (Md.1967) (premarital agreement upheld if no disclosure but agreement was fair and equitable under the circumstances)).

The test of "unconscionability" is drawn from Section 306 of the Uniform Marriage and Divorce Act (UMDA) (see Ferry v. Ferry, 586

S.W.2d 782 (Mo.1979); see also Newman v. Newman, 653 P.2d 728 (Colo.Sup.Ct.1982) (maintenance provisions of premarital agreement tested for unconscionability at time of marriage termination)). The following discussion set forth in the Commissioner's Note to Section 306 of the UMDA is equally appropriate here:

"Subsection (b) undergirds the freedom allowed the parties by making clear that the terms of the agreement respecting maintenance and property disposition are binding upon the court unless those terms are found to be unconscionable. The standard of unconscionability is used in commercial law, where its meaning includes protection against onesidedness, oppression, or unfair surprise (see section 2-302, Uniform Commercial Code), and in contract law, Scott v. U. S., 12 Wall (U.S.) 443 (1870) ('contract . . . unreasonable and unconscionable but not void for fraud'); Stiefler v. McCullough, 174 N.E. 823, 97 Ind. App. 123 (1931); Terre Haute Cooperage v. Branscome, 35 So.2d 537, 203 Miss. 493 (1948); Carter v. Boone County Trust Co., 92 S.W.2d 647, 338 Mo. 629 (1936). It has been used in cases respecting divorce settlements or awards. Bell v. Bell, 371 P.2d 773, 150 Colo. 174 (1962) ('this division of property is manifestly unfair, inequitable and unconscionable'). Hence the act does not introduce a novel standard unknown to the law. In the context of negotiations between spouses as to the financial incidents of their marriage, the standard includes protection against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other.

"In order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties resulting from the agreement, and any other relevant evidence such as the conditions under which the agreement was made, including the knowledge of the other party. If the court finds the agreement not unconscionable, its terms respecting property division and maintenance may not be altered by the court at the hearing."

(Commissioner's Note, Sec. 306, Uniform Marriage and Divorce Act.)

Nothing in Section 6 makes the absence of assistance of independent legal counsel a condition for the unenforceability of a premarital agreement. However, lack of that assistance may well be a factor in determining whether the conditions stated in Section 6 may have existed (see, e.g., Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla.1962)).

Even if the conditions stated in subsection (a) are not proven, if a provision of a premarital agreement modifies or eliminates spousal support, subsection (b) authorizes a court to provide very limited relief to a party who would otherwise be eligible for public welfare (see, e.g., Osborne v. Osborne, 428 N.E.2d 810 (Mass.1981) (dictum); Unander v. Unander, 506 P.2d 719 (Ore.1973) (dictum)).

No special provision is made for enforcement of provisions of a premarital agreement relating to personal rights and obligations. However, a premarital agreement is a contract and these provisions may be enforced to the extent that they are enforceable are under otherwise applicable law (see Avitzur v. Avitzur, 459 N.Y.S.2d 572 (Ct. App.).

Section 6 is framed in a manner to require the party who alleges that a premarital agreement is not enforceable to bear the burden of proof as to that allegation. The statutory law conflicts on the issue of where the burden of proof lies (contrast Ark. Stats. § 55-313; 31 Minn.Stats.Ann. § 519.11 with Vernon's Texas Codes Ann. § 5.45). Similarly, some courts have placed the burden on the attacking spouse to prove the invalidity of the agreement. Linker v. Linker, 470 P.2d 921 (Colo.1970); Matter of Estate of Benker, 296 N.W.2d 167 (Mich.App.1980); In re Kauffmann's Estate, 171 A.2d 48 (Pa.1961). Some have placed the burden upon those relying upon the agreement to prove its validity. Hartz v. Hartz, 234 A.2d 865 (Md.1967). Finally, several have adopted a middle ground by stating that a premarital agreement is presumptively valid but if a disproportionate disposition is made for the wife, the husband bears the burden of proof of showing adequate disclosure. (Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla.1962); Christians v. Christians, 44 N.W.2d 431 (Iowa 1950); In re Neis' Estate, 225 P.2d 110 (Kans. 1950); Truitt v. Truitt's Adm'r, 162 S.W.2d 31 (Ky. 1942); In re Estate of Strickland, 149 N.W.2d 344 (Neb. 1967); Kosik v. George, 452 P.2d 560 (Or.1969); Friedlander v. Friedlander, 494 P.2d 208 (Wash.1972).

Cross References. — As to postseparation support, see G.S. 50-16.2A.

CASE NOTES

A premarital agreement concerning alimony is void as against public policy. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d

90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Invalidity of alimony provision in a premarital agreement did not affect the property provisions of the agreement. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Party Claiming Invalidity Has Burden of Proof. — In an action to enforce a premarital agreement executed prior to enactment of Chapter 52B, the party claiming the invalidity of the agreement for reasons of undue influence, duress, fraud, unconscionability or inadequate disclosure has the burden of proof. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Presentation of a premarital agreement to wife on the day before the wedding, combined with the threat that the marriage would not take place unless the document was executed, did not amount to duress and undue influence. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Premarital Agreement Was Not Sufficiently Identical to Act. — Trial court erred in concluding that premarital agreement was sufficiently identical to the Equitable Distribution Act to allow the trial court to distribute the property according to the Act despite the premarital agreement, where the Act did not exist at the time of the agreement's execution, and the parties could not have intended that the Act govern their property division. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Foreign Contract. — Syrian contract would not be viewed as a premarital agreement limiting plaintiff's relief under the laws of North Carolina because the contract, signed by plaintiff's father as her agent, did not meet the requirements of this chapter. Atassi v. Atassi, 117 N.C. App. 506, 451 S.E.2d 371, cert. denied, 340 N.C. 109, 456 S.E.2d 310 (1995).

Cited in King v. King, 114 N.C. App. 454, 442 S.E.2d 154 (1994); Huntley v. Huntley, 140 N.C. App. 749, 538 S.E.2d 239, 2000 N.C. App. LEXIS 1269 (2000).

§ 52B-8. Enforcement: void marriage.

If a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result. (1987, c. 473, s. 1.)

OFFICIAL COMMENT

Under this section a void marriage does not completely invalidate a premarital agreement but does substantially limit its enforceability. Where parties have married and lived together for a substantial period of time and one or both have relied on the existence of a premarital agreement, the failure to enforce the agreement may well be inequitable. This section, accordingly, provides the court discretion to enforce the agreement to the extent necessary to avoid the inequitable result (see Annot., 46 A.L.R.3d 1403).

§ 52B-9. Limitation of actions.

Any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party. (1987, c. 473, s. 1.)

OFFICIAL COMMENT

In order to avoid the potentially disruptive effect of compelling litigation between the spouses in order to escape the running of an applicable statute of limitations, Section 8 tolls any applicable statute during the marriage of the parties (contrast Dykema v. Dykema, 412 N.E.2d 13 (Ill.App.1980) (statute of limitations not tolled where fraud not adequately pleaded, hence premarital agreement enforced at death)). However, a party is not completely free to sit on his or her rights because the section does preserve certain equitable defenses.

CASE NOTES

Cited in Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989); Huntley v. Huntley, 140 N.C. App. 749, 538 S.E.2d 239, 2000 N.C. App. LEXIS 1269 (2000).

§ 52B-10. Application and construction.

The Uniform Premarital Agreement Act shall be applied and construed to effectuate its general purpose to make uniform among the states enacting it, the law on premarital agreements. (1987, c. 473, s. 1.)

OFFICIAL COMMENT

Section 9 is a standard provision in all Uniform Acts.

§ 52B-11. Severability.

If any provision of this Chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable. (1987, c. 473, s. 1.)

OFFICIAL COMMENT

Section 11 is a standard provision included in certain Uniform Acts.

Chapter 52C.

Uniform Interstate Family Support Act.

Article 1.

General Provisions.

Sec.
52C-1-100. Short title.
52C-1-101. Definitions.
52C-1-102. District court has jurisdiction under this Act.
52C-1-103. Remedies.

Article 2.

Jurisdiction.

Part 1. Extended Personal Jurisdiction.

52C-2-201. Bases for jurisdiction over nonresident.
52C-2-202. Procedure when exercising jurisdiction over nonresident.

Part 2. Proceedings Involving Two or More States.

52C-2-203. Initiating and responding tribunal of state.
52C-2-204. Simultaneous proceedings in another state.
52C-2-205. Continuing, exclusive jurisdiction.
52C-2-206. Enforcement and modification of support order by tribunal having continuing jurisdiction.

Part 3. Reconciliation of Multiple Orders.

52C-2-207. Recognition of controlling child support order.
52C-2-208. Multiple child support orders for two or more obligees.
52C-2-209. Credit for payments.

Article 3.

Civil Provisions of General Application.

52C-3-301. Proceedings under this Chapter.
52C-3-302. Action by minor parent.
52C-3-303. Application of law of this State.
52C-3-304. Duties of initiating tribunal.
52C-3-305. Duties and powers of responding tribunal.
52C-3-306. Inappropriate tribunal.
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Editor's Note. — Permission to include the Official Comments was granted by the National Conference of Commissioners on Uniform State Laws and The American Law Institute. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Chapter.

ARTICLE 1.

General Provisions.

§ 52C-1-100. Short title.

This Chapter may be cited as the Uniform Interstate Family Support Act. (1995, c. 538, s. 7(c).)

Editor's Note. — Session Laws 1995, c. 538, s. 7, enacted this Chapter and repealed Chapter 52A. Where appropriate, the annotations under sections of repealed Chapter 52A have been placed under corresponding sections of this Chapter.

Session Laws 2009-126, s. 1(a) and (b), provides: "(a) The Joint Legislative Program Evaluation Oversight Committee shall include in the 2009-2010 Work Plan for the Program Evaluation Division of the General Assembly a study of existing programs that directly or indirectly benefit children and youth in this State. The Division shall identify the programs and their sources of funding and determine whether the programs have clear goals, indicators, or benchmarks by which to measure the programs' success.

"(b) The Program Evaluation Division shall submit its findings and recommendations to the Joint Legislative Program Evaluation Oversight Committee, the Joint Legislative Study Commission on Children and Youth, and the Fiscal Research Division at a date to be determined by the Joint Legislative Program Evaluation Oversight Committee."

Legal Periodicals. — For comment on Uniform Reciprocal Enforcement of Support Act, see 29 N.C.L. Rev. 423 (1951).

For note on conflict of laws, see 34 N.C.L. Rev. 126 (1955).

For note on survival of support and the Uniform Reciprocal Enforcement of Support Act, see 48 N.C.L. Rev. 100 (1969).

For comment on access of indigents to the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

For survey of 1976 case law on domestic relations, see 55 N.C.L. Rev. 1018 (1977).

For survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

CASE NOTES

As to the history of the uniform act, see Mahan v. Read, 240 N.C. 641, 83 S.E.2d 706 (1954).

A proceeding under former Chapter 52A was a civil proceeding as in actions for alimony without divorce. Brondum v. Cox, 30 N.C. App. 35, 226 S.E.2d 193 (1976), aff'd, 292 N.C. 192, 232 S.E.2d 687 (1977).

A primary function of the former Uniform Reciprocal Enforcement of Support Act (URESA) was to simplify and streamline the procedure by which an action to enforce a court order rendered in another jurisdiction could be instituted. Williams v. Williams, 97 N.C. App. 118, 387 S.E.2d 217 (1990).

Conflict Between UIFSA and Prior Law. — Since the Uniform Interstate Family Support Act (UIFSA), G.S. 52C-1-100 et seq. is a more specific and more recent statute than G.S. 50-16.9(c), any conflict between UIFSA and G.S. 50-16.9(c) must be resolved in accordance with the provisions of UIFSA. Hook v. Hook, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

Former Chapter 52A did not establish additional grounds for support; it produced additional means of enforcing support obligations already established. Stevens v. Stevens, 68 N.C. App. 234, 314 S.E.2d 786, cert. denied, 312 N.C. 89, 321 S.E.2d 908 (1984).

Foreign Order. — The effect of a 1986 North Carolina URESA order on a 1981 California child support order was determined in accordance with URESA, not UIFSA; and where no North Carolina order made findings pertaining to the nullification of the California order or to exclusive jurisdiction, the trial court erred in finding that the California order was superseded and effectively voided. Twaddell v. Anderson, 136 N.C. App. 56, 523 S.E.2d 710, 1999 N.C. App. LEXIS 1306 (1999), cert. denied, 351 N.C. 480, 543 S.E.2d 510 (2000).

Where a Washington court issued the original divorce decree but, within two years, neither party nor their children were living there, Washington lost jurisdiction over the child support order; because Tennessee acquired continuing, exclusive jurisdiction over the child support order since the father and the children lived there and the parties consented to Tennessee's jurisdiction over the order, the trial court did not err in finding that the Tennessee child support order was controlling. Uhrig v. Madaras, 174 N.C. App. 357, 620 S.E.2d 730, 2005 N.C. App. LEXIS 2394 (2005), cert. denied, — N.C. —, 630 S.E.2d 455 (2006).

Nonparentage Not a Defense. — Pursuant to G.S. 52C-3-314, a party whose parentage of a child has been previously determined by or pursuant to law may not plead nonparentage as a defense to a proceeding under this chapter. Reid v. Dixon, 136 N.C. App. 438, 524 S.E.2d 576, 2000 N.C. App. LEXIS 21 (2000).

Cited in Hinton v. Hinton, 128 N.C. App. 637, 496 S.E.2d 409 (1998); Haker-Volkening v. Haker, 143 N.C. App. 688, 547 S.E.2d 127, 2001 N.C. App. LEXIS 343 (2001).

§ 52C-1-101. Definitions.

As used in this Article, unless the context clearly requires otherwise, the term:

(1) "Child" means an individual, whether over or under the age of majority, who is or is alleged to be owed a duty of support by the individual's parent or who is or is alleged to be the beneficiary of a support order directed to the parent.

(2) "Child support order" means a support order for a child, including a child who has attained the age of majority under the law of the issuing state.

(3) "Duty of support" means an obligation imposed or imposable by law to provide support for a child, spouse, or former spouse, including an unsatisfied obligation to provide support.

(4) "Home state" means the state in which a child lived with a parent or a person acting as parent for at least six consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than six-months old, the state in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the six-month or other period.

(5) "Income" includes earnings or other periodic entitlements to money from any source and any other property subject to withholding for support under the law of this State.

(6) "Income-withholding order" means an order or other legal process directed to a payer of income to withhold support from the income of the obligor.

(7) "Initiating state" means a state from which a proceeding is forwarded or in which a proceeding is filed for forwarding to a responding state under this Act or a law or procedure substantially similar to this Act, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act.

(8) "Initiating tribunal" means the authorized tribunal in an initiating state.

(9) "Issuing state" means the state in which a tribunal issues a support order or renders a judgment determining parentage.

(10) "Issuing tribunal" means the tribunal that issues a support order or renders a judgment determining parentage.

(11) "Law" includes decisional and statutory law and rules and regulations having the force of law.

(12) "Obligee" means:
  a. An individual to whom a duty of support is or is alleged to be owed or in whose favor a support order has been issued or a judgment determining parentage has been rendered;
  b. A state or political subdivision to which the rights under a duty of support or support order have been assigned or which has independent claims based on financial assistance provided to an individual obligee; or
  c. An individual seeking a judgment determining parentage of the individual's child.

(13) "Obligor" means an individual, or the estate of a decedent:
  a. Who owes or is alleged to owe a duty of support;
  b. Who is alleged but has not been adjudicated to be a parent of a child; or
  c. Who is liable under a support order.

(14) "Register" means to file a support order or judgment determining paternity in the appropriate location for the recording or filing of foreign judgments generally or foreign support orders specifically.

(15) "Registering tribunal" means a tribunal in which a support order is registered.

(16) "Responding state" means a state in which a proceeding is filed or to which a proceeding is forwarded for filing from an initiating state under this Act or a law or procedure substantially similar to this Act, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act.

(17) "Responding tribunal" means the authorized tribunal in a responding state.

(18) "Spousal-support order" means a support order for a spouse or former spouse of the obligor.

(19) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes:
  a. An Indian tribe; and
  b. A foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders which are substantially similar to the procedures under this Act, the

Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act.

(20) "Support enforcement agency" means a public official or agency authorized to seek:

a. Enforcement of support orders or duties of support;
b. Establishment or modification of child support;
c. Determination of parentage; or
d. To locate obligors or their assets.

(21) "Support order" means a judgment, decree, or order, whether temporary, final, or subject to modification, for the benefit of a child, a spouse, or a former spouse, which provides for monetary support, health care, arrears, or reimbursement, and may include related costs and fees, interest, income withholding, attorneys' fees, and other relief.

(22) "Tribunal" means a court, administrative agency, or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine paternity, except that, for matters heard in this State, tribunal means the General Court of Justice, District Court Division. (1995, c. 538, s. 7(c); 1997-433, s. 10; 1997-456, s. 27; 1998-17, s. 1.)

OFFICIAL COMMENT

Twenty-two terms are defined in UIFSA as compared with the parallel RURESA § 2, which had fourteen entries. Many crucial definitions continue to be left to local law. For example, the definitions of "child" and "child-support order" provided by subsections (1) and (2) refer to "the age of majority" without further elaboration. The exact age at which a child becomes an adult for different purposes is a matter for the law of each State, as is the age at which a parent's duty to furnish child support terminates. Similarly, a wide variety of other terms of art are implicitly left to state law. For example, subsection (21) refers inter alia to "health care, arrearages, or reimbursement ...." All of these terms are subject to individualized definitions on a state-by-state basis.

Subsection (3) defines "duty of support" to mean the legal obligation to provide support before it has been reduced to judgment. This broad definition includes both prospective and retrospective obligations to the extent they are imposed by the relevant state law.

In order to resolve certain conflicts in the exercise of jurisdiction, for limited purposes subsection (4) borrows the concept of the "home State of a child" from the Uniform Child Custody Jurisdiction Act (UCCJA), versions of which have been adopted in all 50 States, and incorporated into the federal Parental Kidnapping Prevention Act, 42 U.S.C. § 1738A (PKPA).

Subsection (6) is written broadly so states that direct income withholding by an obligor's employer based on "other legal process," as distinguished from an order of a tribunal, may have that legal process recognized as an income-withholding order. Federal law requires that each State provide for income withholding "without the necessity of any application therefor, or for any further action by the court or other entity which issued such order ...." 42 U.S.C. § 666(b)(2). States have complied with this directive in a variety of ways. For example, at the time UIFSA was originally drafted New York provided a method for obtaining income withholding of court-ordered support by authorizing an attorney, clerk of court, sheriff or agent of the child support enforcement agency to serve upon the defaulting obligor's employer an "income execution for support enforcement." New York McKinney's C.P.L.R. 5241. This "other legal process" reportedly was the standard method for obtaining income withholding in that State, while the statutory provision for an income-withholding order, C.P.L.R. 5242, was rarely used by either the courts or the litigants.

Subsections (7) and (8) define "initiating State" and "initiating tribunal" similarly to RURESA § 2(d). It is important to note, however, that UIFSA permits the direct filing of an interstate action in the responding State without an initial filing in an initiating tribunal. Thus, in addition to the traditional resort to a local "initiating tribunal," a petitioner in one State may seek to establish a support order in a second State by either filing in the responding state's tribunal or by directly seeking the assistance of the support enforcement agency in the second State.

The relationship between UIFSA and the prior Uniform Acts is captured in the phrasing of subsection (7), and repeated several times throughout the Act. *See, i.e.* , subsections (16) and (19). The Act declares that URESA and RURESA are compatible with UIFSA, and the new Act is designed to function with the earlier Acts without conflict. Support orders issued under one of the earlier Acts should be honored and enforced in any State with any of the three Uniform Acts. But, despite their common roots, neither URESA nor RURESA can be said to be "substantially similar" to the one-order system established in UIFSA. States enacting UIFSA are directed to accord full enforcement remedies to support orders from those States, but also to apply UIFSA restraint regarding modification, and to apply its "one-order" rule to orders from non-UIFSA States, *infra*.

The term "obligee" in subsection (12) is defined in a broad manner similar to RURESA § 2(f), which is consistent with common usage. In instances of spousal support, the person owed the duty of support and the person receiving the payments are almost always the same. Use of the term is more complicated in the context of a child support order. The child is the person to whom the duty of support is owed, and therefore can be viewed as the ultimate obligee. However, "obligee" usually refers to the individual receiving the payments. While this is most commonly the custodial parent or other legal custodian, the "obligee" may be a support enforcement agency that has been assigned the right to receive support payments in order to recoup Temporary Assistance for Needy Families (TANF), 42 U.S.C. § 601 et seq., formerly known as Aid to Families with Dependent Children (AFDC). Even in the absence of such an assignment, a State may have an independent statutory claim for reimbursement for general assistance provided to a spouse, a former spouse, or a child of an obligor. The Act also uses "obligee" to identify an individual who is asserting a claim for support, not just for a person whose right to support is unquestioned, presumed, or has been established in a legal action.

Subsection (13) provides the correlative definition of an "obligor," which includes an individual who is alleged to owe a duty of support as well as a person whose obligation has previously been determined.

The definitions of "responding State" and "responding tribunal" in subsections (16) and (17) accommodate the direct filing of a petition under UIFSA without the intervention of an initiating tribunal. Both definitions acknowledge the possibility that there may be a responding State or tribunal in a situation where there is no initiating State or tribunal.

Subsection (19) withdraws the requirement of reciprocity between the several States and other U.S. jurisdictions formerly demanded by RURESA and URESA. A State need not enact UIFSA for support orders issued by its tribunals to be enforced by other States. Public policy favoring such enforcement is sufficiently strong to warrant waiving any quid pro quo among the States. This provision will be mooted by the likelihood that all States will enact UIFSA by January 1, 1998, as mandated by Congress in its 1996 welfare reform. In the original promulgation of UIFSA, the language of subsection (19) was somewhat ambiguous regarding the necessity of extending reciprocity to an Indian tribe and to foreign jurisdictions. By reorganizing the statutory language, the 1996 amendment clarifies that reciprocity is not required between the several States and Indian tribes. Further, the additional language and reorganization in subsection (19)(ii) makes clear that in this instance UIFSA follows the pattern of RURESA to require that a foreign nation must have substantially similar law or procedures to either UIFSA, RURESA, or URESA (that is, reciprocity) in order for its support orders to be treated as if they had been issued by a sister State. This is sharply different from the rule for States; amended UIFSA 1996 recognizes that in international relations the concept of reciprocity is crucial to acceptance of child support orders by other nations.

Subsection (20), "Support Enforcement Agency," includes the state IV-D agency (Part IV-D, Social Security Act, 42 U.S.C. § 651 et seq.), and other state or local governmental entities charged with establishing or enforcing support.

Subsection (22) introduces a completely new term, "tribunal," which replaces the term "court" used in RURESA. With the advent of federally-funded IV-D programs, a number of States have delegated various aspects of child support establishment and enforcement to quasi-judicial bodies and administrative agencies. UIFSA adopts the term "tribunal" to account for the breadth of state variations in dealing with support orders. Unless expressly noted otherwise, throughout the Act the term refers to a tribunal of the enacting State. To avoid confusion, however, when actions of tribunals of the enacting State and another State are contrasted in the same section or subsection, the phrases "tribunal of this State" and "tribunal of another State" are used for the sake of clarity.

CASE NOTES

Applicability. — UIFSA governs the proceedings over any foreign support order which is registered in North Carolina after January 1, 1996; URESA laws remain in effect only for (1) pending actions, rights, duties, or liabilities based on URESA, (2) any penalty, forfeiture, or liability incurred under URESA, and (3) for the purpose of sustaining any pending or vested right as of January 1, 1996 and for the enforcement of rights, duties, penalties, forfeitures, and liabilities under the repealed laws. Welsher v. Rager, 127 N.C. App. 521, 491 S.E.2d 661 (1997).

Support Order. — The language "all duties of support" in former 52A-9 included all common law duties of support, all statutory duties of support, and duties growing out of judgments or decrees for alimony or child support, both as to amounts in arrears and as to amounts owed currently or in the future. Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

Former Chapter 52A, North Carolina's version of the Uniform Reciprocal Enforcement of Support Act (URESA), clearly embraced alimony orders. Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

Enforcement. — In terms of choice of law, former URESA generally required that the law applied in interpreting and/or enforcing the support order be that of the state in which enforcement was sought; however, UIFSA provides that the law of the issuing state governs the current payments and other obligations of support and the payment of arrears under the order, and any order for the support of a child until age 21 must be recognized and enforced in that manner in a state in which the duty of support of a child ends at age 18. Welsher v. Rager, 127 N.C. App. 521, 491 S.E.2d 661 (1997).

"State" Not Shown. — The record failed to establish that Switzerland was a "state" as that term is defined by this section where the record contained no evidence that Switzerland had enacted a law for the issuance and enforcement of support orders that was "substantially similar to the procedures under [UIFSA]" and (2) although the Swiss order itself was arguably some evidence that legal procedures had been established in Switzerland for the issuance and enforcement of support orders. Haker-Volkening v. Haker, 143 N.C. App. 688, 547 S.E.2d 127, 2001 N.C. App. LEXIS 343 (2001).

Applied in Hook v. Hook, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

§ 52C-1-102. District court has jurisdiction under this Act.

The General Court of Justice, District Court Division is the court authorized to hear matters under this Act. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

The enacting State must identify the court, administrative agency, or the combination of those entities, which constitute the tribunal or tribunals authorized to deal with family support. In a particular State there may be several different such entities authorized to determine family support matters.

CASE NOTES

Cited in Haker-Volkening v. Haker, 143 N.C. App. 688, 547 S.E.2d 127, 2001 N.C. App. LEXIS 343 (2001).

§ 52C-1-103. Remedies.

Remedies provided by this Act are cumulative and do not affect the availability of remedies under other law. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

The existence of procedures for interstate establishment, enforcement, or modification of support or a determination of parentage in UIFSA does not preclude the application of the general law of the forum. Even if the parents live in different States, for example, a petitioner may decide to file an original action for child support (and most likely for other relief as well) directly in the State of residence of the respondent and proceed under that forum's generally applicable support law. In so doing, the petitioner thereby submits to the personal jurisdiction of the forum and foregoes reliance on UIFSA. Once a child support order has been issued, this option is no longer available to interstate parties. Under UIFSA, a State may not permit a party to proceed to obtain a second support order; rather, in further litigation the tribunal must apply the Act's provisions for enforcement of an existing order and limit modification to the strict standards of UIFSA.

Legal Periodicals. — For survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

CASE NOTES

Former Chapter 52A did not establish additional grounds for support. It provided additional means of enforcing support obligations. Blake v. Blake, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

The doctrine of res judicata applied to civil actions brought under former Chapter 52A. Blake v. Blake, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

Scope of Act. — The duty of support was the only subject matter covered by the former Uniform Reciprocal Enforcement of Support Act (URESA); nothing in that act allowed the adjudication of child custody or visitation privileges or other matters commonly determined in domestic relation cases. Vanburen County Dep't of Social Servs. ex rel. Swearengin v. Swearengin, 118 N.C. App. 324, 455 S.E.2d 161 (1995).

Jurisdiction Found. — North Carolina trial court properly exercised jurisdiction over a father's action seeking modification of a New Jersey trial court's order requiring the father to pay child support for a mentally retarded child who was born in 1964, after the child and her mother moved to North Carolina and the father moved to Maryland, and the trial court's judgment that the father's request for an order terminating his obligation to pay child support had to be granted, pursuant to G.S. 50-13.4(c), was affirmed on appeal. Lombardi v. Lombardi, 157 N.C. App. 540, 579 S.E.2d 419, 2003 N.C. App. LEXIS 740 (2003).

Cited in Lombardi v. Lombardi, 157 N.C. App. 540, 579 S.E.2d 419, 2003 N.C. App. LEXIS 740 (2003).

ARTICLE 2.

Jurisdiction.

Part 1. Extended Personal Jurisdiction.

§ 52C-2-201. Bases for jurisdiction over nonresident.

In a proceeding to establish, enforce, or modify a support order or to determine parentage, a tribunal of this State may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

(1) The individual is personally served with a summons and complaint within this State;
(2) The individual submits to the jurisdiction of this State by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
(3) The individual resided with the child in this State;
(4) The individual resided in this State and provided prenatal expenses or support for the child;
(5) The child resides in this State as a result of the acts or directives of the individual;
(6) The individual engaged in sexual intercourse in this State and the child may have been conceived by that act of intercourse;
(7) The individual asserted paternity in an affidavit which has been filed with the clerk of superior court; or

(8) There is any other basis consistent with the constitutions of this State and the United States for the exercise of personal jurisdiction. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

Sections 201 and 202 assert what is commonly described as long-arm jurisdiction over a nonresident respondent for purposes of establishing a support order or determining parentage. Inclusion of this long-arm provision in this interstate Act is justified because residents of two separate States are involved in the litigation, both of whom are subject to the personal jurisdiction of the forum. Thus, the case has a clear interstate aspect, despite the fact that only the law of the forum State is applicable. Moreover, this is sufficient to invoke additional UIFSA provisions in an otherwise intrastate lawsuit. *See* Sections 202, 316, and 318, *infra*. The intent is to insure that every enacting State has a long-arm statute as broad as constitutionally permitted. In situations in which the long-arm statute can be satisfied, the petitioner (either the obligor or the obligee) has two options: (1) utilize the long-arm statute to obtain personal jurisdiction over the respondent; or (2) initiate a two-state action under the succeeding provisions of UIFSA seeking to establish a support order in the respondent's State of residence. Of course, a third option is available that does not implicate UIFSA; a petitioner may file a suit in the respondent's State of residence (perhaps to settle all issues between the parties in a single proceeding).

This long-arm statute applies to an order for spousal support as well as for child support. However, almost all of the specific provisions relate to child support orders or determinations of parentage. This accords with the fact that very few States have chosen to enact specific domestic relations long-arm statutes and that the focus of UIFSA is primarily on child support. Only subsections (1), (2) and (8) are applicable to an action for spousal support asserting long-arm jurisdiction over a nonresident. The first two subsections are wholly noncontroversial insofar as an assertion of personal jurisdiction is concerned. Moreover, assertion of personal jurisdiction under subsections (1), (2), or (8) will doubtless yield jurisdiction over all matters to be decided between the spouses, including division of property on divorce. Thus, the most obvious basis for asserting long-arm jurisdiction over spousal support, *i.e.*, "last matrimonial domicile," is not included in Section 201 to avoid the potential problem of another instance of bifurcated jurisdiction. That is, a situation is not created in which a tribunal is authorized to order a nonresident to pay spousal support, but may not personally bind the nonresident to a property division on divorce.

Under RURESA, multiple support orders affecting the same parties were commonplace. UIFSA creates a structure designed to provide for only one support order at a time. The new one-order regime is facilitated and combined with a broad assertion of personal jurisdiction under this long-arm provision. The frequency of a two-state procedure involving the participation of tribunals in both States should be substantially reduced by the introduction of this long-arm statute.

Subsections (1) through (8) are derived from a variety of sources, including the Uniform Parentage Act § 8, Texas Family Code § 102.011, and New York Family Court Act § 154.

Subsection (1) codifies the holding of *Burnham v. Superior Court*, 495 U.S. 604 (1990), which reaffirms the constitutional validity of asserting personal jurisdiction based on personal service within a State.

Subsection (2) expresses the principle that a nonresident party concedes personal jurisdiction by seeking affirmative relief or by submitting to the jurisdiction by answering or entering an appearance. However, the power to assert jurisdiction over a support issue under the Act does not extend the tribunal's jurisdiction to other matters.

Subsections (3) through (6) identify specific fact situations justifying the assertion of long-arm jurisdiction over a nonresident. Each provides an appropriate affiliating nexus for such an assertion, when judged on a case-by-case basis with an eye on procedural and substantive due process. Further, each subsection does contain a possibility that an overly literal construction of the terms of the statute will overreach due process. For example, subsection (3) provides that long-arm jurisdiction to establish a support order may be asserted if "the individual resided with the child in this State." The typical scenario contemplated by the statute is that the parties lived as a family unit in the forum State, separated, and one of the parents subsequently moved to another State while the other parent and the child continued to reside in the forum. No time frame is stated for filing suit; this is based on the fact that the absent parent has a support obligation that extends for at least the minority of the child (and often longer in many States). On the other hand, suppose that the two parents and their child lived in State A for many years, and then decided to move the family to State B to seek better employment opportunities. Those opportunities did not materialize and, after several weeks or a few months of frustration with the situation, one of the parents returned with the child to State A. Under these facts a tribunal of State A may conclude it has long-arm jurisdiction to establish the support obligation of the absent parent. But, suppose that the family's sojourn in State B lasted for many years, and one parent unilaterally decides to return to State A. Many, and perhaps all, tribunals will conclude that assertion of personal jurisdiction over the absent parent immediately after the return based on subsection (3) would offend due process. The interstate provisions of UIFSA are available to the returning parent to establish child support. Note that State B will have long-arm jurisdiction to establish support under Section 201. *See also* Section 204, *infra*, for the resolution of simultaneous proceedings provided by the Act.

The factual situations catalogued in the first seven subsections are appropriate and constitutionally acceptable grounds upon which to exercise personal jurisdiction over an individual. Subsection (7) is bracketed because not all States maintain putative father registries.

Finally, subsection (8) tracks the broad, catch-all provisions found in many state statutes, including California, Civ. P. Code § 410.10 (1973); New York, *supra*; and Texas, *supra*. Note, however, that the California provision, standing alone, was found to be inadequate to sustain a child support order under the facts presented in *Kulko v. Superior Court of California for San Francisco*, 436 U.S. 84 (1978).

CASE NOTES

Legislative Intent. — The Legislature did not intend to limit the effect of former Chapter 52A to obligors residing in this State. Rather, the Legislature intended to extend the obligations of an obligee without the suit for domestication of a foreign judgment when proper jurisdiction was present. Stevens v. Stevens, 68 N.C. App. 234, 314 S.E.2d 786, cert. denied, 312 N.C. 89, 321 S.E.2d 908 (1984).

Broad Grant of Authority. — Because the State had an interest in the welfare and support of those persons living within its boundaries, the former statute was broad in granting authority to bring suit for support, and granted authority to the official who prosecuted criminal actions for the State to appear on behalf of the obligee, although the action could also have been brought by another. Stevens v. Stevens, 68 N.C. App. 234, 314 S.E.2d 786, cert. denied, 312 N.C. 89, 321 S.E.2d 908 (1984).

Jurisdiction over Parties. — The former Uniform Reciprocal Enforcement of Support Act applied only where the obligee was present in the initiating state and the obligor was subject to the jurisdiction of the responding state. Mahan v. Read, 240 N.C. 641, 83 S.E.2d 706 (1954).

In a proceeding under the former Uniform Reciprocal Enforcement of Support Act, the court of the initiating state, by approval of the petition and the certification of the documents, enabled petitioner to submit herself to the jurisdiction of the responding state without the necessity of personal presence or employment of counsel, and the responding state acquired jurisdiction of the respondent through service of summons and notice. Mahan v. Read, 240 N.C. 641, 83 S.E.2d 706 (1954).

In an action for child support, alimony, and equitable distribution, trial court properly ruled that the non-resident ex-husband had sufficient minimum contacts with North Carolina to establish personal jurisdiction, as the ex-husband had bought a house in North Carolina with his then-wife so his child could be schooled there, for two years he lived in that marital residence for three days each month, and used the residence's equity line for business purposes. Butler v. Butler, 152 N.C. App. 74, 566 S.E.2d 707, 2002 N.C. App. LEXIS 858 (2002).

California manufacturer's motion to dismiss third-party claims that the manufacturer had negligently packed and loaded a machine for shipment to a North Carolina buyer was denied; personal jurisdiction existed over the manufacturer because, inter alia, the manufacturer had solicited the buyer's business, the claims would not have arisen absent the manufacturer's contacts with North Carolina, and exercise of personal jurisdiction was constitutionally reasonable given the manufacturer's significant business relationship with North Carolina. Cree, Inc. v. Exel N. Am. Logistics, Inc., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 1726 (M.D.N.C. Feb. 6, 2004).

Modification of Valid Orders. — Under the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C. § 1738B, modification of a valid order is only allowed if: (1) all parties have consented to the jurisdiction of the forum state to modify the order; or (2) neither the child nor any of the parties remains in the issuing state and the forum state has personal jurisdiction over the parties. Welsher v. Rager, 127 N.C. App. 521, 491 S.E.2d 661 (1997).

Removal of Obligee to a Third State at Time of Hearing. — Where, after filing a petition under the former Uniform Reciprocal

Enforcement of Support Act of the initiating state, the obligee moved to another state and was a resident of such third state at the time of the hearing in North Carolina, the responding state, the North Carolina court had no jurisdiction to make an award for transmittal to the initiating state for transmittal in turn to the petitioner in the third state, and judgment of nonsuit and dismissal should have been entered in the North Carolina court upon motion. Mahan v. Read, 240 N.C. 641, 83 S.E.2d 706 (1954).

§ 52C-2-202. Procedure when exercising jurisdiction over nonresident.

A court of this State exercising personal jurisdiction over a nonresident under G.S. 52C-2-201 may apply G.S. 52C-3-315 to receive evidence from another state, and G.S. 52C-3-317 to obtain discovery through a tribunal of another state. In all other respects, Articles 3 through 7 of this Chapter do not apply and the tribunal shall apply the procedural and substantive law of this State, including the rules on choice of law other than those established by this Chapter. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

Assertion of long-arm jurisdiction over a nonresident essentially results in a one-state proceeding, notwithstanding the fact that the parties reside in different States. With two exceptions, the provisions of UIFSA — labeled an interstate act — are not applicable to such a proceeding. To facilitate interstate exchange of information and to enable the nonresident to participate as fully as possible in the proceedings without the necessity of personally appearing in the forum State, Section 202 expressly incorporates two special UIFSA sections to long-arm cases. The first exception allows the tribunal to apply the special rules of evidence and procedure of Section 316 in order to facilitate decision-making when one party resides in another State, even though that party is subject to the personal jurisdiction of the tribunal. The same consideration accounts for the second exception; the two-state discovery procedures of Section 318 are applicable to a one-state proceeding when a foreign tribunal can assist in that process. In all other situations, the substantive and procedural law of the forum State applies. In sum, a one-state UIFSA case may utilize those two-state procedures which forward the interests of economy, efficiency, and fair play.

CASE NOTES

Cited in Butler v. Butler, 152 N.C. App. 74, 566 S.E.2d 707, 2002 N.C. App. LEXIS 858 (2002).

Part 2. Proceedings Involving Two or More States.

§ 52C-2-203. Initiating and responding tribunal of state.

Under this Chapter, a tribunal of this State may serve as an initiating tribunal to forward proceedings to another state and as a responding tribunal for proceedings initiated in another state. (1995, c. 538, s. 7(c); 1997-433, s. 10.1; 1998-17, s. 1.)

OFFICIAL COMMENT

Sections 203 through 206 track the traditional RURESA action involving residents of separate States. In this situation the initiating State does not assert personal jurisdiction over the nonresident, but instead forwards the case to another, responding State, which has the authority to assert personal jurisdiction over its resident. This section identifies the various roles a tribunal of the forum may serve; as appropriate, it may act as either an initiating or a responding tribunal. Under UIFSA a tribunal may serve as a responding tribunal even when there is no initiating tribunal in another State. This accommodates the direct filing of an action in a responding tribunal by a nonresident.

This section identifies the roles a tribunal of the forum may serve; as appropriate, it may act as either an initiating or a responding tribunal under UIFSA. Note that a tribunal can serve as a responding tribunal when there is no initiating tribunal in another state. This is to accommodate the direct filing of an action in a responding tribunal by a nonresident.

§ 52C-2-204. Simultaneous proceedings in another state.

(a) A tribunal of this State may exercise jurisdiction to establish a support order if the petition or comparable pleading is filed after a petition or comparable pleading is filed in another state only if:

(1) The petition or comparable pleading in this State is filed before the expiration of the time allowed in the other state for filing a responsive pleading challenging the exercise of jurisdiction by the other state;

(2) The contesting party timely challenges the exercise of jurisdiction in the other state; and

(3) If relevant, this State is the home state of the child.

(b) A tribunal of this State may not exercise jurisdiction to establish a support order if the petition or comparable pleading is filed before a petition or comparable pleading is filed in another state if:

(1) The petition or comparable pleading in the other state is filed before the expiration of the time allowed in this State for filing a responsive pleading challenging the exercise of jurisdiction by this State;

(2) The contesting party timely challenges the exercise of jurisdiction in this State; and

(3) If relevant, the other state is the home state of the child. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

This section is similar to Section 6 of the Uniform Child Custody Jurisdiction Act. Under the one-order system established by UIFSA, it is necessary to provide a new procedure to eliminate the multiple orders so common under RURESA and URESA. This requires cooperation between, and deference by, sister-state tribunals in order to avoid issuance of competing support orders. To this end, tribunals are expected to take an active role in seeking out information about support proceedings in other States concerning the same child. Depending on the circumstances, one or the other of two tribunals considering the same support obligation should decide to defer to the other. In this regard, UIFSA makes a significant departure from the approach adopted by the UCCJA, which chooses "first filing" as the method for resolving competing jurisdictional disputes. In the analogous situation, the federal Parental Kidnapping Prevention Act chooses the home State of the child to establish priority. Given the preemptive nature of the PKPA, and the possibility that custody and support are both involved in the case, UIFSA opts for the federal method of resolving disputes between competing jurisdictional assertions by establishing a priority for the tribunal in the child's home State. If the child has no home State, "first filing" controls.

§ 52C-2-205. Continuing, exclusive jurisdiction.

(a) A tribunal of this State issuing a support order consistent with the law of this State has continuing, exclusive jurisdiction over a child support order:

(1) As long as this State remains the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or

(2) Until all of the parties who are individuals have filed written consents with the tribunal of this State for a tribunal of another state to modify the order and assume continuing, exclusive jurisdiction.

(b) A tribunal of this State issuing a child support order consistent with the law of this State may not exercise its continuing jurisdiction to modify the order if the order has been modified by a tribunal of another state pursuant to a law substantially similar to this Chapter.

(c) If a child support order of this State is modified by a tribunal of another state pursuant to a law substantially similar to this Chapter, a tribunal of this State loses its continuing, exclusive jurisdiction with regard to prospective enforcement of the order issued in this State, and may only:

(1) Enforce the order that was modified as to amounts accruing before the modification;

(2) Enforce nonmodifiable aspects of that order; and

(3) Provide other appropriate relief for violations of that order which occurred before the effective date of the modification.

(d) A tribunal of this State shall recognize the continuing, exclusive jurisdiction of a tribunal of another state which has issued a child support order pursuant to a law substantially similar to this Chapter.

(e) A temporary support order issued ex parte or pending resolution of a jurisdictional conflict does not create continuing, exclusive jurisdiction in the issuing tribunal.

(f) A tribunal of this State issuing a support order consistent with the law of this State has continuing, exclusive jurisdiction over a spousal support order throughout the existence of the support obligation. A tribunal of this State may not modify a spousal support order issued by a tribunal of another state having continuing, exclusive jurisdiction over that order under the law of that state. (1995, c. 538, s. 7(c); 1997-433, s. 10.2; 1998-17, s. 1.)

OFFICIAL COMMENT

This section is perhaps the most crucial provision in UIFSA. Drawing on the precedent of the federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, the issuing tribunal retains continuing, exclusive jurisdiction over a child support order, except in very narrowly defined circumstances. As long as one of the individual parties or the child continues to reside in the issuing State, and as long as the parties do not agree to the contrary, the issuing tribunal has continuing, exclusive jurisdiction over its order — which in practical terms means that it may modify its order. The statute attempts to be even-handed — the identity of the remaining party — obligor or obligee — does not matter. If the individual parties have left the issuing State but the child remains behind, continuing, exclusive jurisdiction remains with the issuing State.

The other side of the coin follows logically. Just as subsection (a)(1) defines the retention of continuing, exclusive jurisdiction, by clear implication the subsection also defines how jurisdiction to modify may be lost. That is, if all the relevant persons — the obligor, the individual obligee, and the child — have permanently left the issuing State, the issuing State no longer has an appropriate nexus with the parties or child to justify exercise of jurisdiction to modify. Further, the issuing tribunal has no current information about the factual circumstances of anyone involved, and the taxpayers of that State have no reason to expend public funds on the process. Note, however, that the original order of the issuing tribunal remains valid and enforceable. That order is in effect not only in the issuing State and those States in which the order has been registered, but also may be registered and enforced in additional States even after the issuing State has lost its power to modify its order, see Sections 601-604 (Registration and Enforcement of Support Order), *infra*. The original order remains in effect until it is properly modified in accordance with the narrow terms of Sections 609-612 (Registration and Modification of Child Support Order), *infra*.

According to the logical implication of subsection (a)(2), the issuing State may also lose its continuing, exclusive jurisdiction to modify if the parties consent in writing for another State to assume jurisdiction to modify (even though one of the parties or the child continues to reside in the issuing State). The only statutory requirement for the parties to divest the issuing tribunal of its continuing, exclusive jurisdiction is the filing of a written agreement to that effect with that tribunal. The Drafting Committee anticipated that such an agreement would seldom occur because of the almost universal desire of each party to prefer his or her local tribunal; but, the Committee also believed that the parties should be allowed to agree upon an alternate forum if they choose to do so.

Although subsection (a) identifies the methods for the retention and the loss of continuing, exclusive jurisdiction by the issuing tribunal, it does not confer jurisdiction to modify on another tribunal. Modification requires that a tribunal have personal jurisdiction over the parties and meet other criteria as provided in Sections 609 through 614, *infra*. It should also be noted that nothing in this section is intended to deprive a tribunal which has lost continuing, exclusive jurisdiction of the power to enforce arrearages that have accrued during the existence of a valid order.

Spousal support is treated differently; the issuing tribunal retains continuing, exclusive jurisdiction over an order of spousal support throughout the entire existence of the support obligation. Sections 205(f) and 206(c) state that the procedures of UIFSA are not available to a responding tribunal to modify the existing spousal support order of the issuing State. This marks a radical departure from RURESA, which treated spousal and child support orders identically. Under UIFSA, modification of spousal support is limited to a procedure whereby an action is initiated outside of the issuing State and a tribunal in that original State modifies its order under its law. While UIFSA revises RURESA in this regard, in fact this will have a minimal effect on actual practice. Interstate modification of pure spousal support was relatively rare under RURESA, and played almost no part in the activities of support enforcement agencies.

The prohibition of modification of spousal support by a nonissuing State tribunal under UIFSA is consistent with the principle that a tribunal should apply local law to such cases to insure efficient handling and to minimize choice of law problems. Avoiding conflict of law problems is almost impossible if spousal support orders are subject to modification in a second State. For example, States take widely varying views of the effect on a spousal support order of the obligee's remarriage or nonmarital cohabitation. Making a distinction between spousal and child support is further justified because the standards for modification of child support and spousal support are very different. In most jurisdictions a dramatic improvement in the obligor's economic circumstances will have little or no relevance in an action seeking an upward modification of spousal support, while a similar change in an obligor's situation typically is the primary basis for an increase in child support. This disparity is founded on a policy choice that post-divorce success of an obligor-parent should benefit the obligor's child, but not the obligor's ex-spouse.

Finally, UIFSA does not provide for shifting the continuing, exclusive jurisdiction over a spousal-support order by mutual agreement. That procedure is limited to child support under subsection (a)(2). Note that the Act is silent rather than preclusive on the subject. If the parties wish to enter into such an agreement, it is up to the individual States to decide whether to recognize it. A waiver of continuing, exclusive jurisdiction and subsequent modification of spousal support by a tribunal of another State simply is not authorized under the auspices of UIFSA.

CASE NOTES

Conflict Between UIFSA and Prior Law. — G.S. 52C-2-205 and G.S. 52C-2-206 of the Uniform Interstate Family Support Act, G.S. 52C-1-100 et seq., which prohibit a responding state from modifying spousal support orders issued in another state, control over any conflict created by G.S. 50-16.9(c). Hook v. Hook, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

Former wife's registering a New Jersey divorce judgment in North Carolina had no effect on New Jersey's status as the issuing state with continuing, exclusive jurisdiction over its alimony order. New Jersey was the only state with jurisdiction to modify the former husband's alimony obligation. Hook v. Hook, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

Modification of Valid Order. — Under the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C. § 1738B, modification of a valid order is only allowed if: (1) all parties have consented to the jurisdiction of the forum state to modify the order; or (2) neither the child nor any of the parties remains in the issuing state and the forum state has personal jurisdiction over the parties. Welsher v. Rager, 127 N.C. App. 521, 491 S.E.2d 661 (1997).

Jurisdiction of Texas Court. — Where father sought to modify Texas order for child support, the Texas court retained exclusive jurisdiction over the matter. Hinton v. Hinton, 128 N.C. App. 637, 496 S.E.2d 409 (1998).

Jurisdiction Not Found. — The trial court erred both in failing to register a 1995 New Jersey order and in entering a North Carolina Voluntary Support Agreement terminating child support at age eighteen, contrary to the terms of the New Jersey order; the court did not have subject matter jurisdiction where the record demonstrated that the plaintiff met the requirements of G.S. 52C-6-602 by properly transmitting all of the required URESA documentation and where, upon notification, the defendant did not contest the foreign support order; furthermore, the law of the issuing state, allowing for child support until the child reaches twenty-two, should have been applied by the adopting state. State ex rel. Harnes v. Lawrence, 140 N.C. App. 707, 538 S.E.2d 223, 2000 N.C. App. LEXIS 1262 (2000).

§ 52C-2-206. Enforcement and modification of support order by tribunal having continuing jurisdiction.

(a) A tribunal of this State may serve as an initiating tribunal to request a tribunal of another state to enforce or modify a support order issued in that state.

(b) A tribunal of this State having continuing, exclusive jurisdiction over a support order may act as a responding tribunal to enforce or modify the order. If a party subject to the continuing, exclusive jurisdiction of the tribunal no longer resides in the issuing state, in subsequent proceedings the tribunal may apply G.S. 52C-3-315 to receive evidence from another state and G.S. 52C-3-317 to obtain discovery through a tribunal of another state.

(c) A tribunal of this State which lacks continuing, exclusive jurisdiction over a spousal support order may not serve as a responding tribunal to modify a spousal support order of another state. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

This section is the correlative of the continuing, exclusive jurisdiction asserted in the preceding section. Subsection (a) authorizes a tribunal of the enacting State to initiate a request for enforcement or modification to the tribunal with continuing, exclusive jurisdiction over a support order.

Subsection (b) confirms the power of the issuing tribunal to modify its child support order as the responding tribunal, provided it retains a sufficient nexus with its order. UIFSA defines that nexus as a situation in which the child or at least one of the parties continues to reside in the issuing State. Subsection (b) also makes a vital contribution to the exercise of its continuing, exclusive jurisdiction if one of the parties leaves the State after the initial order was issued. The petitioner and the absent respondent may take advantage of the special rules of evidence and discovery in order to provide the tribunal with maximum current information in a modification proceeding.

Subsection (c) is the correlative of Section 205(f), acknowledging the continuing, exclusive jurisdiction of the tribunal ordering alimony and specifically prohibiting a responding tribunal from modifying a spousal support order of another State.

CASE NOTES

Conflict Between UIFSA and Prior Law. — G.S. 52C-2-205 and G.S. 52C-2-206 of the Uniform Interstate Family Support Act, G.S. 52C-1-100 et seq., which prohibit a responding state from modifying spousal support orders issued in another state, control over any conflict created by G.S. 50-16.9(c). Hook v. Hook, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

Part 3. Reconciliation of Multiple Orders.

§ 52C-2-207. Recognition of controlling child support order.

(a) If a proceeding is brought under this Chapter and only one tribunal has issued a child support order, the order of that tribunal controls and must be so recognized.

(b) If a proceeding is brought under this Chapter, and two or more child support orders have been issued by tribunals of this State or another state with regard to the same obligor and child, a tribunal of this State shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction:

(1) If only one of the tribunals would have continuing, exclusive jurisdiction under this Chapter, the order of that tribunal controls and must be so recognized.

(2) If more than one of the tribunals would have continuing, exclusive jurisdiction under this Chapter, an order issued by a tribunal in the current home state of the child controls and must be so recognized, but if an order has not been issued in the current home state of the child, the order most recently issued controls and must be so recognized.

(3) If none of the tribunals would have continuing, exclusive jurisdiction under this Chapter, the tribunal of this State having jurisdiction over the parties shall issue a child support order, which controls and must be so recognized.

(c) If two or more child support orders have been issued for the same obligor and child and if the obligor or the individual obligee resides in this State, a party may request a tribunal of this State to determine which order controls and must be so recognized under subsection (b) of this section. The request must be accompanied by a certified copy of every support order in effect. The requesting party shall give notice of the request to each party whose rights may be affected by a certified copy of every support order in the effect. The requesting party shall give notice of the request to each party whose rights may be affected by the determination.

(d) The tribunal that issued the controlling order under subsection (a), (b), or (c) of this section is the tribunal that has continuing, exclusive jurisdiction under G.S. 52C-2-205.

(e) A tribunal of this State which determines by order the identity of the controlling order under subdivision (b)(1) or (2) of this section or which issues a new controlling order under subdivision (b)(3) of this section shall state in that order the basis upon which the tribunal made its determination.

(f) Within 30 days after issuance of an order determining the identity of the controlling order, the party obtaining the order shall file a certified copy of it with each tribunal that issued or registered an earlier order of child support. A party who obtains the order and fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the controlling order. (1995, c. 538, s. 7(c); 1997-433, s. 10.3(b); 1998-17, s. 1.)

OFFICIAL COMMENT

Sections 207-209 are designed to span the gulf between the one-order system created by UIFSA and the multiple-order system previously in place under RURESA and URESA. A keystone of UIFSA is to provide a transitional procedure for the eventual elimination of existing multiple support orders in an expeditious and efficient manner. But, even assuming all U.S. jurisdictions enact UIFSA, many years will pass before its one-order system will be completely in place. Multiple orders covering the same parties and child number in the tens of thousands; it can be reasonably anticipated that these orders will continue in effect far into the future. To begin the process towards a one-order system, however, this section provides a relatively simple procedure designed to identify a single viable order that will be entitled to prospective enforcement in every UIFSA State.

Subsection (a) declares that if only one child support order exists, it is to be denominated the controlling order, irrespective of when and where it was issued and whether any of the individual parties or the child continue to reside in the issuing State.

Subsection (b) establishes the priority scheme for recognition and prospective enforcement of a single order among existing multiple orders regarding the same obligor, obligee, and child. For UIFSA to function, one order must be denominated as the controlling order, and its issuing tribunal must be recognized as having continuing, exclusive jurisdiction. In choosing among existing multiple orders, none of which can be distinguished as being in conflict with the principles of UIFSA, subsection (b)(1) gives first priority to the order issued by the only tribunal that is entitled to continuing, exclusive jurisdiction under the terms of UIFSA, *i.e.*, an individual party or the child continues to reside in that State, and no other issuing State meets this criterion. If two or more tribunals would have continuing, exclusive jurisdiction under the Act, subsection (b)(2) first looks to the tribunal of the child's current home State. If that State has not issued a support order, subsection (b)(2) looks next to the order most recently issued. Finally, if none of the existing multiple orders are entitled to be denominated as the controlling order because none of the preceding priorities apply, the forum tribunal is directed to issue a new order, assuming that it has personal jurisdiction over the obligor and obligee. The new order is to be treated as the controlling order, establishing the support obligation, the nonmodifiable aspects of the support obligation, see Section 611(c), *infra*, and the issuing tribunal's continuing, exclusive jurisdiction. The rationale for creating yet another order is that there is no valid reason under UIFSA to prefer the terms of one of the multiple orders over another.

As originally promulgated, UIFSA did not come to grips with whether existing multiple orders issued by different States might be entitled to full faith and credit without regard to the determination of the controlling order under the Act. The drafters took the position that state law, however uniform, could not interfere with the ultimate interpretation of a constitutional directive. Fortunately, this question has almost certainly been mooted by the 1996 amendment to 28 U.S.C. § 1738B, Full Faith and Credit for Child Support Orders. Congress adopted the terms of Section 207 of UIFSA virtually word for word in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Pub. L. 104-193, Aug. 22, 1996, 110 Stat. 2221.

It is not altogether clear whether the terms of UIFSA apply to a strictly intrastate case; that is, a situation in which multiple child support orders have been issued by multiple tribunals of a single State and all parties and the child continue to reside in that State. This is not an uncommon situation, often traceable to the intrastate applicability of RURESA. A literal reading of the statutory language suggests the section applies. For a tribunal of the issuing State to so conclude will further the goal of the Act of identifying a single controlling order for prospective enforcement and modification. At the very least, the section provides a template for resolving such conflicts, most likely yielding a determination that the last order is the controlling order.

Subsection (c), added in 1996, clarifies that any party may request a tribunal of the forum State to identify the controlling order. That party is directed to fully inform the tribunal of all existing child support orders.

Amended subsection (d) provides that the determination of the controlling order under this section has the effect of establishing the tribunal with continuing, exclusive jurisdiction; only the order of that tribunal is entitled to prospective enforcement by a sister State. To help insure regularity, subsection (e) directs the forum tribunal to set forth the basis of its finding. Finally, the party obtaining the determination is directed by subsection (f) to notify all interested tribunals of the decision.

Section 207 presumes that a tribunal will be fully informed about all existing orders if it is requested to determine which one of the existing multiple child support orders is to be accorded prospective enforcement. If this does not occur and one or more existing orders is not considered by the tribunal, the finality of its decision is likely to turn on principles of estoppel on a case-by-case basis. Assuming that the parties were accorded notice and opportunity to be heard by the tribunal, a final decision on the subject is entitled to full faith and credit.

CASE NOTES

Issuance by Home State. — Under this section, if the current home state of the child issued the support order, then that state retains continuing exclusive jurisdiction. State ex rel. Harnes v. Lawrence, 140 N.C. App. 707, 538 S.E.2d 223, 2000 N.C. App. LEXIS 1262 (2000).

Intent as to Changed Circumstances. — The legislature apparently intended that enactment of former G.S. 52A-21 would provide authority to the courts of this State to apply the former Uniform Reciprocal Enforcement of Support Act so as to provide for the support of a minor child independent of and without regard for any other support judgments or whether there had been a change of circumstances of either the child or its parents; therefore, it was not necessary that the complaint for child support contain allegations of facts constituting changed circumstances. County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979).

Entitlement to Enforce Prior Support Order Made by Court of Another State. — The plaintiff who accepted payments under a North Carolina Uniform Reciprocal Enforcement of Support Act (URESA) order did not abandon her rights to child support payments awarded under a prior South Carolina support order; she was entitled to bring an action to enforce the South Carolina order, and the defendant was entitled to receive credit for the payments he made under the URESA order. Stephens v. Hamrick, 86 N.C. App. 556, 358 S.E.2d 547 (1987).

Where the only issue was arrearages, a North Carolina trial court erred in failing to give full faith and credit to an Oregon child support order; the trial court's duty was to enforce the Oregon order until a subsequent North Carolina order was entered, and then to enforce a father's child support arrearages under both orders. New Hanover County v. Kilbourne, 157 N.C. App. 239, 578 S.E.2d 610, 2003 N.C. App. LEXIS 639 (2003).

Jurisdiction of Texas Court. — Where father sought to modify Texas order for child support, the Texas court retained exclusive jurisdiction over the matter. Hinton v. Hinton, 128 N.C. App. 637, 496 S.E.2d 409 (1998).

Cited in Welsher v. Rager, 127 N.C. App. 521, 491 S.E.2d 661 (1997).

§ 52C-2-208. Multiple child support orders for two or more obligees.

In responding to multiple registrations or petitions for enforcement of two or more child support orders in effect at the same time with regard to the same obligor and different individual obligees, at least one of which was issued by a tribunal of another state, a tribunal of this State shall enforce those orders in the same manner as if the multiple orders had been issued by a tribunal of this State. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

Multiple orders may involve two or more families of the same obligor. Although all such orders are entitled to enforcement, practical difficulties are often presented. For example, full enforcement of each of the multiple orders may exceed the maximum allowed for income withholding. The federal statute, 42 U.S.C. § 666(b)(1), requires that to be eligible for the federal funding for enforcement, States must provide for a maximum to be withheld from earnings for child support in a percentage that may not exceed the federal consumer credit code limitations on wage garnishment, 15 U.S.C. § 1673(b). In order to allocate resources between competing families, UIFSA refers to state law. The basic principle is that one or more foreign orders for the support of an out-of-state family of the obligor, and one or more orders of an in-state family, are all of equal dignity. In allocating payments to different obligees, every child support order should be treated as if it had been issued by a tribunal of the forum State.

§ 52C-2-209. Credit for payments.

Amounts collected and credited for a particular period pursuant to a support order issued by a tribunal of another state must be credited against the amounts accruing or accrued for the same period under a support order issued by the tribunal of this State. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

This section is derived from RURESA § 31 (Application of Payments). Because of the multiple orders possible under RURESA, that section was primarily concerned with insuring that payments made on a particular order were credited towards the amounts due on all other orders. For example, full payment of $300 on an order of State C earns a 100% pro tanto discharge of the current support owed on a $200 order of State A, and a 75% credit against a $400 order of State B. Crediting payments against arrears on multiple orders is more complex, and is subject to different constructions in various States. Under the one-order system of UIFSA, an obligor ultimately will be ordered to pay only one sum-certain amount for current support (a sum certain to reduce arrears, if any).

The issuing tribunal is ultimately responsible for the overall control of the enforcement methods employed and for accounting for the payments made on its order from multiple sources. Until that scheme is fully in place, however, it will be necessary to continue to mandate pro tanto credit for actual payments made against all existing orders.

CASE NOTES

Full Faith and Credit. — Where the only issue was arrearages, a trial court erred in failing to give full faith and credit to an Oregon child support order; the trial court's duty was to enforce the Oregon order until a subsequent North Carolina order was entered, and then to enforce a father's child support arrearages under both orders. New Hanover County v. Kilbourne, 157 N.C. App. 239, 578 S.E.2d 610, 2003 N.C. App. LEXIS 639 (2003).

ARTICLE 3.

Civil Provisions of General Application.

§ 52C-3-301. Proceedings under this Chapter.

(a) Except as otherwise provided in this Chapter, this Article applies to all proceedings under this Chapter.

(b) This Chapter provides for the following proceedings:

(1) Establishment of an order for spousal support or child support pursuant to Article 4 of this Chapter;
(2) Enforcement of a support order and income withholding order of another state without registration pursuant to Article 5 of this Chapter;
(3) Registration of an order for spousal support or child support of another state or enforcement pursuant to Article 6 of this Chapter;
(4) Modification of an order for child support or spousal support issued by a tribunal of this State pursuant to Article 2, Part 2 of this Chapter;
(5) Registration of an order for child support of another state for modification pursuant to Article 6 of this Chapter;
(6) Determination of paternity pursuant to Article 7 of this Chapter; and
(7) Assertion of jurisdiction over nonresidents pursuant to Article 2, Part 1 of this Chapter.

(c) An individual petitioner or a support enforcement agency may commence a proceeding authorized under this Chapter by filing a petition in an initiating tribunal for forwarding to a responding tribunal or by filing a petition or a comparable pleading directly in a tribunal of another state which has or can obtain personal jurisdiction over the respondent. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

This section is a "road map" of the types of actions authorized by UIFSA. Although such a section is unusual for a Uniform Act, it is justified in this instance because the majority of those persons administering the Act are not attorneys and will doubtless find such assistance to be useful.

Subsection (a) mandates application of the general provisions of this article to all UIFSA actions.

Subsection (b) identifies the general principles and structure of the Act. Note that although orders for spousal support and child support are generally dealt with in the same manner, subsection (b)(5) implicitly restates the fact that the modification provisions are limited to child support orders, and do not apply to spousal support orders.

Subsection (c) establishes the basic two-state procedure contemplated by the Act. The initiating responding procedure is derived from the two-state procedure under RURESA. Direct filing in the responding State by an individual or a support enforcement agency without reference to an initiating State is new to this Act, however.

CASE NOTES

Purpose. — Under the former Uniform Reciprocal Enforcement of Support Act, a state had jurisdiction to establish, vacate, or modify an obligor's support obligation even when that obligation had been created in another jurisdiction, and the result was often multiple, inconsistent obligations existing for the same obligor and injustice in that obligors could avoid their responsibility by moving to another jurisdiction and having their support obligations modified or even vacated; the new Uniform Interstate Family Support Act was designed to correct this problem. Welsher v. Rager, 127 N.C. App. 521, 491 S.E.2d 661 (1997).

Establishment, Modification and Enforcement of Support Obligations. — The Uniform Reciprocal Enforcement of Support Act (URESA) was repealed effective January 1, 1996, and in its place, the legislature adopted the Uniform Interstate Family Support Act (UIFSA); both URESA and UIFSA were promulgated and intended to be used as procedural mechanisms for the establishment, modification, and enforcement of child and spousal support obligations. Welsher v. Rager, 127 N.C. App. 521, 491 S.E.2d 661 (1997).

Enforcement of Foreign Spousal Support Orders. — Under Chapter 52C, the trial court had subject matter jurisdiction to enforce a British court's spousal support order as that jurisdiction had enacted a law for the issuance and enforcement of support orders substantially similar to the law which North Carolina used to enforce foreign spousal support orders. Foreman v. Foreman, 144 N.C. App. 582, 550 S.E.2d 792, 2001 N.C. App. LEXIS 542 (2001), cert. denied, 354 N.C. 68, 553 S.E.2d 38 (2001).

Registration of Support Orders. — Even though effective date of Chapter 52C was January 1, 1996, plaintiff wife's petition for enforcement of British court's spousal support order entered before that date was valid, as Chapter 52C governed orders regardless of when entered so long as the orders were registered in North Carolina after January 1, 1996, and plaintiff properly registered the British support order in North Carolina on September 23, 1997. Foreman v. Foreman, 144 N.C. App. 582, 550 S.E.2d 792, 2001 N.C. App. LEXIS 542 (2001), cert. denied, 354 N.C. 68, 553 S.E.2d 38 (2001).

Nonparentage Not a Defense to Support Enforcement. — Where an Alaskan decree had adjudged the defendant to be the father of the subject child, under North Carolina's enactment of the Uniform Interstate Family Support Act (UIFSA), G.S. 52C-1 et seq., he may not plead nonparentage as a defense in a proceeding to enforce the payment of child support. See G.S. 52C-3-314. Reid v. Dixon, 136 N.C. App. 438, 524 S.E.2d 576, 2000 N.C. App. LEXIS 21 (2000).

Applied in Hook v. Hook, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

Cited in Haker-Volkening v. Haker, 143 N.C. App. 688, 547 S.E.2d 127, 2001 N.C. App. LEXIS 343 (2001); Butler v. Butler, 152 N.C. App. 74, 566 S.E.2d 707, 2002 N.C. App. LEXIS 858 (2002).

§ 52C-3-302. Action by minor parent.

A minor parent, or a guardian or other legal representative of a minor parent, may maintain a proceeding on behalf of or for the benefit of the minor's child. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

This section is derived from RURESA § 13. A minor parent may maintain an action under UIFSA without the appointment of a guardian ad litem, even if the law of the forum jurisdiction requires a guardian for an in-state case. If a guardian or legal representative has been appointed, he or she may act on behalf of the minor's child in seeking support.

OPINIONS OF ATTORNEY GENERAL

Identification of Minor Children as Complainants. — In a proceeding under former Chapter 52A, where it appeared from examination of all documents transmitted to the North Carolina Court in accordance with the Act that support was being sought for minor dependents identified in the complaint, it was lawful for a North Carolina Court to order support payments for the minor dependents even though their names did not appear in the style of the case and the mother was identified on the complaint as the complainant. See opinion of Attorney General to Mr. W.H.S. Burgwyn, Jr., Solicitor, 40 N.C.A.G. 718 (1969).

§ 52C-3-303. Application of law of this State.

Except as otherwise provided by this Chapter, a responding tribunal of this State:

(1) Shall apply the procedural and substantive law, including the rules on choice of law, generally applicable to similar proceedings originating in this State and may exercise all powers and provide all remedies available in those proceedings; and

(2) Shall determine the duty of support and the amount payable in accordance with the law and support guidelines of this State. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

Historically States have insisted that forum law be applied to support cases whenever possible. This continues as a key principle of UIFSA. In general, a responding tribunal has the same powers in an action involving interstate parties as it has in an intrastate case. This inevitably means that the Act is not self-contained; rather, it is supplemented by the forum's statutes and procedures governing support orders. To insure the efficient processing of the huge number of interstate support cases, it is vital that decision-makers apply familiar rules of local law to the maximum degree possible. This must be accomplished in a manner consistent with the overriding principle of UIFSA that enforcement is of the issuing tribunal's order, and that the responding State does not make the order its own as a condition of enforcing it.

§ 52C-3-304. Duties of initiating tribunal.

(a) Upon the filing of a petition authorized by this Chapter, an initiating tribunal of this State shall forward three copies of the petition and its accompanying documents:

(1) To the responding tribunal or appropriate support enforcement agency in the responding state; or

(2) If the identity of the responding tribunal is unknown, to the state information agency of the responding state with a request that they be forwarded to the appropriate tribunal and that receipt be acknowledged.

(b) If a responding state has not enacted this act or a law or procedure substantially similar to this act, a tribunal of this State may issue a certificate or other document and make findings required by the law of the responding state. If the responding State is a foreign jurisdiction, the tribunal may specify the amount of support sought and provide other documents necessary to satisfy the requirements of the responding state. (1995, c. 538, s. 7(c); 1997-433, s. 10.4; 1998-17, s. 1.)

OFFICIAL COMMENT

Under RURESA § 14, the initiating tribunal was required to make a preliminary finding of the existence of a support obligation. As a practical matter, observance of this obligation was at best erratic across the nation; very often courts viewed the finding as boilerplate. By contrast, under UIFSA the role of the initiating tribunal clearly consists of the ministerial function of forwarding the documents. *See Mossburg v. Coffman*, 6 Kan. App. 2d 428, 629 P.2d 745 (1981); *Neff v. Johnson*, 391 S.W.2d 760 (Tex. Civ. App. — Houston 1965, no writ).

New subsection (b), a transition provision, facilitates interstate enforcement between UIFSA States and those URESA and RURESA States prior to the likely nationwide enactment of UIFSA by January 1, 1998. *See* P.L. 104-193, § 321. Although the three uniform acts seek the same goal — interstate child support — and are compatible in the main, neither URESA nor RURESA can be said to be "substantially similar" to UIFSA. Careful reading of UIFSA reveals that an arms-length view is maintained on this topic, see Section 101(7), (16), and

(19)(ii), *supra*. Exemplary of the imperfect fit between the acts is the number of complaints received during the period between the original promulgation of the Act in February 1993 and the amendments in July 1996 alleging that the elimination of the RURESA requirement for certification of a duty of support had led to serious communication problems between RURESA States and UIFSA States. Supposedly the difference in procedure and documentation required by the two acts caused a tribunal in one State or the other to refuse to enforce a child support obligation unless the paperwork conformed to its requirements or, alternatively, a tribunal refused to provide the requested documents on the basis that the law of its State did not require the production of such documents. The loser in the exercise of such hypertechnical interstate recalcitrance was the child who was due support. In response to such bureaucratic impasses, the 1996 amendment authorizes a tribunal in a UIFSA State to provide whatever documentation is required by a RURESA State to facilitate child support enforcement.

Supplying documentation required by a foreign jurisdiction that is not required by UIFSA procedure will continue to be necessary into the future. The initiating tribunal is authorized to cooperate and provide whatever information or documentation is requested by the foreign jurisdiction, *i.e.*, a statement of the amount of support being requested is required by Canadian provinces.

CASE NOTES

Initiating Court Need Not Issue Summons. — Former G.S. 52A-11 did not require the initiating court to issue a summons. Frederick County ex rel. Ridgway v. Skinner, 48 N.C. App. 621, 269 S.E.2d 678 (1980).

§ 52C-3-305. Duties and powers of responding tribunal.

(a) When a responding tribunal of this State receives a petition or comparable pleading from an initiating tribunal or directly pursuant to G.S. 52C-3-301(c) it shall cause the petition or pleading to be filed and notify the petitioner where and when it was filed.

(b) A responding tribunal of this State, to the extent otherwise authorized by law, may do one or more of the following:

(1) Issue or enforce a support order, modify a child support order, or render a judgment to determine parentage;
(2) Order an obligor to comply with a support order, specifying the amount and the manner of compliance;
(3) Order income withholding;
(4) Determine the amount of any arrears, and specify a method of payment;
(5) Enforce orders by civil or criminal contempt, or both;
(6) Set aside property for satisfaction of the support order;
(7) Place liens and order execution on the obligor's property;
(8) Order an obligor to keep the tribunal informed of the obligor's current residential address, telephone number, employer, address of employment, and telephone number at the place of employment;
(9) Issue an order for arrest for an obligor who has failed after proper notice to appear at a hearing ordered by the tribunal and enter the order for arrest in any local and State computer systems for criminal warrants;
(10) Order the obligor to seek appropriate employment by specified methods;
(11) Award reasonable attorneys' fees and other fees and costs; and
(12) Grant any other available remedy.

(c) A responding tribunal of this State shall include in a support order issued under this Chapter, or in the documents accompanying the order, the calculations on which the support order is based.

(d) A responding tribunal of this State may not condition the payment of a support order issued under this Chapter upon compliance by a party with provisions for visitation.

(e) If a responding tribunal of this State issues an order under this Chapter, the tribunal shall send a copy of the order to the petitioner and the respondent and to the initiating tribunal, if any. (1995, c. 538, s. 7(c); 1997-433, s. 10.5; 1998-17, s. 1.)

OFFICIAL COMMENT

This section revises RURESA §§ 9, 18, 19, 24, 25, and 26. It contains both ministerial functions, such as those in subsection (a); judicial functions, as in subsection (b); and substantive rules applicable to interstate cases, subsections (c)-(e). Because a responding tribunal may be an administrative agency rather than a court, the Act explicitly states that a tribunal is not granted powers that it does not otherwise possess under state law. For example, authority to enforce orders by contempt often is limited to courts.

Subsection (a) eliminates the authorization of notice "by first class mail." Several reasons underlie this deletion. Originally the authorization of first class mail was intended to facilitate relatively informal notice of the issuing tribunal's action, that is, formal service of the order by an officer was not to be required. The intent was that first class mail notice would be sufficient. The deletion of specificity regarding notice is not intended to increase the burden of giving notice. Rather, the advent of a variety of swifter and perhaps even more reliable forms of notice in the modern era justifies the deletion of the first class mail requirement, which may very well be unduly restrictive. For example, many States now authorize notice by telephone facsimile (FAX), or by an express delivery company. In addition, the authorization of legal notice of at least some documents by electronic mail (email) may not be far off. Finally, authorization of notice by first class mail in UIFSA could be regarded as an undue interference with state law, something a Uniform Act should avoid.

Subsection (b)(7) purposefully avoids mention of the priority of liens issued under UIFSA. As is generally true under the Act, that priority will be determined by applicable state law concerning support liens. Subsection (b) supplies much more detail than did RURESA §§ 24 and 26 to make explicit the wide range of specific powers of the responding tribunal. Subsection (b)(9) replaces RURESA § 16 (Jurisdiction By Arrest), which authorized the responding tribunal "to obtain the body of the obligor" if the tribunal "believes that the obligor may flee ...." Under UIFSA, the physical seizure of an obligor is left to the procedures available under state law in other civil cases.

Subsection (c) clarifies that the details of calculating the child support order are to be included along with the order. Local law generally requires that variation from the child support guidelines must be explained, see 42 U.S.C. § 667; this requirement is extended to interstate cases.

Subsection (d) states that an interstate support order may not be conditioned on compliance with a visitation order. While this may be at variance with state law governing intrastate cases, under a UIFSA action the petitioner generally is not present before the tribunal. This distinction justifies prohibiting visitation issues from being litigated in the context of a support proceeding.

Subsection (e) introduces the policy determination that the petitioner, the respondent, and the initiating tribunal, if any, shall be kept informed about actions taken by the responding tribunal.

CASE NOTES

No Statutory Offense. — While a trial court of a "responding state" could punish a respondent for noncompliance with its orders, and while certain provisions of former Chapter 52A provided for the interstate rendition of persons charged in other states with the crime of nonsupport, no statutory offense was created by that Chapter, and it was error for the trial court to treat it as such, given the civil nature of the proceeding. Childers v. Childers, 19 N.C. App. 220, 198 S.E.2d 485 (1973).

A proceeding under former Chapter 52A was a civil proceeding as in actions for alimony without divorce. Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969); Childers v. Childers, 19 N.C. App. 220, 198 S.E.2d 485 (1973); Brondum v. Cox, 30 N.C. App. 35, 225 S.E.2d 193 (1976), aff'd, 292 N.C. 192, 232 S.E.2d 687 (1977); Blake v. Blake, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

An action for support of illegitimate children under former Chapter 52A was a civil action. Smith v. Burden, 31 N.C. App. 145, 228 S.E.2d 662 (1976).

Actions under former Chapter 52A were decided under same law as actions for alimony without divorce. Blake v. Blake, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

Responding State to Determine Substantive Rights of Parties. — Under former

Chapter 52A, the initiating state had no jurisdiction to make any determination affecting the substantive rights of the parties, and therefore, a conclusion by a court of North Carolina, the responding state, that the duty of respondent to support the children in question had already been found to exist by a court of competent jurisdiction of the initiating state, was erroneous. Mahan v. Read, 240 N.C. 641, 83 S.E.2d 706 (1954).

Jurisdiction of Judge in Responding State. — The judge in the responding State of North Carolina had jurisdiction only to determine whether defendant owed a duty of support to his children in the initiating state of Florida, and to enter an order requiring defendant to furnish such support. Pifer v. Pifer, 31 N.C. App. 486, 229 S.E.2d 700 (1976).

The judge in the responding state had no jurisdiction whatsoever to condition support payments upon certain visitation privileges for defendant with his children in the responding or initiating state. Pifer v. Pifer, 31 N.C. App. 486, 229 S.E.2d 700 (1976).

The judge in the responding state had no authority to permit a discontinuance of the support payments upon a finding by him of an alleged violation of the condition of visitation privileges. Pifer v. Pifer, 31 N.C. App. 486, 229 S.E.2d 700 (1976).

Right of Defendant to Blood Grouping Test and Jury Trial on Issue of Paternity. — A defendant was entitled in a proceeding under the former Uniform Reciprocal Enforcement of Support Act to a blood grouping test pursuant to G.S. 8-50.1 where the issue of paternity was raised, and upon timely motion, was entitled to have the jury pass on the issue of paternity. Brondum v. Cox, 30 N.C. App. 35, 226 S.E.2d 193 (1976), aff'd, 292 N.C. 192, 232 S.E.2d 687 (1977).

Past Due Support Installments. — A decree for future payment of alimony or child support was, as to installments part due and unpaid, within the protection of the full faith and credit clause of the United States Constitution, unless by law of the state in which the decree was rendered its enforcement was so completely in that state that they could annul or modify the decree as to overdue and unsatisfied installments. Fleming v. Fleming, 49 N.C. App. 345, 271 S.E.2d 584 (1980).

Ministerial Function of Court. — Subdivision (b)(4) allows the responding courts to perform only a ministerial function and does not contemplate relitigation of issues determined in the order or interpretation of the order under the responding state's law. State ex rel. George v. Bray, 130 N.C. App. 552, 503 S.E.2d 686 (1998).

§ 52C-3-306. Inappropriate tribunal.

If a petition or comparable pleading is received by an inappropriate tribunal of this State, it shall forward the pleading and accompanying documents to an appropriate tribunal in this State or another state and notify the petitioner where and when the pleading was sent. (1995, c. 538, s. 7(c); 1997-433, s. 10.6; 1998-17, s. 1.)

OFFICIAL COMMENT

This section directs a tribunal receiving UIFSA documents in error to forward the original documents to their proper destination without undue delay, whether the appropriate tribunal is located in the same State or elsewhere. This section is intended to apply both to initiating and responding tribunals receiving such documents. For example, if a tribunal is inappropriately designated as the responding tribunal, it shall forward the petition to the appropriate responding tribunal wherever located, if known, and notify the initiating tribunal of its action. Such a procedure is much to be preferred to returning the documents to the initiating tribunal to begin the process anew. Cooperation of this sort will facilitate the ultimate goals of the Act.

For a full explanation regarding the deletion of the authorization of notice by first class mail, see the Comment to Section 305.

§ 52C-3-307. Duties of support enforcement agency.

(a) A support enforcement agency of this State, upon request, shall provide services to a petitioner in a proceeding under this Chapter.

(b) A support enforcement agency that is providing services to the petitioner as appropriate shall:

(1) Take all steps necessary to enable an appropriate tribunal in this State or another state to obtain jurisdiction over the respondent;

(2) Request an appropriate tribunal to set a date, time, and place for a hearing;

(3) Make a reasonable effort to obtain all relevant information, including information as to income and property of the parties;

(4) Within two days, exclusive of Saturdays, Sundays, and legal holidays, after receipt of a written notice from an initiating, responding, or registering tribunal, send a copy of the notice to the petitioner;

(5) Within two days, exclusive of Saturdays, Sundays, and legal holidays, after receipt of a written communication from the respondent or the respondent's attorney, send a copy of the communication to the petitioner; and

(6) Notify the petitioner if jurisdiction over the respondent cannot be obtained.

(c) This Chapter does not create or negate a relationship of attorney and client or other fiduciary relationship between a support enforcement agency or the attorney for the agency and the individual being assisted by the agency. (1995, c. 538, s. 7(c); 1997-433, s. 10.7; 1998-17, s. 1.)

OFFICIAL COMMENT

This section is derived from RURESA §§ 12, 18, and 19.

Subsection (a) changes the focus of RURESA § 12 (Officials to Represent Obligee) from representation of an obligee to providing services to a petitioner. Care should be exercised in the use of terminology given this substantial alteration of past practice under RURESA. Not only may either the obligee or the obligor request services, but that request may be in the context of the establishment of an initial support order, enforcement or review and adjustment of an existing order, or a modification of that order (upwards or downwards). Note that the Act does not distinguish between child support and spousal support for purposes of providing services. Note also, that the services available may differ significantly; for example, modification of spousal support is limited to the issuing State, see Section 205(f), *supra*.

Subsection (b) responds to the complaint of many RURESA petitioners that they were not properly kept informed about the progress of their requests for services.

Subsection (c) explicitly states that UIFSA neither creates nor rejects the establishment of an attorney-client or fiduciary relationship between the support enforcement agency and a petitioner receiving services from that agency. This highly controversial issue is left to otherwise applicable state law.

For a full explanation regarding the deletion of the authorization of notice by first class mail, see the Comment to Section 305.

§ 52C-3-308. Representation of obligee.

It shall be the duty of the district attorney to represent the obligee in proceedings authorized by this Chapter unless alternative arrangements are made by the obligee. An obligee may employ private counsel to represent the obligee in proceedings authorized by this Chapter. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

This section continues the principle of RURESA § 18(c), under which the State Attorney General, or an alternative designated by state law, is given oversight responsibility for the diligent provision of services by the support enforcement agency and the power to seek compliance with the Act.

CASE NOTES

The Attorney General of North Carolina had standing to file a brief on behalf of a New York resident in a case involving the enforcement of orders rendered in an action to register a foreign child support order. New York v. Paugh, 135 N.C. App. 434, 521 S.E.2d 475, 1999

N.C. App. LEXIS 1154 (1999).

Cited in State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

§ 52C-3-309. Duties of State information agency.

(a) The Department of Health and Human Services, Division of Social Services, is designated as the State information agency under this Chapter.

(b) The State information agency shall:

(1) Compile and maintain a current list, including addresses, of the tribunals in this State which have jurisdiction under this Chapter and any support enforcement agencies in this State and transmit a copy to the state information agency of every other state;

(2) Maintain a register of tribunals and support enforcement agencies received from other states;

(3) Forward to the appropriate tribunal in the place in this State in which the individual obligee or the obligor resides, or in which the obligor's property is believed to be located, all documents concerning a proceeding under this Chapter received from an initiating tribunal or the state information agency of the initiating state; and

(4) Obtain information concerning the location of the obligor and the obligor's property within this State not exempt from execution, by such means as postal verification and federal or state locator services, examination of telephone directories, requests for the obligor's address from employers, and examination of governmental records, including, to the extent not prohibited by other law, those relating to real property, vital statistics, law enforcement, taxation, motor vehicles, drivers licenses, and social security. (1995, c. 538, s. 7(c); 1997-443, s. 11A.118(a).)

OFFICIAL COMMENT

This section, based on RURESA § 17 (State Information Agency), continues the information-gathering duties of the central information agency.

Subsection (b)(4) does not provide independent access to the information sources or to the governmental documents listed. Because States have different requirements and limitations concerning such access based on differing views of the privacy interests of individual citizens, the agency is directed to use all lawful means under the relevant state law to obtain and disseminate information.

§ 52C-3-310. Pleadings and accompanying documents.

(a) A petitioner seeking to establish or modify a support order or to determine parentage in a proceeding under this Chapter must verify the petition. Unless otherwise ordered under G.S. 52C-3-311, the petition or accompanying documents must provide, so far as known, the name, residential address, and social security numbers of the obligor and the obligee, and the name, sex, residential address, social security number, and date of birth of each child for whom support is sought. The petition must be accompanied by a certified copy of any support order in effect. The petition may include any other information that may assist in locating or identifying the respondent.

(b) The petition must specify the relief sought. The petition and accompanying documents must conform substantially with the requirements imposed by the forms mandated by federal law for use in cases filed by a support enforcement agency. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

Derived from RURESA § 11, this section establishes the basic requirements for drafting and filing interstate pleadings. Subsection (a) should be read in conjunction with Section 312, which provides for the confidentiality of certain information if disclosure is likely to result in harm to a party or a child.

Subsection (b) provides authorization for the use of the federally authorized forms promulgated in connection with the IV-D child support enforcement program and mandates substantial compliance with those forms. Although the use of other forms is not prohibited, statutory preapproval of forms that substantially conform to those sanctioned by federal law will help to standardize documents, with a concomitant improvement in the efficient processing of UIFSA actions.

CASE NOTES

Petition not void. — Denial of a father's motion to dismiss a Uniform Interstate Family Support Act petition on the basis that the petition did not comply with G.S. 52C-3-310(a) was proper because the failure of the Florida notary to indicate the type of identification relied on to identify the mother, in contravention of the express language of Fla. Stat. § 117.05(4)(f), did not render the petition void; there was no dispute that the notary public properly identified the mother when she signed the petition and that the mother was present when the petition was notarized. State ex rel. Johnson v. Eason, — N.C. App. —, 679 S.E.2d 151, 2009 N.C. App. LEXIS 1093 (July 7, 2009).

§ 52C-3-311. Nondisclosure of information in exceptional circumstances.

Upon a finding, which may be made ex parte, that the health, safety, or liberty of a party or child would be unreasonably put at risk by the disclosure of identifying information, or if an existing order so provides, a tribunal shall order that the address of the child or party or other identifying information not be disclosed in a pleading or other document filed in a proceeding under this Chapter. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

Public awareness of and sensitivity to the dangers of domestic violence has significantly increased since the original promulgation of URESA and RURESA. This section authorizes confidentiality in instances where there is a serious risk of domestic violence or child abduction. Although local law generally governs the conduct of the forum tribunal, state law may not provide for maintaining secrecy about the exact whereabouts of a litigant or other information ordinarily required to be disclosed under state law, *i.e.*, Social Security number of the parties or the child. If so, this provision creates a confidentiality provision which is particularly appropriate in the light of the intractable problems associated with interstate (as opposed to intrastate) childnapping.

§ 52C-3-312. Costs and fees.

(a) The petitioner shall not be required to pay a filing fee or other costs.

(b) If an obligee prevails, a responding tribunal may assess against an obligor filing fees, reasonable attorneys' fees, other costs, and necessary travel and other reasonable expenses incurred by the obligee and the obligee's witnesses. The tribunal may not assess fees, costs, or expenses against the obligee or the support enforcement agency of either the initiating or the responding state, except as provided by other law. Attorneys' fees may be taxed as costs, and may be ordered paid directly to the attorney, who may enforce the order in the attorney's own name. Payment of support owed to the obligee has priority over fees, costs, and expenses.

(c) The tribunal shall order the payment of costs and reasonable attorneys' fees if it determines that a hearing was requested primarily for delay. In a proceeding under Article 6 of this Chapter, a hearing is presumed to have been requested primarily for delay if a registered support order is confirmed or enforced without change. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

This section is derived from RURESA § 15 (Costs and Fees), which authorized fees and costs to be assessed against "the obligor." In recognition of the fact that under UIFSA either the obligor or the obligee may file suit or seek services from a support enforcement agency, subsection (a) permits either party to file without payment of a filing fee or other costs. Subsection (b), however, continues the RURESA determination that only the support obligor may be assessed the specified costs and fees.

Subsection (c) provides a sanction to deal with a frivolous contest regarding compliance with an interstate withholding order, registration of a support order, or comparable delaying tactics regarding an appropriate enforcement remedy.

§ 52C-3-313. Limited immunity of petitioner.

(a) Participation by a petitioner in a proceeding before a responding tribunal, whether in person, by private attorney, or through services provided by the support enforcement agency, does not confer personal jurisdiction over the petitioner in another proceeding.

(b) A petitioner is not amenable to service of civil process while physically present in this State to participate in a proceeding under this Chapter.

(c) The immunity granted by this section does not extend to civil litigation based on acts unrelated to a proceeding under this Chapter committed by a party while present in this State to participate in the proceeding. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

This section significantly expands RURESA § 32. Under subsection (a), direct or indirect participation in a UIFSA proceeding does not subject a petitioner to an assertion of personal jurisdiction over the petitioner by the forum State in other litigation between the parties. The primary object of this prohibition is to preclude joining disputes over child custody and visitation with the establishment, enforcement, or modification of child support. This prohibition strengthens the ban on visitation litigation established in Section 305(d). A petition for affirmative relief under UIFSA limits the jurisdiction of the tribunal to the boundaries of the support proceeding.

Similarly, subsection (b) grants a litigant a variety of limited immunity from service of process during the time a party is physically present in a State for a UIFSA action. The immunity provided is in no way comparable to diplomatic immunity, however, which should be clear from reading subsection (c) in conjunction with the other subsections.

Subsection (c) does not extend immunity to civil litigation unrelated to the support action which stems from contemporaneous acts committed by a party while present in the State for the support litigation. For example, a petitioner involved in an automobile accident or a contract dispute over the cost of lodging while present in the State does not have immunity from a civil suit on those issues.

§ 52C-3-314. Nonparentage as defense.

A party whose parentage of a child has been previously determined by or pursuant to law may not plead nonparentage as a defense to a proceeding under this Chapter. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

Arguably this section does no more than restate the basic principle of res judicata. However, there is a great variety of state law regarding presumptions of parentage and available defenses after a prior determination of parentage. This section is intended neither to discourage nor encourage collateral attacks in situations in which the law of a foreign jurisdiction is at significant odds with local law. If a collateral attack on a parentage decree is permissible under the law of the issuing jurisdiction, such an action must be pursued in that forum and not in a UIFSA proceeding. In sum, this section mandates that a parentage decree rendered by another tribunal is not subject to collateral attack in a UIFSA proceeding. Of course, an attack on an alleged final order on a fundamental constitutional ground is permissible in the forum State, such as a denial of due process because of a failure of notice and opportunity to be heard or a lack of personal jurisdiction over a party who did not answer or appear.

Similarly, the law of the issuing State may provide for a determination of parentage based on certain specific acts of the obligor acknowledging parentage as a substitute for a decree, *i.e.*, signing the child's birth certificate or publicly acknowledging a duty of support after receiving the child into his home. UIFSA also is neutral regarding a collateral attack on such a parentage determination. The responding tribunal must give effect to such an act of acknowledgment of parentage if it is recognized as determinative in the issuing State. The consistent theme of this section is that a collateral attack cannot be made in a UIFSA proceeding.

CASE NOTES

Applied in Reid v. Dixon, 136 N.C. App. 438, 524 S.E.2d 576, 2000 N.C. App. LEXIS 21 (2000).

§ 52C-3-315. Special rules of evidence and procedure.

(a) The physical presence of the petitioner in a responding tribunal of this State is not required for the establishment, enforcement, or modification of a support order or the rendition of a judgment determining parentage.

(b) A verified petition, affidavit, document substantially complying with federally mandated forms, and a document incorporated by reference in any of them, not excluded under the hearsay rule if given in person, is admissible in evidence if given under oath by a party or witness residing in another state.

(c) A copy of the record of child support payments certified as a true copy of the original by the custodian of the record may be forwarded to a responding tribunal. The copy is evidence of facts asserted in it and is admissible to show whether payments were made.

(d) Copies of bills for testing for parentage, and for prenatal and postnatal health care of the mother and child, furnished to the adverse party at least 10 days before trial, are admissible in evidence to prove the amount of the charges billed and that the charges were reasonable, necessary, and customary.

(e) Documentary evidence transmitted from another state to a tribunal of this State by telephone, telecopier, or other means that do not provide an original writing may not be excluded from evidence on an objection based on the means of transmission.

(f) In a proceeding under this Chapter, a tribunal of this State may permit a party or witness residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means at a designated tribunal or other location in that state. A tribunal of this State shall cooperate with tribunals of other states in designating an appropriate location for the deposition or testimony.

(g) If a party called to testify at a civil hearing refuses to answer on the ground that the testimony may be self-incriminating, the trier of fact may draw an adverse inference from the refusal.

(h) A privilege against disclosure of communication between spouses does not apply in a proceeding under this Chapter.

(i) The defense of immunity based on the relationship of husband and wife or parent and child does not apply in a proceeding under this Chapter. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

This section combines RURESA §§ 9, 19, 21, 22, and 23; and, provides additional innovative methods for gathering evidence in interstate cases.

Subsections (b) through (f) greatly expand on RURESA G.S. 23 (Rules of Evidence). The intent is to eliminate as many potential hearsay problems as possible in interstate litigation because the out-of-state party and that party's witnesses usually do not appear in person at the hearing.

Subsection (d) provides a simplified means for proving health care expenses related to the birth of a child. Because ordinarily these charges are not in dispute, this is designed to obviate the cost of having health care providers appear in person or of obtaining affidavits of business records from each provider.

Subsections (e) and (f) encourage tribunals and litigants to take advantage of modern methods of communication in interstate support litigation; most dramatically, the out-of-state party is authorized to testify by telephone and supply documents by fax.

Subsection (g) codifies the rule in effect in many States that in civil litigation an adverse inference may be drawn from a litigant's silence. *See, i.e., In re Matter of Joseph P.* , 487 N.Y.S.2d 685 (Fam. Ct. 1985); Pa. Cons. Stats. Ann., Tit. 23, § 5104(c) (1991) and La. Rev. Stats., Tit. 9, § 396(A) (1992) ("if any party refuses to submit to such tests, the court may resolve the question of paternity against such party"); 9 N.J. Stats. Ann. 17-51(d) (1991) ("refusal to submit to blood tests or genetic tests, or both, may be admitted into evidence and shall give rise to the presumption that the results of the tests would have been unfavorable to the interests of the party refusing").

CASE NOTES

Remand for Findings and Conclusions. — While plaintiff's allegations in her verified complaint established prima facie that the reasonable needs of the parties' children were in the amount of $778.00 per month and that defendant had the relative ability to pay $650.00 per month support for his children, it remained for the trial court to make the necessary findings of fact and conclusions of law, and the case could be remanded for this purpose. Grimes v. Grimes, 78 N.C. App. 208, 336 S.E.2d 664 (1985).

Cited in Butler v. Butler, 152 N.C. App. 74, 566 S.E.2d 707, 2002 N.C. App. LEXIS 858 (2002).

§ 52C-3-316. Communications between tribunals.

A tribunal of this State may communicate with a tribunal of another state in writing, or by telephone or other means, to obtain information concerning the laws of that state, the legal effect of a judgment, decree, or order of that tribunal, and the status of a proceeding in the other state. A tribunal of this State may furnish similar information by similar means to a tribunal of another state. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

This section is derived from UCCJA § 7(d) (Inconvenient Forum), which authorizes communications between courts in order to facilitate decisions under that Act. In contrast to RURESA, broad cooperation between tribunals is permitted under UIFSA to expedite establishment and enforcement of a support order.

§ 52C-3-317. Assistance with discovery.

A tribunal of this State may request a tribunal of another state to assist in obtaining discovery, and upon request, may compel a person over whom it has jurisdiction to respond to a discovery order issued by a tribunal of another state. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

This section takes another logical step to facilitate interstate cooperation by enlisting the power of the forum to assist a tribunal of another State with the discovery process. The grant of authority is quite broad, enabling the tribunal of the enacting State to fashion its remedies to facilitate discovery consistent with local practice.

CASE NOTES

Cited in Butler v. Butler, 152 N.C. App. 74, 566 S.E.2d 707, 2002 N.C. App. LEXIS 858 (2002).

§ 52C-3-318. Receipt and disbursement of payments.

A support enforcement agency or tribunal of this State shall disburse promptly any amounts received pursuant to a support order, as directed by the order. The agency or tribunal shall furnish to a requesting party or tribunal of another state a certified statement by the custodian of the record of the amounts and dates of all payments received. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

The first sentence of this section is derived from RURESA § 29 (Additional Duty of Initiating Court). The second sentence confirms the duty of the agency or tribunal to furnish payment information in interstate cases.

Article 4.

Establishment of Support Order.

§ 52C-4-401. Petition to establish support order.

(a) If a support order entitled to recognition under this Chapter has not been issued, a responding tribunal of this State may issue a support order if:

(1) The individual seeking the order resides in another state; or

(2) The support enforcement agency seeking the order is located in another state.

(b) The tribunal may issue a temporary child support order if:

(1) The respondent has signed a verified statement acknowledging parentage;

(2) The respondent has been determined by or pursuant to law to be the parent; or

(3) There is other clear and convincing evidence that the respondent is the child's parent.

(c) Upon finding, after notice and opportunity to be heard, that an obligor owes a duty of support, the tribunal shall issue a support order directed to the obligor and may issue other orders pursuant to G.S. 52C-3-305. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

This section authorizes a tribunal of the responding State to issue temporary and permanent support orders binding on an obligor over whom the tribunal has personal jurisdiction. UIFSA does not permit such orders to be issued when another support order exists, thereby prohibiting a second tribunal from establishing another support order and the accompanying continuing, exclusive jurisdiction over the matter. *See* Section 205 (Continuing, Exclusive Jurisdiction) and Section 206 (Enforcement and Modification of Support Order by Tribunal Having Continuing Jurisdiction).

Article 5.

Enforcement of Order of Another State Without Registration.

§ 52C-5-501. Employer's receipt of income-withholding order of another state.

(a) An income-withholding order issued in another state may be sent to the person or entity defined or identified as the obligor's employer under the income-withholding provisions of Chapter 50 or Chapter 110 of the General Statutes, as applicable, without first filing a petition or comparable pleading or registering the order with a tribunal of this State. In the event that an obligor is receiving unemployment compensation benefits from the North Carolina Employment Security Commission, in accordance with G.S. 96-17, an income-withholding order issued in another state may be sent to the Employment Security Commission without first filing a petition or comparable pleading or registering the order with a tribunal of this State. Upon receipt of the order, the employer or the Employment Security Commission shall:

(1) Treat an income-withholding order issued in another state which appears regular on its face as if it had been issued by a tribunal of this State;

(2) Immediately provide a copy of the order to the obligor; and

(3) Distribute the funds as directed in the withholding order. The Employment Security Commission shall not withhold an amount to exceed twenty-five percent (25%) of the unemployment compensation benefits.

(b) Repealed by Session Laws 1997-433, s. 10.8. (1995, c. 538, s. 7(c); 1997-433, s. 10.8; 1998-17, s. 1; 1999-293, s. 5.)

OFFICIAL COMMENT

In 1984 Congress mandated that all States adopt procedures for enforcing income-withholding orders of sister States. As a result, the Child Support Project of the American Bar Association and the National Conference of State Legislatures promulgated a Model Interstate Income Withholding Act in 1985; however, the Model Act was not widely enacted. RURESA was silent on the subject. Direct recognition by the out-of-state obligor's employer of a withholding order issued by another State long was sought by support enforcement associations and other advocacy groups. In 1993 UIFSA recognized such a procedure.

Section 501 is deliberately written in the passive voice; the Act does not restrict who may send an income-withholding order across state lines. Although the sender will ordinarily be a child support enforcement agency or the obligee, the obligor or any other person may supply an employer with the income-withholding order. Further, "sending a copy" of a withholding order to an employer is clearly distinguishable from "service" of that order on the same employer. The latter necessarily intends to invoke the tribunal's authority only over an employer doing business in the forum State. But, for there to be valid "service" of a withholding order on an employer in another State, the tribunal must have authority to bind the employer. In most cases, this requires the assertion of the authority of a local responding tribunal in a "registration for enforcement" proceeding. The formality of "service" defeats the whole purpose of direct income withholding across state lines. This explains the deletion of the original requirement in the 1993 version of UIFSA that the income-withholding order of one State "may be sent by first class mail." In sum, the process contemplated is direct "notification" to an employer in another State of a withholding order without the involvement of initiating or responding tribunals. Therefore, receipt of a copy of a withholding order by facsimile, regular first class mail, registered or certified mail, or any other type of direct notice is sufficient to provide the requisite notice to trigger direct income withholding in the absence of a contest by the employee-obligor.

§ 52C-5-502. Employer's compliance with income-withholding order of another state.

(a) Upon receipt of an income-withholding order, the obligor's employer shall immediately provide a copy of the order to the obligor.

(b) The employer shall treat an income-withholding order issued in another state which appears regular on its face as if it had been issued by a tribunal of this State.

(c) Except as otherwise provided in subsection (d) of this section and G.S. 52C-5-503, the employer shall withhold and distribute the funds as directed in the income-withholding order by complying with terms of the order which specify:

(1) The duration and amount of periodic payments of current child support, stated as a sum certain;

(2) The person or agency designated to receive payments and the address to which the payments are to be forwarded;

(3) Medical support, whether in the form of periodic cash payment, stated as a sum certain, or ordering the obligor to provide health insurance coverage for the child under a policy available through the obligor's employment;

(4) The amount of periodic payments of fees and costs for a support enforcement agency, the issuing tribunal, and the obligee's attorney, stated as sums certain; and

(5) The amount of periodic payments of arrearages and interest on arrearages, stated as sums certain.

(d) An employer shall comply with the law of the state of the obligor's principal place of employment for withholding from income with respect to:

(1) The employer's fee for processing an income-withholding order;

(2) The maximum amount permitted to be withheld from the obligor's income; and

(3) The times within which the employer must implement the income-withholding order and forward the child support payment. (1995, c. 538, s. 7(c); 1997-433, s. 10.8; 1998-17, s. 1.)

OFFICIAL COMMENT

Major employers and national payroll associations urged the National Conference of Commissioners on Uniform State Laws to supply more detail regarding the rights and duties of an employer on receipt of an income-withholding order from another State. The Conference obliged with amendments to UIFSA that set forth a series of steps for the employer to track.

The employer's first step is to notify the employee of receipt of the out-of-state withholding order. If the employee disputes the validity of the withholding order, it is the employee's responsibility to take appropriate defensive measures to contest the withholding. At this point neither an initiating nor a responding tribunal is directly involved. The withholding order may have been forwarded by the obligee, the obligee's attorney, or the out-of-state IV-D agency. In fact, there is no prohibition against anyone sending a valid copy of an income-withholding order, even a stranger to the litigation, such as the child's grandparent. Subsection (a) does not specify the method for sending this relatively informal notice for direct income withholding, but rather takes a permissive view of communication notice on the assumption that an obligor will act to prevent a wrongful invasion of income not owed as current child support or arrears.

Subsection (b) directs an employer of the enacting State to recognize a withholding order of a sister State, subject to the employee's right to contest the validity of the order or its enforcement. Prior to the promulgation of UIFSA, agencies in several States adopted a procedure of sending direct withholding requests to out-of-state employers. A contemporaneous study by the federal General Accounting Office reported that employers in a second State routinely recognized withholding orders of sister States despite an apparent lack of statutory authority to do so. UIFSA marked the first official sanction of this practice. Subsection (b) does not define "regular on its face," but the term should be liberally construed, see *U.S. v. Morton*, 467 U.S. 822 (1984) ("legal process regular on its face"). The rules governing intrastate procedure and defenses for withholding orders will apply to interstate orders. Thus, subsection (a) makes clear that employers who refuse to recognize out-of-state withholding orders will be subjected to whatever remedies are otherwise available under state law.

Subsection (c) is the answer to employers' complaints that insufficient direction for action was given by the original UIFSA. Formerly the employer was merely told to "distribute the funds as directed in the withholding order." This section clarifies the terms of the out-of-state order with which the employer must strictly comply, and those terms that are subject to compliance with local law. As a general principle, an employer is directed to comply with the specific terms contained in the order, but there are exceptions. Moreover, many income-withholding orders currently do not provide the detail necessary for the employer to comply with each and every directive. Fortunately, when the long-anticipated federal forms are finally promulgated, more uniformity in the text of child support orders will eventually occur. To the extent that an order is silent, the employer is not required to respond to unstated demands of the issuing State. Formerly, employers often were so concerned about ambiguous or incomplete orders that they telephoned child support enforcement agencies in other States to attempt to understand and comply with unstated terms. Employers should not be expected to become investigators or shoulder the responsibility of learning the law of 50 States.

Subsection (c)(1) directs that the amount and duration of periodic payments of current child support must be stated in a sum certain in order to elicit compliance. The duration of the support obligation is fixed by the controlling order and should be stated in the withholding order so that the employer is informed of the date on which the withholding is anticipated to terminate. The "sum certain" requirement is crucial to facilitating the employer's compliance. An order for a "percentage of the obligor's net income," for example, does not satisfy this requirement. A State that typically issues its orders as a percentage of income is not entitled to compliance by an employer receiving an interstate income-withholding order by an employer. Such a State should revisit the issue and provide an order for a sum certain if the procedures set forth in this article are to be employed.

Subsection (c)(2) states the obvious: Necessary information must be clearly stated. For example, the destination of the payments must correspond to the destination originally designated or subsequently authorized by the issuing tribunal.

Subsection (c)(3) provides that medical support for the child must be stated either by a periodic cash payment or, alternatively, by an order directing the obligor to provide health insurance coverage from his employment. In the absence of an order for payment of a sum certain, an order for medical support as child support requires the employer to enroll the obligor's child for coverage if medical insurance is available through the obligor's employment. Failure to enroll the child should elicit, at the least, registration of the order for enforcement in the responding State, to be implemented by an order of a tribunal directing the employer to comply. Because the employer is so directed by the medical support order, enrollment of the child in the health care plan at the employee-obligor's expense is not dependent on the obligor's consent, any more than withholding a sum certain from the obligor's wages is subject to a veto. It is up to the obligor to assert any defense to prevent the employer from abiding by the medical support order.

Subsection (c)(4) identifies certain costs and fees incurred in conjunction with the support enforcement that may be added to the withholding order.

Subsection (c)(5) requires that the amount of periodic payments for arrears and interest on arrears also must be stated as a sum certain. If the one-order system is to function properly, the issuing State ultimately must be responsible to account for payments and maintain the record of arrears and interest rate on arrears. Full compliance with the support order will only be achieved when the issuing State determines that the obligation no longer exists.

Subsection (d) identifies those narrow provisions in which the law of the employee's work State, rather than the law of the issuing State, should apply. A large employer will almost certainly have a number of employees subject to income-withholding orders. From the employer's perspective, the procedural requirements for compliance should be uniform for all of those employees. Certain issues should be matters for the law of the employee's work State, such as the employer's fee for processing, the maximum amount to be withheld, and the time in which to comply. The latter necessarily includes the frequency with which income withholding must occur. This is also consistent with regard to the tax consideration imposed by choice of law considerations. The only element of the list of local law concerns identified in subsection (d) which stirred any controversy whatsoever was the fact that the maximum amount permitted to be withheld is to be subject to the law of the employee's work State. Demands of equal treatment for all citizens of the responding State and the practical concern for uniform computer programming, however, mandate this solution.

§ 52C-5-503. Compliance with multiple income-withholding orders.

If an obligor's employer receives multiple income-withholding orders with respect to the earnings of the same obligor, the employer satisfies the terms of the multiple orders if the employer complies with the law of the state of the obligor's principal place of employment to establish the priorities for withholding and allocating income withheld for multiple child support obligees. (1997-433, s. 10.8; 1998-17, s. 1.)

OFFICIAL COMMENT

Consistent with the Act's general problem-solving approach, the employer is directed to deal with multiple income orders for multiple families in a manner consistent with local law.

§ 52C-5-504. Immunity from civil liability.

An employer who complies with an income-withholding order issued in another state in accordance with this Article is not subject to civil liability to an individual or agency with regard to the employer's withholding of child support from the obligor's income. (1997-433, s. 10.8; 1998-17, s. 1.)

OFFICIAL COMMENT

Because employer cooperation is a key element in interstate child support enforcement, it is sound policy to state explicitly that an employer who complies with the income-withholding order from another State is immune from civil liability.

§ 52C-5-505. Penalties for noncompliance.

An employer who willfully fails to comply with an income-withholding order issued by another state and received for enforcement is subject to the same penalties that may be imposed for noncompliance with an order issued by a tribunal of this State. (1997-433, s. 10.8; 1998-17, s. 1.)

OFFICIAL COMMENT

Only an employer who willfully fails to comply with an interstate order should be subject to enforcement procedures. Local law is the appropriate source for the applicable sanctions.

§ 52C-5-506. Contest by obligor.

(a) An obligor may contest the validity or enforcement of an income-withholding order issued in another state and received directly by an employer in this State in the same manner as if the order had been issued by a tribunal of this State. G.S. 52C-6-604 applies to the contest.

(b) The obligor shall give notice of the contest to:

(1) A support enforcement agency providing services to the obligee;

(2) Each employer that has directly received an income-withholding order; and

(3) The person or agency designated to receive payments in the income-withholding order if no person or agency is designated, to the obligee. (1997-433, s. 10.8; 1998-17, s. 1.)

OFFICIAL COMMENT

This section incorporates the law regarding defenses an alleged obligor may raise to an intrastate withholding order into the interstate context. Generally, States have accepted the IV-D requirement that the only viable defense is a "mistake of fact." 42 U.S.C. § 666(b)(4)(A). This apparently includes "errors in the amount of current support owed, errors in the amount of accrued arrearage or mistaken identity of the alleged obligor" while excluding "other grounds, such as the inappropriateness of the amount of support ordered to be paid, changed financial circumstances of the obligor, or lack of visitation." H.R. Rep. No. 98-527, 98th Cong., 1st Sess. 33 (1983). The latter claims must be pursued in a separate legal action in the State having continuing, exclusive jurisdiction over the support order, not in a UIFSA proceeding.

After the employer receives a withholding order from another State, the first step is to notify the employee that income withholding for child support will begin within the time frame specified by state law, just as it would if the withholding order is received from a tribunal of the employer's State. It is the responsibility of the employee to take whatever protective measures are necessary to prevent the withholding if the employee asserts a defense.

This procedure is based on the assumption that defenses to income withholding for child support are few and far between. Experience has shown that only in a relatively few cases does an employee-obligor have a defense, *i.e.*, the child has died, another contingency ending the support has occurred, the order has been superseded, or there is a case of mistaken identity and the employee is not the obligor. An employee's complaint that "The child support is too high" must be ignored. The employee's simplest, most efficient, cost-effective method to assert a defense is probably to register the withholding order with a local tribunal and seek protection from that tribunal pending resolution of the contest. This may be accomplished through the obligor's employment of private counsel or by a request for services made to the child support enforcement agency of the responding State. In the absence of expeditious action by the employee to assert a defense and contest the request, however, the employer must begin income withholding in a timely fashion.

In contrast to the multiple-order system of RURESA, another issue the employee may raise is that the withholding order received by the employer is not based on the controlling child support order issued by the tribunal with continuing, exclusive jurisdiction, see Section 207, *supra*. Such a claim does not constitute a defense to the obligation of child support, but does put at issue the identity of the order to which the employer must respond. Clearly the employer is in no position to make such a decision. When multiple orders involve the same obligor and child, as a practical matter resort to a responding tribunal to resolve a dispute over apportionment almost certainly is necessary.

§ 52C-5-507. Administrative enforcement of orders.

(a) A party seeking to enforce a support order or an income-withholding order, or both, issued by a tribunal of another state may send the documents required for registering the order to a support enforcement agency of this State.

(b) Upon receipt of the documents, the support enforcement agency, without initially seeking to register the order, shall consider and, if appropriate, use any administrative procedure authorized by the law of this State to enforce a support order or an income-withholding order, or both. If the obligor does not contest administrative enforcement, the order need not be registered. If the obligor contests the validity or administrative enforcement of the order, the support enforcement agency shall register the order pursuant to this Chapter. (1997-433, s. 10.8; 1998-17, s. 1.)

OFFICIAL COMMENT

This section authorizes summary enforcement of an interstate child support order through the administrative means available for intrastate orders. Under subsection (a), an interested party in another State, which necessarily may include a private attorney or a support enforcement agency, may forward a support order or income-withholding order to a support enforcement agency of the responding State. The term "responding State" in this context does not contemplate resort to a tribunal as an initial step.

Subsection (b) directs the support enforcement agency in the responding State to employ that State's regular administrative procedures to process an out-of-state order. Thus, a local employer accustomed to dealing with the local agency need not change its procedure to comply with an out-of-state order. Similarly, the administrative agency is authorized to apply its ordinary rules equally to both intrastate and interstate orders. For example, if the administrative hearing procedure must be exhausted for an intrastate order before a contesting party may seek relief in a tribunal, the same rule applies to an interstate order received for administrative enforcement. Thereafter, the order may be registered with a tribunal for enforcement if that is the next step for an intrastate order, see Sections 601-608, *infra*.

ARTICLE 6.

Enforcement and Modification of Support Order After Registration.

Part 1. Registration and Enforcement of Support Order.

§ 52C-6-601. Registration of order for enforcement.

A support order or an income-withholding order issued by a tribunal of another state may be registered in this State for enforcement. (1995, c. 538, s. 7(c); 1997-433, s. 10.9; 1998-17, s. 1.)

OFFICIAL COMMENT

Sections 601 through 604 greatly expand the procedure for the registration of interstate support orders available under RURESA §§ 35-40. The common practice under RURESA was to initiate a new suit for the establishment of a support order, even though there was an existing order for child support. That practice is specifically rejected by UIFSA. The fact that RURESA permitted (really encouraged) initiation of a new suit under those circumstances led to the multiple support order system that UIFSA is designed to eliminate.

Under the one-order system of UIFSA, only one existing order is to be enforced prospectively (if more than one child support order exists, refer to Section 207 for resolution of the conflict). Registration of that order in the responding State is the first step to enforcement by a tribunal of that State. Rather than being an optional procedure, as was the case under RURESA, registration for enforcement under UIFSA is the primary method for interstate enforcement of child support. If the prior support order has been validly issued by a tribunal with continuing, exclusive jurisdiction, see Section 205, only that order is to be prospectively enforced against the obligor in the absence of narrow, strictly-defined fact situations in which an existing order may be modified. *See* Sections 609 through 612. Until that order is modified, however, it is fully enforceable in the responding State.

Registration should be employed if the purpose is enforcement. Although registration not accompanied by a request for affirmative relief is not prohibited, the Act does not contemplate registration as serving a purpose in itself.

CASE NOTES

Constitutionality of Orders Under Former URESA. — Orders pursuant to former Chapter 52A, the Uniform Reciprocal Enforcement of Support Act (URESA), did not violate a respondent's right to due process and equal protection under the Constitutions of the United States and North Carolina. Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

North Carolina law applied prospectively from the date of registration under former Chapter 52A, the Uniform Reciprocal Enforcement of Support Act (URESA). Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

But Not Retroactively. — Registration was a ministerial duty of the clerk, not exercising any power over the obligor's person or property. Such registration could not lawfully transform foreign alimony orders that were modifiable as to past-due installments in the jurisdiction of rendition into North Carolina orders subject to North Carolina law retrospectively. Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

Jurisdiction over the person or property

of the obligor was unnecessary for registration of a foreign support order. Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

Registered alimony orders retained, for their lifespan prior to registration, their foreign identity, and the laws of the foreign jurisdiction apply in any subsequent enforcement proceeding. This means that at any enforcement proceeding under former G.S. 52A-30 the obligor could apply, just as at a civil action instituted under G.S. 50-16.9(c), for a new order modifying or superseding the foreign order "to the extent that it could have been so modified in the jurisdiction where granted." Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

Effect of Registration on Foreign Alimony Order That Was Retroactively Modifiable. — Registration under former G.S. 52A-26 et seq. could not entitle a foreign alimony order that was retroactively modifiable in the jurisdiction of its rendition to the full faith and credit protection of the United States Constitution, since the full faith and credit clause was applicable only to judgments that were unconditional and certain, or at least capable of being made so. However, former G.S. 52A-30 authorized the courts of this state by comity to extend to foreign alimony orders the selfsame recognition and effect due them in the jurisdiction of their rendition. Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

German Divorce Decree. — German divorce decree and settlement agreement were properly registered under former G.S. 52A-26. Lang v. Lang, 125 N.C. App. 573, 481 S.E.2d 380 (1997).

Record clearly showed that German authorities considered parties' settlement agreement to be an order of support where there was a letter from the German Federal Prosecutor asking the North Carolina Attorney General to take measures for the recovery of arrearage. Lang v. Lang, 125 N.C. App. 573, 481 S.E.2d 380 (1997).

Applied in Hook v. Hook, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

Cited in Haker-Volkening v. Haker, 143 N.C. App. 688, 547 S.E.2d 127, 2001 N.C. App. LEXIS 343 (2001).

§ 52C-6-602. Procedure to register order for enforcement.

(a) A support order or income-withholding order of another state may be registered in this State by sending the following documents and information to the tribunal for the county in which the obligor resides in this State:

(1) A letter of transmittal to the tribunal requesting registration and enforcement;

(2) Two copies, including one certified copy, of all orders to be registered, including any modification of an order;

(3) A sworn statement by the party seeking registration or a certified statement by the custodian of the records showing the amount of any arrearage;

(4) The name of the obligor and, if known:

  a. The obligor's address and social security number;

  b. The name and address of the obligor's employer and another other source of income of the obligor; and

  c. A description and the location of property of the obligor in this State not exempt from execution; and

(5) The name and address of the obligee and, if applicable, the agency or person to whom support payments are to be remitted.

(b) On receipt of a request for registration, the registering tribunal shall cause the order to be filed as a foreign order, together with one copy of the documents and information, regardless of their form.

(c) A petition or comparable pleading seeking a remedy that must be affirmatively sought under other law of this State may be filed at the same time as the request for registration or later. The pleading must specify the grounds for the remedy sought. (1995, c. 538, s. 7(c); 1997-456, s. 27.)

OFFICIAL COMMENT

This section outlines the mechanics for registration of an interstate order. Subsection (c) warns that if a particular enforcement remedy must be specifically sought under local law, the same rule of pleading is applicable in an interstate case. The authorization of a later filing to comply with local law contemplates that interstate pleadings may be liberally amended to conform to local practice.

Legal Periodicals. — For survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

CASE NOTES

Constitutionality of Orders Under Former URESA. — Orders pursuant to former Uniform Reciprocal Enforcement of Support Act (URESA) did not violate a respondent's right to due process and equal protection under the Constitutions of the United States and North Carolina. Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

Protection of Due Process Rights by Two-Step Registration Procedure. — Registration takes place in two stages: (1) The filing of documents, and (2) the confirmation of registration after 20 days; this procedure provided defendant ample opportunity to exercise his due process right to a hearing to challenge the validity of the foreign support order asserted. Allsup v. Allsup, 323 N.C. 603, 374 S.E.2d 237 (1988).

Registration and enforcement were entirely separate procedures under former Chapter 52A. Fleming v. Fleming, 49 N.C. App. 345, 271 S.E.2d 584 (1980).

Personal jurisdiction was unnecessary for mere registration of a foreign support order under former G.S. 52A-29, and language in a confirmation order purporting to find personal jurisdiction was superfluous and did not bind the defendant therein in subsequent enforcement proceedings. Fleming v. Fleming, 49 N.C. App. 345, 271 S.E.2d 584 (1980).

Personal jurisdiction was not a requisite for registration of an order under former 52A-29. Stevens v. Stevens, 68 N.C. App. 234, 314 S.E.2d 786, cert. denied, 312 N.C. 89, 321 S.E.2d 908 (1984).

The mere registration of a foreign support order presented by the obligee was a ministerial duty of the clerk. By that act, no court or agency of the State was purporting to exercise power over the obligor or his property. Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

As Was Transfer of Order to This State. — The registration provisions of former Chapter 52A applied so as to allow enforcement in this State of foreign state support orders entered prior to October 1, 1975; transfer of an order to this State was a ministerial act ancillary to the entry of original judgment. Stevens v. Stevens, 68 N.C. App. 234, 314 S.E.2d 786, cert. denied, 312 N.C. 89, 321 S.E.2d 908 (1984).

Compliance Prevented Exercise of Jurisdiction and Modification of Support Order. — The trial court erred both in failing to register a 1995 New Jersey order and in entering a North Carolina Voluntary Support Agreement terminating child support at age eighteen, contrary to the terms of the New Jersey order; the court did not have subject matter jurisdiction where the record demonstrated that the plaintiff met the requirements of G.S. 52C-6-602 by properly transmitting all of the required URESA documentation and where, upon notification, the defendant did not contest the foreign support order; furthermore, the law of the issuing state, allowing for child support until the child reaches twenty-two, should have been applied by the adopting state. State ex rel. Harnes v. Lawrence, 140 N.C. App. 707, 538 S.E.2d 223, 2000 N.C. App. LEXIS 1262 (2000).

Registration did not prejudice any rights of the obligor; it merely changed the status of the foreign support order by allowing it to be treated the same as a support order issued by a court of North Carolina under former G.S. 52A-30. Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

An obligee could not strip an obligor of rights and defenses otherwise available by the simple expedient of litigating under former Chapter 52A, the Uniform Reciprocal Enforcement of Support Act (URESA), rather than G.S. 50-16.9(c). Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

No Requirement to File Complaint. — In a former Uniform Reciprocal Enforcement of Support Act (URESA) registration proceeding, one was not required to file a complaint in the traditional sense. Former G.S. 52A-29 required only that certain documents be transmitted to the clerk of court. After submitting the required documents, obligee seeking registration had no other duties under the statute. Williams v. Williams, 97 N.C. App. 118, 387 S.E.2d 217 (1990).

Under former § 52A-30(a), registration of a Tennessee decree in this state was

treated as any other support order issued by a North Carolina court. Thereafter, either party could request modifications in the order. Jenkins v. Jenkins, 89 N.C. App. 705, 367 S.E.2d 4 (1988).

Registered alimony orders retained, for their lifespan prior to registration, their foreign identity, and the laws of the foreign jurisdiction apply in any subsequent enforcement proceeding. This means that at any enforcement proceeding under former G.S. 52A-30 the obligor could apply, just as at a civil action instituted under G.S. 50-16.9(c), for a new order modifying or superseding the foreign order "to the extent that it would could have been so modified in the jurisdiction where granted." Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

Failure to Describe Obligor's Property or to List States. — The failure to describe the obligor's property did not warrant dismissal of an action; it merely limited the enforcement remedies available to the obligee. Likewise, failure to list other states where the decree was registered did not warrant a dismissal. Silvering v. Vito, 107 N.C. App. 270, 419 S.E.2d 360 (1992).

Substantial Compliance. — The plaintiff substantially complied with this section where the record indicated that her "Registration Statement" was signed and notarized, and contained the case number, date and county of the foreign state's order, the parties to the action and their respective addresses and employers, and the support amount, date of last payment, and total amount of arrears, along with the name and address of the State agency to which support payments were to be remitted. Twaddell v. Anderson, 136 N.C. App. 56, 523 S.E.2d 710, 1999 N.C. App. LEXIS 1306 (1999), cert. denied, 351 N.C. 480, 543 S.E.2d 510 (2000).

Actual Notice Sufficient. — Although defendant did not receive notice of registration from the clerk, he did have actual notice of registration. Where a civil summons and the former Uniform Reciprocal Enforcement of Support Act (URESA) petition were served upon defendant eight days after the URESA petition was filed. Therefore, the defendant received actual notice of the pending litigation within the 20 days prescribed. Silvering v. Vito, 107 N.C. App. 270, 419 S.E.2d 360 (1992).

Applied in Hook v. Hook, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

Cited in Haker-Volkening v. Haker, 143 N.C. App. 688, 547 S.E.2d 127, 2001 N.C. App. LEXIS 343 (2001).

§ 52C-6-603. Effect of registration for enforcement.

(a) A support order or income-withholding order issued in another state is registered when the order is filed in the registering tribunal of this State.

(b) A registered order issued in another state is enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of this State.

(c) Except as otherwise provided in this Article, a tribunal of this State shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

Subsection (a) is derived from RURESA § 39(a), which stated that "filing constitutes registration." Although the registration procedure under UIFSA is nearly identical to that of RURESA, the underlying intent of registration is radically different. Under RURESA, once an order of State A was registered in State B, it became an order of the latter. Under UIFSA, the order continues to be a State A order, which is to be enforced by a State B tribunal. State B's rules of evidence and procedure apply to hearings, except as local law is supplemented or specifically superseded by the Act. The order itself remains a State A order.

Subsection (b) is derived from RURESA § 40(a). RURESA specifically subjected a registered order to "proceedings for reopening, vacating, or staying as a support order of this State"; these procedures are not authorized under UIFSA. An interstate support order is to be enforced and satisfied in the same manner as if it had been issued by a tribunal of the registering State, although it remains an order of the issuing State. Conceptually, the responding State is enforcing the order of another State, not its own order.

Subsection (c) mandates enforcement of the registered order. *See* Sections 606 through 608. This is at sharp variance with the common interpretation of RURESA § 40, which stated that "the registered foreign support order shall be treated in the same manner as a support order issued by a court of this State." This language was generally construed as converting the foreign order into an order of the registering State. Once the registering court concluded that it was enforcing its own order, the next logical step was to modify the order as the court deemed appropriate. This rationale resulted in yet another order in the multiple-order system. UIFSA mandates an end to this process, except as modification is authorized in this article. *See* Sections 609 through 612.

Ultimately, under UIFSA there will be only one order in existence at any one time. That order is enforceable in a responding State irrespective of whether such an order may be modified. In most instances, the support order will be subject to the continuing, exclusive jurisdiction of the issuing State. But sometimes the issuing State will have lost its authority to modify the order because neither the child nor the parties continue to reside in the issuing State. Nonetheless, the order may be registered and is fully enforceable in a responding State until the potential for modification actually occurs in accordance with the strict terms for such an action. *See* Sections 609-612.

CASE NOTES

Constitutionality of Orders Under Former URESA. — Orders pursuant to the former Uniform Reciprocal Enforcement of Support Act (URESA) did not violate a respondent's right to due process and equal protection under the Constitutions of the United States and North Carolina. Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

Former § 52A-30 established a two-step procedure: (1) Registration of the order, and if required, a hearing on whether to vacate the registration or grant the "obligor" other relief; and (2) Enforcement of the order. Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633 (1977); Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

Registration takes place in two stages: (1) The filing of documents, and (2) the confirmation of registration after 20 days; this procedure provided defendant ample opportunity to exercise his due process right to a hearing to challenge the validity of the foreign support order asserted. Allsup v. Allsup, 323 N.C. 603, 374 S.E.2d 237 (1988).

Registration and enforcement were entirely separate procedures under former Chapter 52A. Fleming v. Fleming, 49 N.C. App. 345, 271 S.E.2d 584 (1980).

Personal jurisdiction was not a requisite for registration of an order. Stevens v. Stevens, 68 N.C. App. 234, 314 S.E.2d 786, cert. denied, 312 N.C. 89, 321 S.E.2d 908 (1984).

Registration of Tennessee decree in this state was treated as any other support order issued by North Carolina court. Thereafter, either party could request modifications in the order. Jenkins v. Jenkins, 89 N.C. App. 705, 367 S.E.2d 4 (1988).

Failure to Describe Obligor's Property or to List States. — The failure to describe the obligor's property did not warrant dismissal of an action; it merely limited the enforcement remedies available to the obligee. Likewise, failure to list other states where the decree was registered did not warrant a dismissal. Silvering v. Vito, 107 N.C. App. 270, 419 S.E.2d 360 (1992).

Transfer of Order to This State as Ministerial Act. — The registration provisions of former Chapter 52A applied so as to allow enforcement in this State of foreign state support orders entered prior to October 1, 1975; transfer of an order to this State was a ministerial act ancillary to the entry of original judgment. Stevens v. Stevens, 68 N.C. App. 234, 314 S.E.2d 786, cert. denied, 312 N.C. 89, 321 S.E.2d 908 (1984).

Determinations Required in Proceedings to Enforce Order. — Once foreign support order was treated as a support order issued by a North Carolina court, the obligee or obligor could request modifications in the order, and when the obligee attempted to enforce the order, the court had to determine whether jurisdiction existed over the person or property of the obligor and what amount, if any, was in arrears. Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

In challenging a foreign judgment, defendant had the right to interpose proper defenses. He could defeat recovery by showing want of jurisdiction either as to the subject matter or as to his person; however, jurisdiction would be presumed until the contrary was shown. Fleming v. Fleming, 49 N.C. App. 345, 271 S.E.2d 584 (1980).

Once a foreign alimony order was registered, it lost its identity as an order of the foreign court and became an order of the North Carolina court for all purposes. Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

But registered alimony orders retained, for their lifespan prior to registration, their foreign identity, and the laws of the foreign jurisdiction applied in any subsequent enforcement proceeding. This means that at any enforcement proceeding under former G.S. 52A-30 the obligor could apply, just as at a civil action instituted under G.S. 50-16.9(c), for a new order modifying or superseding the foreign order "to the extent that it could have been so modified in the jurisdiction where granted." Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

Effect of Registration on Foreign Alimony Order That Was Retroactively Modifiable. — Registration under former Chapter 52A could not entitle a foreign alimony order that was retroactively modifiable in the jurisdiction of its rendition to the full faith and credit protection of the United States Constitution, since the full faith and credit clause is applicable only to judgments that are unconditional and certain, or at least capable of being made so. However, former G.S. 52A-30 authorized the courts of this State by comity to extend to foreign alimony orders the selfsame recognition and effect due them in the jurisdiction of their rendition. Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

North Carolina court could not modify child support order over which Texas courts had jurisdiction. Hinton v. Hinton, 128 N.C. App. 637, 496 S.E.2d 409 (1998).

Cited in Welsher v. Rager, 127 N.C. App. 521, 491 S.E.2d 661 (1997); Martin County ex rel. Hampton v. Dallas, 140 N.C. App. 267, 535 S.E.2d 903, 2000 N.C. App. LEXIS 1113 (2000); State ex rel. Harnes v. Lawrence, 140 N.C. App. 707, 538 S.E.2d 223, 2000 N.C. App. LEXIS 1262 (2000); Haker-Volkening v. Haker, 143 N.C. App. 688, 547 S.E.2d 127, 2001 N.C. App. LEXIS 343 (2001).

§ 52C-6-604. Choice of law.

(a) The law of the issuing state governs the nature, extent, amount, and duration of current payments and other obligations of support and the payment of arrears under the order.

(b) In a proceeding for arrears, the statute of limitations under the laws of this State or of the issuing state, whichever is longer, applies. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

This section identifies situations in which local law is inapplicable. The basic principle of the Act is that throughout the process the controlling order remains the order of the issuing State, and that responding States only assist in the enforcement of that order. Absent a loss of continuing, exclusive jurisdiction and a subsequent modification of the order, the order never becomes an "order of the responding State." Ultimate responsibility for enforcement and final resolution of the obligor's compliance with all aspects of the support order belongs to the issuing State. Thus, calculation of whether the obligor has fully complied with the payment of current support, arrears, and interest on arrears, is the duty of the issuing State. For example, under subsection (a) the responding State must recognize and enforce an order of the issuing State for the support of a child until age 21, notwithstanding the fact that the duty of support of a child ends at age 18 under the law of the responding State. *See Gonzalez-Goengaga v. Gonzalez*, 426 So.2d 1106 (Fla. App. 1983); *Taylor v. Taylor*, 122 Cal. App. 3d 209, 175 Cal. Rptr. 716 (1981). Similarly, the law of the issuing State governs whether a payment made for the benefit of a child, such as a Social Security benefit for a child of a disabled obligor, should be credited against the obligor's child support obligation.

Subsection (b) contains another choice of law provision that may diverge from local law. In situations in which the statutes of limitation differ from State to State, the statute with the longer term is to be applied. In interstate cases, arrearages often will have accumulated over a considerable period of time before enforcement is perfected. The obligor should not gain an undue benefit from the choice of residence if the forum State has a short statute of limitations for arrearages.

CASE NOTES

In terms of choice of law, former URESA generally required that the law applied in interpreting and/or enforcing the support order be that of the state in which enforcement was sought; however, UIFSA provides that the law of the issuing state governs the current payments and other obligations of support and the payment of arrears under the order, and any order for the support of a child until age 21 must be recognized and enforced in that manner in a state in which the duty of support of a child ends at age 18. Welsher v. Rager, 127 N.C. App. 521, 491 S.E.2d 661 (1997).

Illustrative Case. — Indiana's statute of limitations applied in determining if an action to register and enforce an Indiana child support order in North Carolina was timely. State ex rel. George v. Bray, 130 N.C. App. 552, 503 S.E.2d 686 (1998).

Part 2. Contest of Validity of Enforcement.

§ 52C-6-605. Notice of registration of order.

(a) When a support order or income-withholding order issued in another state is registered, the registering tribunal shall notify the nonregistering party. The notice must be accompanied by a copy of the registered order and the documents and relevant information accompanying the order.

(b) The notice must inform the nonregistering party:

(1) That a registered order is enforceable as of the date of registration in the same manner as an order issued by a tribunal of this State;

(2) That a hearing to contest the validity or enforcement of the registered order must be requested within 20 days after notice;

(3) That failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrears and precludes further contest of that order with respect to any matter that could have been asserted; and

(4) Of the amount of any alleged arrears.

(c) Upon registration of an income-withholding order for enforcement, the registering tribunal shall notify the obligor's employer pursuant to the income-withholding provisions of Chapter 50 or Chapter 110 of the General Statutes, as applicable. (1995, c. 538, s. 7(c); 1997-433, s. 10.10; 1998-17, s. 1.)

OFFICIAL COMMENT

Sections 605-608 provide the procedure for the nonregistering party to contest registration of an order, either because the order is allegedly invalid, superseded, or no longer in effect, or because the enforcement remedy being sought is opposed by the nonregistering party.

This section directs that the nonregistering party be fully informed of the effect of registration. After such notice is given, absent a successful contest by the nonregistering party, the order will be confirmed and future contest will be precluded.

For a full explanation regarding the deletion of the authorization of notice by first class mail, see the Comment to Section 305. The same considerations apply to the deletion of the additional methods of notice originally prescribed in this section.

§ 52C-6-606. Procedure to contest validity or enforcement of registered order.

(a) A nonregistering party seeking to contest the validity or enforcement of a registered order in this State shall request a hearing within 20 days after notice of the registration. The nonregistering party may seek to vacate the registration, to assert any defense to an allegation of noncompliance with the registered order, or to contest the remedies being sought or the amount of any alleged arrears pursuant to G.S. 52C-6-607.

(b) If the nonregistering party fails to contest the validity or enforcement of the registered order in a timely manner, the order is confirmed by operation of law.

(c) If a nonregistering party requests a hearing to contest the validity or enforcement of the registered order, the registering tribunal shall schedule the matter for hearing and give notice to the parties of the date, time, and place of the hearing. (1995, c. 538, s. 7(c); 1997-433, s. 10.11; 1998-17, s. 1.)

OFFICIAL COMMENT

Subsection (a) is derived in part from RURESA § 40(b), under which the "obligor" was directed to contest the registration of a foreign order within a short period of time. This procedure is continued, but the terminology is changed to "nonregistering party" because either the obligor or the obligee may seek to register a foreign support order.

Moreover, subsection (a) is philosophically very different from RURESA § 40, which directed that a registered order "shall be treated in the same manner as a support order issued by a court of this state." A contest of the fundamental provisions of the registered order is not permitted in the responding State. The nonregistering party must return to the issuing State to prosecute such a contest (obviously only as the law of that State permits). The procedure adopted here is akin to the prohibition found in Section 315 against asserting a nonparentage defense in a UIFSA proceeding. In short, raising a collateral issue in a UIFSA proceeding is prohibited, but no attempt is made to preclude the issue from being litigated in another, more appropriate forum if otherwise allowed by that forum.

On the other hand, the respondent may assert defenses such as "payment" or "the obligation has terminated" to allegations of past noncompliance with the registered order. Similarly, a constitutionally-based attack may always be asserted, *i.e.*, an alleged lack of personal jurisdiction over a party by the issuing tribunal. There is no defense, however, to the registration of a valid foreign support order.

Subsection (b) precludes an untimely contest of a registered support order. As noted above, the nonregistering party is free to seek redress in the issuing State from the tribunal with continuing, exclusive jurisdiction over the support order.

Subsection (c) directs that a hearing be scheduled when the nonregistering party contests some aspect of the registration. At present, federal regulations govern the allowable time frames for contesting income withholding in IV-D cases. *See* 42 U.S.C. § 666(b). Additional, codification of the procedure process is unwise.

For a full explanation regarding the deletion of the authorization of notice by first class mail, see the Comment to Section 305. The same considerations apply to the deletion of the additional methods of notice originally identified in this section.

CASE NOTES

Cited in Haker-Volkening v. Haker, 143 N.C. App. 688, 547 S.E.2d 127, 2001 N.C. App. LEXIS 343 (2001).

§ 52C-6-607. Contest of registration or enforcement.

(a) A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

(1) The issuing tribunal lacked personal jurisdiction over the contesting party;
(2) The order was obtained by fraud;
(3) The order has been vacated, suspended, or modified by a later order;
(4) The issuing tribunal has stayed the order pending appeal;
(5) There is a defense under the law of this State to the remedy sought;
(6) Full or partial payment has been made; or
(7) The statute of limitations under G.S. 52C-6-604 precludes enforcement of some or all of the arrears.

(b) If a party presents evidence establishing a full or partial defense under subsection (a) of this section, a tribunal may stay enforcement of the registered order, continue the proceeding to permit production of additional relevant evidence, and issue other appropriate orders. An uncontested portion of the registered order may be enforced by all remedies available under the law of this State.

(c) If the contesting party does not establish a defense under subsection (a) of this section to the validity or enforcement of the order, the registering tribunal shall issue an order confirming the order. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

Subsection (a) places the burden on the nonregistering party to assert narrowly defined defenses to registration of a support order.

If the obligor is liable for current support, under subsection (b) the tribunal must enter an order to enforce that obligation. Proof of arrearages must result in enforcement; under the Bradley Amendment, 42 U.S.C. § 666(a)(10), all States are required to treat child support payments as final judgments as they come due (or lose federal funding). Therefore, such arrearages are not subject to retroactive modification.

CASE NOTES

Enforcement. — If the defending party either fails to contest the registration or does not establish a defense under subsection (a), the registering tribunal is required by law to confirm the order under subsection (c); in other words, unless the court finds that the defendant has met his burden of proving one of the specified defenses, enforcement is compulsory. Welsher v. Rager, 127 N.C. App. 521, 491 S.E.2d 661 (1997).

Burden of Proof on Contesting Party. — The trial court erred in placing the burden on the plaintiff county acting on behalf of the mother of the couple's two children to prove that the Virginia child support order should be registered; while there were conflicts in the evidence presented by defendant and by plaintiff, such conflicts were for the trial court to resolve and their presence did not justify or permit vacation of the prior registration Martin County ex rel. Hampton v. Dallas, 140 N.C. App. 267, 535 S.E.2d 903, 2000 N.C. App. LEXIS 1113 (2000).

Enforcement of foreign support orders under the Uniform Interstate Family Support Act is not an equitable remedy; the Act provides a legal remedy, not an equitable remedy. Accordingly, in an action to register Florida support orders against a father in North Carolina, any equitable defenses to the child support obligations that the father might wish to raise could be raised only in Florida. State ex rel. Lively v. Berry, 187 N.C. App. 459, 653 S.E.2d 192, 2007 N.C. App. LEXIS 2452 (2007).

The list of defenses in subsection (a) is exclusive. State ex rel. George v. Bray, 130 N.C. App. 552, 503 S.E.2d 686 (1998).

Nonparentage Not a Defense. — Pursuant to G.S. 52C-3-314, a party whose parentage of a child has been previously determined by or pursuant to law may not plead nonparentage as a defense to a proceeding under this chapter. Reid v. Dixon, 136 N.C. App. 438, 524 S.E.2d 576, 2000 N.C. App. LEXIS 21 (2000).

Remedy Sought. — In subdivision (a)(5) the term "remedy sought" refers only to the procedural means by which a child support order is sought to be enforced, such as wage withholding, license revocation or imprisonment; thus, this subdivision allows a defendant to challenge those means. State ex rel. George v. Bray, 130 N.C. App. 552, 503 S.E.2d 686 (1998).

Registration Improperly Denied. — Trial court erred under the Uniform Interstate Family Support Act in denying registration of foreign child support orders against a father as to arrears because the father had not presented evidence to establish at least one of the seven enumerated defenses under G.S. 52C-6-607; furthermore, the trial court's refusal to register the arrears portion of the orders affected their amount and thus effectively modified the orders, which the trial court did not have the authority to do under the Full Faith and Credit for Child Support Orders Act. State ex rel. Lively v. Berry, 187 N.C. App. 459, 653 S.E.2d 192, 2007 N.C. App. LEXIS 2452 (2007).

Cited in Haker-Volkening v. Haker, 143 N.C. App. 688, 547 S.E.2d 127, 2001 N.C. App. LEXIS 343 (2001).

§ 52C-6-608. Confirmed order.

Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

The policy determination that a foreign support order may need to be confirmed by the forum tribunal is derived from RURESA § 40, which incidentally did not explain the details of the confirmation procedure. Under UIFSA, confirmation of an order may be the result of operation of law because of a failure to contest or an unsuccessful contest after a hearing.

Either method precludes raising any issue that could have been asserted in a hearing. Confirmation of a foreign support order validates both the terms of the order and the asserted arrearages. *See Chapman v. Chapman*, 205 Cal. App. 3d 253, 252 Cal. Rptr. 359 (1988).

CASE NOTES

Cited in Haker-Volkening v. Haker, 143 N.C. App. 688, 547 S.E.2d 127, 2001 N.C. App. LEXIS 343 (2001).

Part 3. Registration and Modification of Child Support Order.

§ 52C-6-609. Procedure to register child support order of another state for modification.

A party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another state shall register that order in this State in the same manner provided in Part 1 of this Article if the order has not been registered. A petition for modification may be filed at the same time as a request for registration, or later. The pleading must specify the grounds for modification. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

Sections 609 through 614 deal with situations in which it is permissible for a registering State to modify the existing child support order of another State. A petitioner wishing to register a support order of another State for purposes of modification must conform to the general requirements for pleadings in Section 311 (Pleadings and Accompanying Documents), and follow the procedure for registration set forth in Section 602 (Procedure To Register Order for Enforcement). If the tribunal has the requisite jurisdiction over the parties as established in Section 611, modification may be sought in conjunction with registration and enforcement, or at a later date after the order has been registered, confirmed, and enforced.

§ 52C-6-610. Effect of registration for modification.

A tribunal of this State may enforce a child support order of another state registered for purposes of modification, in the same manner as if the order had been issued by a tribunal of this State, but the registered order may be modified only if the requirements of G.S. 52C-6-611 have been met. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

An order registered for purposes of modification may be enforced in the same manner as an order registered for purposes of enforcement. But, the power of the forum tribunal to modify a child support order of another tribunal is limited by the specific factual preconditions set forth in Section 611.

§ 52C-6-611. Modification of child support order of another state.

(a) After a child support order issued in another state has been registered in this State, the responding tribunal of this State may modify that order only if G.S. 52C-6-613 does not apply and after notice and hearing it finds that:

(1) The following requirements are met:

a. The child, the individual obligee, and the obligor do not reside in the issuing state;

b. A petitioner who is a nonresident of this State seeks modification; and

c. The respondent is subject to the personal jurisdiction of the tribunal of this State; or

(2) The child, or a party who is an individual, is subject to the personal jurisdiction of the tribunal of this State and all of the parties who are individuals have filed a written consent in the issuing tribunal for a tribunal of this State to modify the support order and assume continuing, exclusive jurisdiction over the order. However, if the issuing state is a foreign jurisdiction that has not enacted a law or established procedures substantially similar to the procedures under this act, the consent otherwise required of an individual residing in this State is not required for the tribunal to assume jurisdiction to modify the child support order.

(b) Modification of a registered child support order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a tribunal of this State, and the order may be enforced and satisfied in the same manner.

(c) A tribunal of this State may not modify any aspect of a child support order that may not be modified under the law of the issuing state. If two or more tribunals have issued child support orders for the same obligor and child, the order that controls and must be so recognized under G.S. 52C-2-207 establishes the aspects of the support order which are nonmodifiable.

(d) On issuance of an order modifying a child support order issued in another state, a tribunal of this State becomes the tribunal of continuing, exclusive jurisdiction.

(e) Repealed by Session Laws 1997-443, s. 10.12. (1995, c. 538, s. 7(c); 1997-433, s. 10.12; 1997-456, s. 27; 1998-17, s. 1.)

OFFICIAL COMMENT

As long as the issuing State retains its continuing, exclusive jurisdiction over its child support order, a registering sister State is precluded from modifying that order. This is a very significant departure from the multiple-order, multiple-modification system of RURESA. However, if the issuing State no longer has a sufficient interest in the modification of its order under the factual circumstances described in this section, after registration the responding State may assume the power to modify. Note that under UIFSA a responding State does not have authority to modify a spousal support order; modification of a spousal support order is restricted to the original issuing tribunal. *See* Sections 205(f) and 206(c), *supra*.

Under the procedure established by RURESA, after a support order was registered for the purpose of enforcement it was treated as if it had originally been issued by the registering tribunal. Most States interpreted the RURESA registration provisions as also authorizing prospective modification of the registered order, see, *i.e.*, *Lagerwey v. Lagerwey*, 681 P.2d 309 (Alaska 1984); *In re Marriage of Aron*, 224 Cal. App. 3d 1086 (1990); *MacFadden v. Martini*, 119 Misc. 2d 94, 463 N.Y.S.2d 674 (1983); *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E.2d 633 (1977). In sum, by its terms RURESA contemplated the existence of multiple support orders, none of which was directly related to any of the others. Although the issuing tribunal under RURESA retained a version of continuing, exclusive jurisdiction to modify its own order, that power was not exclusive. Tribunals in other States often assumed jurisdiction to enter new orders or to modify an out-of-state support order.

Under UIFSA, registration is subdivided into distinct categories: registration for enforcement, for modification, or both. UIFSA is based on recognizing the truism that when a foreign support order is registered for enforcement, the rights of the parties affected have been previously litigated. Because the obligor already has had a day before an appropriate tribunal, an enforcement remedy may be summarily invoked. On the other hand, modification of an existing order presupposes a change in the rights of the parties. In fact, even under RURESA more elaborate procedures were required by most States prior to the issuance of a modified order. The requirements for modification of a child support order are much more explicit and restrictive under UIFSA.

Under UIFSA a tribunal may modify an existing child support order of another State only if certain quite limited conditions are met. First, the tribunal must have all the prerequisites for the exercise of personal jurisdiction required for rendition of an original support order. Second, one of the restricted fact situations described in subsection (a) must be present. This section, which is a counterpart to Section 205(b) (Continuing, Exclusive Jurisdiction), establishes the conditions under which the continuing, exclusive jurisdiction of the issuing tribunal is released. The degree to which new standards are established is illustrated by comparing UIFSA to the Uniform Child Custody Jurisdiction Act. Sections 12-14 of the UCCJA provide general principles for the judicial determination of an appropriate fact situation for subsequent modification of an existing custody order by another court. In contrast, UIFSA establishes a set of "bright line" rules which must be met before a tribunal may modify an existing child support order. The intent is to eliminate multiple support orders to the maximum extent possible consistent with the principle of continuing, exclusive jurisdiction that pervades the Act.

The UIFSA system begins with Section 205, which mandates that the continuing, exclusive jurisdiction of the issuing tribunal remains intact as long as one individual party or the child continues to reside in the issuing State, or unless the parties mutually agree to the contrary. This is also the standard for recognition of sister state custody orders under the federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A. Once every individual party and the child leave the issuing State, the continuing, exclusive jurisdiction of the issuing tribunal to modify its order terminates, although its order remains in effect and enforceable until it is modified by another tribunal with authority to do so under the Act. If and when the order is modified by a tribunal of another State, the basic principle of UIFSA is further ratified. The order of the modifying tribunal becomes the operative "controlling order" and the modifying tribunal assumes continuing, exclusive jurisdiction over the only operative child support order.

Under subsection (a)(1), the individual parties affected by the initial order must have moved from the issuing State before a tribunal in a new forum may modify. In the overwhelming majority of cases, the party seeking modification must seek that relief in a new forum, almost invariably the State of residence of the other party. This rule applies to either obligor or obligee, depending on which of those parties seeks to modify. Proof of the fact that neither individual party nor the child continues to reside in the issuing State may be made directly in the forum State; no purpose would be served by requiring the petitioner to return to the original issuing State for a document to confirm the fact that none of the relevant persons still lives there.

The policies underlying the change affected by subsection (a)(1) contemplate that the issuing State has lost continuing, exclusive jurisdiction and that the obligee may seek modification in the obligor's State of residence, or that the obligor may seek a modification in the obligee's State of residence. This restriction attempts to achieve a rough justice between the parties in the majority of cases by preventing a litigant from choosing to seek modification in a local tribunal to the marked disadvantage of the other party. For example, an obligor visiting the children at the residence of the obligee cannot be validly served with citation accompanied by a motion to modify the support order. Even though such personal service of the obligor in the obligee's home State is consistent with the jurisdictional requisites of *Burnham v. Superior Court*, 495 U.S. 604 (1990), the motion to modify does not fulfill the requirement of being brought by "a [petitioner] who is a nonresident of this State ...." In short, the obligee is required to register the existing order and seek modification of that order in a State which has personal jurisdiction over the obligor other than the State of the obligee's residence. Most typically this will be the State of residence of the obligor. Similarly, fairness requires that an obligee seeking to modify or modify and enforce the existing order in the State of residence of the obligor will not be subject to a cross-motion to modify custody or visitation merely because the issuing State has lost its continuing, exclusive jurisdiction over the support order. The obligor is required to make that motion in a State other than that of his or her residence; most likely, the obligee's State of residence.

The procedure put in place by UIFSA is in marked contrast to the actual system under RURESA. The multiple-order system provided virtually no incentive for an obligor to seek to reduce an unfair or unduly burdensome child support order. Rather, the obligor typically waited for an enforcement proceeding to be filed in his State of residence and then sought modification in a forum which presented him with the "hometown advantage." Two major arguments sustain the choice of venue made by the Act. First, "jurisdiction by ambush" will be avoided. That is, personal service on either the custodial or noncustodial party found within the state borders will not yield jurisdiction to modify. Thus, parents seeking to exercise rights of visitation, delivering or picking-up the child for such visitation, or engaging in unrelated business activity in the State, will not be involuntarily subjected to protracted litigation in an inconvenient forum. The chilling effect on the exercise of parental contact with the child that the possibility of such litigation might have is avoided. Second, disputes about whether the tribunal has jurisdiction will be eliminated; submission by the petitioner to the State of residence of the respondent alleviates this issue completely.

There are two exceptions to the rule of subsection (a)(1) requiring the petitioner to be a nonresident of the forum in which modification is sought. First, under subsection (a)(2) the parties may agree that a particular forum may serve to modify the order. Second, Section 613, *infra*, applies if all parties have left the original issuing State and now reside in the same new forum State.

Subsection (a)(2), which authorizes the parties to terminate the continuing, exclusive jurisdiction of the issuing State by agreement, is based on several implicit assumptions. First, the subsection applies even if the issuing tribunal has continuing, exclusive jurisdiction because one of the parties or the child continues to reside in that State. Subsection (a)(2) also is applicable if the individual parties and the child no longer reside in the issuing State, but agree to submit the modification issue to a tribunal in the petitioner's State of residence. Also implicit in a shift of jurisdiction over the child support order is that the agreed-upon tribunal must have subject matter jurisdiction and personal jurisdiction over at least one of the parties or the child, and that the other party submits to the personal jurisdiction of that forum. In short, UIFSA does not contemplate that absent parties can agree to confer jurisdiction on a tribunal without a nexus to the parties or the child. But if the other party agrees, either the obligor or the obligee may seek assertion of jurisdiction to modify by a tribunal of the State of residence of either party. In contrast to subsection (a)(1), the written consents of the individual parties to an agreement to submit modification of child support to a tribunal of another State must be filed with the issuing tribunal. The Act does not extend discretion to refuse to yield jurisdiction to the issuing tribunal. In sum, the section contemplates that mutual agreement of the parties to submit themselves to the continuing, exclusive jurisdiction of another tribunal is sufficient to accomplish that goal.

The 1996 amendments provide a different rule if the issuing State is a foreign nation that has not enacted UIFSA or a similar statute or procedure. The policies underlying provisions of UIFSA are wholly inapplicable to a jurisdiction which is unlikely to enact the Act or even a similar act. For example, suppose the foreign jurisdiction has a prohibition against modification unless the parties actually appear before the tribunal in person. Without the amendment, an obligor who moved to the United States could have successfully warded off an attempt to modify the child support obligation in his State of residence by asserting that the obligee or child continued to reside in the foreign nation, which therefore had continuing, exclusive jurisdiction under UIFSA. This despite the fact that the issuing nation does not recognize a continuing, exclusive jurisdiction concept, and will not modify its own child support order without the obligor being physically present. Merely by refusing to agree to a modification and refusing to travel to the issuing nation, the obligor would have been able to forestall modification indefinitely. If the child support order is that of a foreign nation, the UIFSA State of residence of the obligor may adjudicate whether modification of child support is appropriate under its internal law.

Modification of child support under subsections (a)(1) and (a)(2) is distinct from custody modification under the federal Parental Kidnapping Prevention Act, 42 U.S.C. § 1738A, which provides that the court of continuing, exclusive jurisdiction may "decline jurisdiction." Similar provisions are found in the UCCJA, § 14. In those statutes the methodology for the declination of jurisdiction is not spelled out, but rather is left to the discretion of possibly competing courts for case-by-case determination. The privilege of declining jurisdiction, thereby creating the potential for a vacuum, is not authorized under UIFSA. Once an initial child support order is established, at all times thereafter there is an existing order in effect to be enforced. Even if the issuing tribunal no longer has continuing, exclusive jurisdiction, its order remains fully enforceable until a tribunal with modification jurisdiction issues a new order in conformance with this article.

Subsection (b) states that if the forum has modification jurisdiction because the issuing State has lost continuing, exclusive jurisdiction, the proceedings will generally follow local law with regard to modification of child support orders. However, subsection (c) prevents the modification of any final, nonmodifiable aspect of the original order. For example, if child support was ordered through age 21 in accordance with the law of the issuing State and the law of the forum State ends the support obligation at 18, modification by the forum tribunal may not affect the duration of the support order to age 21. The 1996 amendment clarifies that when multiple orders have been issued prior to the effective date of UIFSA, there will almost certainly be nonmodifiable aspects at variance from the two or more tribunals that have acted in the past. The amendment clarifies that it is the controlling order's nonmodifiable aspects that prospectively determine those issues throughout the minority of the child.

Subsection (d) provides that upon modification the new order becomes the one order to be recognized by all UIFSA States, and the issuing tribunal acquires continuing, exclusive jurisdiction.

CASE NOTES

Findings Required for Order Incarcerating Person Until He Complies with Support Order. — An order under former Chapter 52A, entered pursuant to a contempt hearing, which confined a person to jail until he complied with a support order, must have found not only that his failure to comply with the support order was willful, but also that he possessed the means to comply with the order. Ingle v. Ingle, 18 N.C. App. 455, 197 S.E.2d 61 (1973).

Illustrative Cases. — North Carolina trial court properly exercised jurisdiction over a father's action seeking modification of a New Jersey trial court's order requiring the father to pay child support for a mentally retarded child who was born in 1964 after the child and her mother moved to North Carolina and the father moved to Maryland, and the trial court's judgment that the father's request for an order terminating his obligation to pay child support had to be granted, pursuant to G.S. 50-13.4(c), was affirmed on appeal. Lombardi v. Lombardi, 157 N.C. App. 540, 579 S.E.2d 419, 2003 N.C. App. LEXIS 740 (2003).

Applied in Devaney v. Miller, 191 N.C. App. 208, 662 S.E.2d 672, 2008 N.C. App. LEXIS 1226 (2008).

§ 52C-6-612. Recognition of order modified in another state.

A tribunal of this State shall recognize a modification of its earlier child support order by a tribunal of another state which assumed jurisdiction pursuant to a law substantially similar to this Chapter and, upon request, except as otherwise provided in this Chapter, shall:

(1) Enforce the order that was modified only as to amounts accruing before the modification;

(2) Enforce only nonmodifiable aspects of that order;

(3) Provide other appropriate relief only for violations of that order which occurred before the effective date of the modification; and

(4) Recognize the modifying order of the other state, upon registration, for the purpose of enforcement. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

Independent support orders relating to the same parties, a hallmark of RURESA, are replaced in UIFSA by deference to the support order of a sister State. This applies not just to the original order, but also to a modified child support order issued by a second State under the standards established by Section 611 (Modification of Child Support Order of Another State). For the Act to function properly, the original issuing State must recognize and defer to such a modified order, and must regard its prior order as prospectively inoperative. Because the modifying tribunal lacks the authority to direct the original issuing State to release its continuing, exclusive jurisdiction, each State must recognize this effect by enacting UIFSA.

Power is retained over post-modification by the original issuing tribunal for remedial actions directly connected to its now-modified order. A tribunal may enforce its subsequently modified order for violations of that order which occurred before the modification. Further, aspects of the original order that have become final or are not modifiable may be prospectively enforced by the issuing tribunal. For example, a contractual obligation to provide a college education trust fund for a child may be enforced under the law of the issuing State irrespective of the law of the modifying State.

§ 52C-6-613. Jurisdiction to modify child support order of another state when individual parties reside in this State.

(a) If all of the parties who are individuals reside in this State and the child does not reside in the issuing state, a tribunal of this State has jurisdiction to enforce and to modify the issuing state's child support order in a proceeding to register that order.

(b) A tribunal of this State exercising jurisdiction under this section shall apply the provisions of Articles 1 and 2 of this Chapter, this Article, and the procedural and substantive law of this State to the proceeding for enforcement or modification. Articles 3, 4, 5, 7, and 8 of this Chapter do not apply. (1997-433, s. 10.13; 1998-17, s. 1.)

OFFICIAL COMMENT

The Comment to Section 611(e) in the 1992 version of UIFSA contains the following statement:

"Finally, note that if the parties have left the issuing state and now reside in the same state, this section is not applicable. Such a fact situation does not present an interstate matter and UIFSA does not apply. Rather, the issuing state has lost its continuing, exclusive jurisdiction and the forum state, as the residence of the parties, should apply local law without regard to the interstate Act."

The intent of the Comment was to state what seemed at the time to the Drafting Committee to be obvious; an action between two citizens of the same State is not a matter for interstate concern or application. A significant number of knowledgeable commentators, however, found the statement in the Comment to be wholly inadequate. After all, the commentary is not substantive law, but rather merely expresses an interpretive opinion of the drafters of the Act. On reflection, the Drafting Committee decided that the critics were correct; the Act should deal explicitly with the possibility that the parties and the child no longer reside in the issuing State and that the individual parties have moved to the same new State. After all, there is an interstate aspect when one State purports to modify the child support order of another State. Moreover, a literal reading of the Act could yield a construction that the issuing State has lost its continuing, exclusive jurisdiction to modify, but no State is permitted under UIFSA to take its place to do so.

This section is designed to make it clear that when the issuing State no longer has continuing, exclusive jurisdiction and the obligor and obligee reside in the same State, a tribunal of that State has jurisdiction to modify the child support order and assume continuing, exclusive jurisdiction. Although the individual parties must reside in the forum State, there is no requirement that the child must also reside in the forum State (although the child must have moved from the issuing State).

Finally, because modification of the child support order when all parties reside in the forum is essentially an intrastate matter, subsection (b) withdraws authority to apply most of the substantive and procedural provisions of UIFSA, *i.e.*, those found in the Act other than in Articles 1, 2, and 6. Note, however, that the provision in Section 611(c) forbidding modification of nonmodifiable aspects of the controlling order applies. For example, the duration of the support obligation remains fixed despite the subsequent residence of all parties in a new State with a different duration of child support.

§ 52C-6-614. Notice to issuing tribunal of modification.

Within 30 days after issuance of a modified child support order, the party obtaining the modification shall file a certified copy of the order with the issuing tribunal that had continuing, exclusive jurisdiction over the earlier order, and in each tribunal in which the party knows the earlier order has been registered. A party who obtains the order and fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the modified order of the new tribunal having continuing, exclusive jurisdiction. (1997-433, s. 10.13; 1998-17, s. 1.)

OFFICIAL COMMENT

This section, derived from former Section 611(e) of the 1993 version of the Act, is made a stand-alone provision to clarify the organization of the Act. Section 614 states a crucial proposition; the prevailing party must inform the original issuing tribunal that it has lost continuing, exclusive jurisdiction over the child support order. Thereafter, the original tribunal may not modify, or review and adjust, the amount of child support. Notice to the issuing tribunal and other affected tribunals that the former controlling order has been modified is crucial to avoid the confusion and chaos of the multiple-order system UIFSA is designed to replace.

Additionally, the 1996 amendment grants the tribunal the authority to impose sanctions on a party who fails to comply with the requirement to give notice of a modification to all interested tribunals. As originally enacted, this provision could have been regarded as hortatory because no penalty was authorized for failure to comply with the directive of the statute. The 1996 amendment not only provides discretion for sanctions as appropriate, but also states that failure to notify of a modification does not affect the validity of the modified order.

Article 7.

Determination of Parentage.

§ 52C-7-701. Proceeding to determine parentage.

(a) A tribunal of this State may serve as an initiating or responding tribunal in a proceeding brought under this Chapter or a law substantially similar to this Chapter, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act to determine that the petitioner is a parent of a particular child or to determine that a respondent is a parent of that child.

(b) In a proceeding to determine parentage, a responding tribunal of this State shall apply the procedural and substantive law of this State and the rules of this State on choice of law. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

This article authorizes a "pure" parentage action in the interstate context, *i.e.*, an action not joined with a claim for support. Either the mother or a man alleging to be the father of a child may bring such an action. More commonly, an action to determine parentage across state lines will also seek to establish a support order under the Act. *See* Section 401 ([Petition] to Establish Support Order).

An action to establish parentage under UIFSA is to be treated identically to such an action brought in the responding State.

CASE NOTES

Jurisdiction to Determine Issue of Paternity. — Since the district court had exclusive original jurisdiction to entertain a proceeding under the former Uniform Reciprocal Enforcement of Support Act, it was clear that the district court had jurisdiction to determine the issue of paternity in such a case. Amaker v. Amaker, 28 N.C. App. 558, 221 S.E.2d 917 (1976).

In an action under former Chapter 52A, paternity must be judicially determined to warrant relief. Smith v. Burden, 31 N.C. App. 145, 228 S.E.2d 662 (1976); Brondum v. Cox, 292 N.C. 192, 232 S.E.2d 687 (1977).

No Additional Grounds for Determining Paternity. — The former Uniform Reciprocal Enforcement of Support Act (URESA) did not provide additional grounds for determining paternity; consequently, a North Carolina court adjudicating the issue of paternity in a URESA action looked to the applicable substantive law governing the determination of paternity. This, in turn, was determined by reference to the statutory choice of law directive pertaining to URESA actions. Reynolds v. Motley, 96 N.C. App. 299, 385 S.E.2d 548 (1989).

No Certified Copies of Birth Certificates Attached to Petition. — In action under former Uniform Reciprocal Enforcement of Support Act (URESA), where the record disclosed that no certified copies of the birth certificates of the alleged children-obligees were attached to plaintiffs' petition, court was without subject matter jurisdiction to adjudicate defendant's paternity. Reynolds v. Motley, 96 N.C. App. 299, 385 S.E.2d 548 (1989).

Prior criminal conviction of failure to support illegitimate children was not conclusive as to paternity in a subsequent civil action for support of the same children. In the subsequent civil action, the putative father was entitled to have the issue of paternity litigated.

Smith v. Burden, 31 N.C. App. 145, 228 S.E.2d 662 (1976).

As to effect of foreign adjudication of paternity, see Brondum v. Cox, 292 N.C. 192, 232 S.E.2d 687 (1977).

ARTICLE 8.

Interstate Rendition.

§ 52C-8-801. Grounds for rendition.

(a) For purposes of this Article, "governor" includes an individual performing the functions of governor or the executive authority of a state covered by this Chapter.

(b) The Governor of this State may:

(1) Demand that the governor of another state surrender an individual found in the other state who is charged criminally in this State with having failed to provide for the support of an obligee; or

(2) On the demand by the governor of another state, surrender an individual found in this State who is charged criminally in the other state with having failed to provide for the support of an obligee.

(c) A provision for extradition of individuals not inconsistent with this Chapter applies to the demand even if the individual whose surrender is demanded was not in the demanding state when the crime was allegedly committed and has not fled therefrom. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

This section tracks RURESA § 5 (Interstate Rendition) with no substantive change. Virtually no controversy has been generated regarding this portion of RURESA. Arguably application of subsection (c) is problematic in situations in which the obligor neither was present in the demanding State at the time of the commission of the crime nor fled from the demanding State. The possibility that an individual may commit a crime in a State without ever being physically present there has elicited considerable discussion and some case law. *See* L. Brilmayer, "An Introduction to Jurisdiction in the American Federal System," 329-335 (1986) (discussing minimum contacts theory for criminal jurisdiction); Rotenberg, "Extraterritorial Legislative Jurisdiction and the State Criminal Law," 38 Tex. L. Rev. 763, 784-87 (1960) (due process requires that the behavior of the defendant must be predictably subject to State's criminal jurisdiction); *cf.* Ex parte Boetscher, 812 S.W.2d 600 (Tex. Crim. App. 1991) (Equal Protection Clause limits disparate treatment of nonresident defendants); *In re King*, 3 Cal.3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 (1970), cert. denied 403 U.S. 931 (enhanced offense for nonresidents impacts constitutional right to travel).

§ 52C-8-802. Conditions of rendition.

(a) Before making demand that the governor of another state surrender an individual charged criminally in this State with having failed to provide for the support of an obligee, the Governor of this State may require a prosecutor of this State to demonstrate that at least 60 days previously the obligee has initiated proceedings for support pursuant to this Chapter or that the proceeding would be of no avail.

(b) If, under this Chapter or a law substantially similar to this Chapter, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act, the governor of another state makes a demand that the Governor of this State surrender an individual charged criminally in that state with having failed to provide for the support of a child or other individual to whom a duty of support is owed, the governor may require a prosecutor to investigate the demand and report whether a proceeding for support has been initiated or would be effective. If it appears that a proceeding would be effective but has not been initiated, the governor may delay honoring the demand for a reasonable time to permit the initiation of a proceeding.

(c) If a proceeding for support has been initiated and the individual whose rendition is demanded prevails, the governor may decline to honor the demand. If the petitioner prevails and the individual whose rendition is demanded is subject to a support order, the governor may decline to honor the demand if the individual is complying with the support order. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

This section tracks RURESA § 6 (Conditions of Interstate Rendition) without significant change. Interstate rendition remains the last resort for support enforcement, in part because a governor may exercise considerable discretion in deciding whether to honor a demand for rendition of an obligor.

Article 9.

Miscellaneous Provisions.

§ 52C-9-901. Uniformity of application and construction.

This Chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Chapter among states enacting it. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

Renaming the Act reflects the dramatic departure from the structure of the earlier interstate reciprocal support acts, URESA and RURESA.

CASE NOTES

Construction With Other Provisions. — The Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C. § 1738B, which became effective on 20 October 1994, is extremely similar to UIFSA both in terms of structure and intent; the federal statute obligates states to enforce, according to its terms, a child support order issued by another state which is made consistent with the act's jurisdiction and due process standards. Welsher v. Rager, 127 N.C. App. 521, 491 S.E.2d 661 (1997).

While the law of the forum state may have applied to the enforcement and remedy applied to a registered foreign support order under the former Uniform Reciprocal Enforcement of Support Act, UIFSA and the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C. § 1738B, require that the law of the rendering state govern the order's interpretation. Welsher v. Rager, 127 N.C. App. 521, 491 S.E.2d 661 (1997).

Cited in State ex rel. Johnson v. Eason, — N.C. App. —, 679 S.E.2d 151, 2009 N.C. App. LEXIS 1093 (July 7, 2009).

§ 52C-9-902. Severability clause.

If any provision of this Chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable. (1995, c. 538, s. 7(c).)

CASE NOTES

Cited in Hinton v. Hinton, 128 N.C. App. 637, 496 S.E.2d 409 (1998).

ing for support has been initiated, or would be effective. If it appears that a proceeding would be effective but has not been initiated, the governor may delay honoring the demand for a reasonable time to permit the initiation of a proceeding.

(c) If a proceeding for support has been initiated and the individual whose rendition is demanded prevails, the governor may decline to honor the demand. If the petitioner prevails and the individual whose rendition is demanded is subject to a support order, the governor may decline to honor the demand if the individual is complying with the support order. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

This section tracks RURESA § 6 (Conditions of interstate rendition) without substantive change. [illegible] governor may exercise considerable discretion in deciding whether to honor a demand for rendition of an obligor.

ARTICLE 9.

Miscellaneous Provisions.

§ 52C-9-901. Uniformity of application and construction.

This Chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Chapter among states enacting it. (1995, c. 538, s. 7(c).)

OFFICIAL COMMENT

[illegible] state reciprocal support acts, URESA and RURESA.

CASE NOTES

Consistency With Other Provisions. — The Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C. § 1738B, which became effective on 20 October 1994, is expressly similar to UIFSA both in terms of structure and [illegible] Welsher v. Rager, 127 N.C. App. 521, 491 S.E.2d 661 (1997).

While the law of the forum state may be applied to the enforcement and [illegible] not applied to a registered foreign support order under the former Uniform Reciprocal Enforcement of Support Act, URESA, and the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C. § 1738B, [illegible] the law of the rendering state governs the court's interpretation. Welsher v. Rager, 127 N.C. App. 521, 491 S.E.2d 661 (1997).

Cited in State ex rel. Johnson v. Bryant, — N.C. App. —, 675 S.E.2d 371, 2009 N.C. App. LEXIS 1065 (July 7, 2009).

§ 52C-9-902. Severability clause.

If any provision of this Chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable. (1995, c. 538, s. 7(c).)

Chapter 53.

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53-331. Organization and powers of State trust company.

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ARTICLE 1.

Definitions.

§ 53-1. "Bank," "surplus," "undivided profits," and other words defined.

Except as otherwise specifically provided in this Chapter, the following definitions shall be applied to the terms used in this Chapter:

(1) Bank. — The term "bank" shall be construed to mean any corporation, other than savings and loan associations, savings banks, industrial banks, and credit unions, receiving, soliciting or accepting money or its equivalent on deposit as a business.

(1a) Branch. — The term "branch" means an office of any bank in which deposits are received, monies are paid, and loans are made. Any of the functions or services authorized to be engaged in by a bank may be carried out in a branch.

(2) Demand Deposits. — The term "demand deposits" means all deposits, the payment of which can be legally required within 30 days.

(3) Insolvency. — The term "insolvency" means:

a. When a bank cannot meet its deposit liabilities as they become due in the regular course of business;

b. When the actual cash market value of its assets is insufficient to pay its liabilities to depositors and other creditors;

c. When its reserve shall fall under the amount required by this Chapter, and it shall fail to make good such reserve within 30 days after being required to do so by the Commissioner of Banks; or

d. Whenever the undivided profits and surplus shall be inadequate to cover losses of the bank, whereby an impairment of the capital stock is created.

(3a) Limited Service Facility. — The term "limited service facility" means an office of a bank in which deposits are received, monies are paid, or other duties and functions of a teller are performed. Loan applications shall be taken in a limited service facility but notes may not be executed nor loan proceeds disbursed in a limited service facility.

(4) Net Earnings. — The term "net earnings" means the excess of the gross earnings of any bank over the expenses and losses chargeable against such earnings during any dividend period.

(5) Practical Banker. — The term "practical banker" means an officer or employee of a bank actively engaged in performing duties in managing or supervising or assisting in managing or supervising the conducting of a banking business, including any such banker who is in a retired status from such duties.

(6) Surplus. — The term "surplus" means a fund created pursuant to the provisions of this Chapter by a bank from payments by stockholders or from its net earnings or undivided profits which, to the amount specified and by any additions thereto set apart and designated as such, is not available for the payment of dividends, and cannot be used for the payment of expenses or losses so long as such bank has undivided profits.

(7) Time Deposits. — The term "time deposits" means all deposits, the payment of which cannot be legally required within 30 days.

(8) Undivided Profits. — The term "undivided profits" means the credit balance of the profit and loss account of any bank.

(9) Unimpaired Capital Fund. — The term "unimpaired capital fund" means the total of the amount of unimpaired common stock, preferred stock, surplus, undivided profits, reserve for contingencies and other capital reserves (excluding accrued dividends on preferred stock and limited life preferred stock), mandatory convertible instruments, allowance for possible loan losses, and the amount of capital debentures or notes, convertible or otherwise, having an average original maturity of at least seven years, which have been specifically designated as part of the bank's unimpaired capital fund by resolution duly adopted by the board of directors of the bank; provided, that upon payment of such capital debentures or notes or upon accumulation of funds in a sinking fund for amortization of such debentures or notes, unimpaired capital fund shall be reduced by the amount of such payment or accumulation. The terms and conditions of any issue of or prepayment of capital debentures or notes must have the prior written approval of the Commissioner of Banks affirming that in his opinion such issue or prepayment is in the best interest of the depositors, creditors and stockholders of the bank. (1921, c. 4, s. 1; C.S. s. 216(a); 1927, c. 47, s. 1; 1931, c. 243, s. 5; 1945, c. 743, s. 1; 1967, c. 789, s. 21; 1979, c. 483, s. 2; 1983, c. 214, s. 1; 1985, c. 677, s. 3; 1989, c. 187, s. 1; 1995, c. 129, s. 1; 2001-263, s. 6.)

Cross References. — As to definition of "bank" as used in the Uniform Commercial Code, see G.S. 25-1-201. As to definition of "reserve," see G.S. 53-51. As to definitions of "commercial and business paper" and "trade acceptance," see G.S. 53-55. As to definition of "bank acceptances," see G.S. 53-56. As to definition of "goods," see G.S. 53-56. As to definition of "Federal Reserve Act," "Federal Reserve Board," "federal reserve banks," and "member bank," see G.S. 53-61. As to demand deposits, see G.S. 53-65. As to provisions for conversion of bank to stock association, see G.S. 54B-46.

Editor's Note. — In 1921 the General Assembly passed an act which enlarged the former Corporation Commission's powers of supervision over banks and made more specific regulations for the business of banking. See Litchfield v. Roper, 192 N.C. 202, 134 S.E. 651 (1926). By Public Laws 1931, c. 243, all the powers vested in the Corporation Commission with respect to banks were transferred to the Commissioner of Banks, and former laws relating to banks and banking were conformably amended. See Blades v. Hood, 203 N.C. 56, 164 S.E. 828 (1932). See also G.S. 53-92 et seq.

Session Laws 1985, c. 677, which rewrote subdivision (1), provided in s. 7: "The provisions of this act shall not apply to any institution chartered as a savings bank prior to the effective date of this act and any such institution shall continue to be regulated and supervised in accordance with the laws of the State of North Carolina in effect prior to ratification of this act." The act was ratified July 10, 1985, and became effective on that date.

Session Laws 2001-263, s. 7, provides: "Trust companies organized under Article 1 of Chapter 53 of the General Statutes shall hereafter be governed by this Article [Article 24] and may take such steps as may be necessary or appropriate to conform to the provisions hereof. The Commissioner shall allow a period of up to one year for this transition."

Session Laws 2004-171, s. 17, provides: "The Legislative Research Commission shall undertake a comprehensive study of those laws, including Chapters 53, 54B, and 54C of the General Statutes, which affect the establishment and operation of banks in North Carolina and shall make recommendations to the 2005 General Assembly, prior to the convening of the 2006 Regular Session as to which laws (i) are obsolete, unnecessary, or duplicative, (ii) are unnecessarily inconsistent in the treatment of banks, savings and loan associations, and savings banks, and (iii) unnecessarily restrict, impede, or prohibit activities of banks, savings and loan associations, and savings banks or the ability of the Commissioner of Banks to regulate banks and savings institutions in an effective, efficient, and equitable manner.

"In preparing its recommendations, the Commission shall actively solicit and consider information received from representatives of banks, savings and loan associations, savings banks, the State Banking Commission, the Commissioner of Banks and the Commissioner's staff, other interested parties, and the general public."

Session Laws 2009-574, ss. 48.1 through 48.8, provide: "SECTION 48.1. There is created the Joint Legislative Study Commission on the Modernization of North Carolina Banking Laws and the Consumer Finance Act. The purpose of the Commission is to determine whether and to what extent the North Carolina Banking Laws and the Consumer Finance Act (Article 15 of Chapter 53 of the General Statutes) need to be updated.

"SECTION 48.2. The Commission shall consist of 16 members as follows:

"(1) Five members of the House of Representatives, appointed by the Speaker of the House of Representatives.

"(2) Five members of the Senate, appointed by the President Pro Tempore of the Senate.

"(3) One member of the consumer finance industry, one member representing a State-chartered bank, and one member of a consumer advocacy organization, each appointed by the Speaker of the House of Representatives.

"(4) One member of the consumer finance industry, one member representing a State-chartered bank, and one member of a consumer advocacy organization, each appointed by the President Pro Tempore of the Senate.

"SECTION 48.3. The Commission shall have two cochairs, one designated by the Speaker of the House of Representatives and one designated by the President Pro Tempore of the Senate from among their respective appointees. The Commission shall meet upon the call of the cochairs. Any vacancy on the Commission shall be filled by the original appointing authority. A quorum of the Commission shall be a majority of its members.

"SECTION 48.4. The Commission shall study the following issues related to the modernization of the North Carolina Consumer Finance Act:

"(1) The increase in costs of operations for the consumer finance industry and its impact on the delivery of products to the public.

"(2) The maximum dollar amount that can be lent to an individual consumer.

"(3) The appropriate rate of interest and fees to be charged for each level of consumer transaction.

"(4) Strategies for increasing consumer protection and disclosure.

"SECTION 48.5. The Commission also shall study any issue related to the Banking Laws of North Carolina that the Commission deems appropriate.

"SECTION 48.6. Members of the Commission shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate. The Commission, while in the discharge of its official duties, may exercise all powers provided for under G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4. The Commission may meet in the Legislative Building or the Legislative Office Building.

"With approval of the Legislative Services Commission, the Legislative Services Officer shall assign professional staff to assist the Commission in its work. The House of Representatives' and the Senate's Directors of Legislative Assistants shall assign clerical staff to the Commission, and the expenses relating to the clerical employees shall be borne by the Commission. The Commission may contract for professional, clerical, or consultant services as provided by G.S. 120-32.02. If the Commission hires a consultant, the consultant shall not be a State employee or a person currently under contract with the State to provide services.

"All State departments and agencies and local governments and their subdivisions shall furnish the Commission with any information in their possession or available to them.

"SECTION 48.7. The Commissioner of Banks shall use up to twenty-five thousand dollars ($25,000) of the funds available to the State Banking Commission for the 2009-2010 fiscal year to fund the study authorized by this act.

"SECTION 48.8. The Commission shall report the results of its study and its recommendations, including any proposed legislative changes, to the 2010 Regular Session of the 2009 General Assembly. The Commission shall terminate on May 1, 2010, or upon the filing of its final report, whichever occurs first."

Session Laws 2009-574, s. 52.1, provides: "For legislative studies authorized by this act, out-of-state travel must be authorized by the President Pro Tempore of the Senate or the Speaker of the House of Representatives, as appropriate."

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

CASE NOTES

Definition of "insolvency" is correct. State v. Shipman, 202 N.C. 518, 163 S.E. 657 (1932).

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961); Mutual Community Savs. Bank v. Boyd, 125 N.C. App. 118, 479 S.E.2d 491 (1996).

ARTICLE 2.

Creation.

§ 53-2. How incorporated.

Any number of persons, not less than five, who may be desirous of forming a company and engaging in the business of establishing, maintaining, and operating banks of discount and deposit to be known as commercial banks, shall be incorporated in the manner following and in no other way; that is to say, such persons shall, by a certificate of incorporation under their hands and seals set forth:

(1) The name of the corporation; no name shall be used already in use by another existing corporation organized under the laws of this State or of the Congress, or so nearly similar thereto as to lead to uncertainty or confusion.

(2) The location of its principal office in this State.

(3) Whether it will do trust business as well as the business of a commercial bank.

(4) The amount of its authorized common capital stock, the number of shares into which it is divided, the par value of each share; and the amount of common capital stock with which it will commence business. The amount of capital required to charter a bank shall be determined as herein set forth by the Commissioner of Banks who shall give due consideration to (i) the population of the proposed bank's trade area, (ii) the total deposits of those depository financial institutions already operating in the proposed bank's trade area, (iii) the economic conditions and outlook within the proposed bank's trade area, (iv) the business experience and reputation of the proposed bank's management, (v) the business experience and reputation of the proposed bank's incorporators and proposed directors, (vi) the type and nature of business activities proposed to be engaged in, and (vii)

the proposed bank's projected deposit growth and profitability. Except as otherwise provided, the amount of common capital stock required to charter a bank shall not be less than two million dollars ($2,000,000); provided, however, such amount of capital may be increased or decreased in the discretion of the Commissioner of Banks who, after considering the above enumerated criteria, determines that a greater capital requirement is necessary or that a smaller capital requirement will provide a sufficient capital base. In addition to the required capital, every bank shall have a paid in surplus of at least fifty percent (50%) of its common capital stock. The capital and paid in surplus required to charter a bank shall be exclusive of any organizational expenses. This subdivision shall not apply to banks organized and doing business prior to its adoption or amendment; provided, however, the Banking Commission is hereby authorized and directed to adopt rules to keep any original required minimum capital funds intact to the end that they remain in and with the bank as a protection for depositors.

(5) The names and post-office addresses of subscribers for stock, and the number of shares subscribed by each; the aggregate of such subscriptions shall be the amount of the capital with which the company will commence business.

(6) Period, if any, limited for the duration of the company. (1921, c. 4, s. 2; C.S., s. 217(a); 1927, c. 47, s. 2; 1929, c. 72, s. 1; 1947, c. 781; 1953, c. 1209, s. 3; 1963, c. 793, s. 2; 1967, c. 789, s. 1; 1985, c. 677, s. 4; 1989, c. 187, s. 2; c. 770, s. 42; 1989 (Reg. Sess., 1990), c. 1024, s. 44; 2001-263, s. 2.)

Cross References. — As to provision for branch banks, see G.S. 53-62.

Editor's Note. — Session Laws 1985, c. 677, which amended this section, provided in s. 7: "The provisions of this act shall not apply to any institution chartered as a savings bank prior to the effective date of this act and any such institution shall continue to be regulated and supervised in accordance with the laws of the State of North Carolina in effect prior to ratification of this act." The act was ratified July 10, 1985, and became effective on that date.

CASE NOTES

Banking corporation is wholly a creature of statute, doing business by legislative grace, and the right to carry on a banking business through the agency of a corporation is a franchise which is dependent on a grant of corporate powers by the State. Young v. Roberts, 252 N.C. 9, 112 S.E.2d 758 (1960).

Cited in Cocke v. Hood, 205 N.C. 832, 170 S.E. 637 (1933).

§ 53-3. Certificate of incorporation; how signed, proved and filed.

The certificate of incorporation shall be signed by the original incorporators, or a majority of them, and shall be proved or acknowledged before an officer duly authorized under the laws of this State to take proof or acknowledgment of deeds, and shall be filed in the office of the Secretary of State. The Secretary of State shall forthwith transmit to the Commissioner of Banks a copy of said certificate of incorporation, and shall not issue or record the same until duly authorized so to do by the Commissioner of Banks as hereinafter provided. (1921, c. 4, s. 3; C.S., s. 217(b); 1931, c. 243, s. 5.)

CASE NOTES

Suit upon Refusal to Issue Charter. — Where plaintiffs applied for an industrial bank charter, and their application was not passed upon by the Secretary of State on the advice and recommendation of the Commissioner of Banks, acting in accordance with G.S. 53-4, and plaintiffs sued to compel the issuance of a charter, alleging no capricious acts, bad faith or disregard of law by the State officers, the complaint did not state a cause of action and was not sufficient as a petition for certiorari or as an application for mandamus. Pue v. Hood, 222 N.C. 310, 22 S.E.2d 896 (1942).

Cited in Young v. Roberts, 252 N.C. 9, 112 S.E.2d 758 (1960).

§ 53-4. Examination by Commissioner; when certification to be refused; review by Commission.

Upon receipt of a copy of the certificate of incorporation of the proposed bank, the Commissioner of Banks shall at once examine into all the facts connected with the formation of such proposed corporation including its location and proposed stockholders, and if it appears that such corporation, if formed, will be lawfully entitled to commence the business of banking, the Commissioner of Banks shall so certify to the Secretary of State, unless upon examination and investigation he finds that

(1) The proposed corporation is formed for any other than legitimate banking business; or
(2) That the character, general fitness, and responsibility of the persons proposed as stockholders in such corporation and directors, officers, and other managerial officials are not such as to command the confidence of the community in which said bank is proposed to be located; or
(3) That the probable volume of business and reasonable public demand in such community is not sufficient to assure and maintain the solvency of the new bank and of the then existing bank or banks in said community; or
(4) That the name of the proposed corporation is likely to mislead the public as to its character or purpose; or
(5) That the proposed name is the same as the one already adopted or appropriated by an existing bank in this State, or so similar thereto as to be likely to mislead the public.

Upon such certification the Secretary of State shall issue and record such certificate of incorporation.

Notwithstanding any other provisions of this section, the Commissioner of Banks shall not make the certification to the Secretary of State described above until he shall have ascertained that the establishment of such bank will meet the needs and promote the convenience of the community to be served by the bank. Any action taken by the Commissioner of Banks pursuant to this section shall be subject to review by the State Banking Commission which shall have the authority to approve, modify or disapprove any action taken or recommended by the Commissioner of Banks. (1921, c. 4, s. 4; Ex. Sess. 1921, c. 56, s. 1; C.S., s. 217(c); 1931, c. 243, s. 5; 1953, c. 1209, s. 1; 1963, c. 793, s. 1; 1967, c. 789, s. 2.)

CASE NOTES

This section and § 53-92 are construed in pari materia. Young v. Roberts, 252 N.C. 9, 112 S.E.2d 758 (1960).

Scope of Duty and Discretion of Commissioner. — The duty imposed upon and the discretion vested in the Commissioner of Banks under this section bears only upon the question whether certain conditions exist justifying the creation of the proposed bank under the terms and procedure laid down in the statute. His action and the certificate issued thereon merely constitute the prescribed procedure to determine whether the franchise applied for was grantable under the law. Pue v. Hood, 222 N.C. 310, 22 S.E.2d 896 (1942).

Basis for Refusal to Issue Certificate. — If the certificate of incorporation complies with statutory requirements in all other respects, the authority of the Commissioner of Banks to refuse to issue such certificate to the Secretary of State must be based on a finding adverse to the proposed banking corporation in respect of one or more of the legislative standards defined in this section. Young v. Roberts, 252 N.C. 9, 112 S.E.2d 758 (1960).

Review by State Banking Commission. — Any decision made by the Commissioner of Banks in the exercise of the responsibility and authority conferred upon him by this section is subject to review by the State Banking Commission upon application by any adversely affected interested person. Young v. Roberts, 252 N.C. 9, 112 S.E.2d 758 (1960).

Upon review of a decision of the Commissioner of Banks, the Commission has no authority to direct the Commissioner of Banks to refuse to issue a certificate of approval to a proposed banking corporation which is otherwise in compliance with statutory requirements, except on a finding adverse to the proposed banking corporation in respect of one or more of the legislative standards defined in this section. Young v. Roberts, 252 N.C. 9, 112 S.E.2d 758 (1960).

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 53-5. Certificate of incorporation, when certified.

Upon receipt of such certificate from the Commissioner of Banks, the Secretary of State shall, if said certificate of incorporation be in accordance with law, cause the same to be recorded in his office in a book to be kept for that purpose, and known as the corporation book, and he shall, upon the payment of the organization tax and fees, certify under his official seal two copies of the said certificate of incorporation and probates, one of which shall forthwith be recorded in the office of the register of deeds of the county where the principal office of said corporation in this State shall or is to be located, in a book to be known as the record of incorporations, and the other certified copy shall be filed in the office of the Commissioner of Banks, and thereupon the said persons shall be a body politic and corporate under the name stated in such certificate. The said certificate of incorporation, or a copy thereof, duly certified by the Secretary of State or the register of deeds of the county in which the same is recorded, or by the Commissioner of Banks, under their respective seals, shall be evidence in all courts and places, and shall, in all judicial proceedings, be deemed prima facie evidence of the complete organization and incorporation of the company purporting thereby to have been established. The charter of any bank which fails to complete its organization and open for business to the public within six months after the date of filing its certificate of incorporation with the Secretary of State shall be void: Provided, however, the Commissioner of Banks may for cause extend the limitation herein imposed. (1921, c. 4, s. 5; C.S., s. 217(d); 1931, c. 243, s. 5; 1967, c. 823, s. 3.)

CASE NOTES

Six-month limitation set out in the last sentence of this section applies only in the event the "said persons" have become "a body politic and corporate" and the certificate of incorporation has been recorded and issued. Young v. Roberts, 252 N.C. 9, 112 S.E.2d 758 (1960).

Only State May Take Advantage of Defect in Organization. — A defect in the organization of a bank because of failure to begin business within the specified time can be taken advantage of only by a direct proceeding by the State for that purpose. Boyd v. Redd, 120 N.C. 335, 27 S.E. 35 (1897).

§ 53-6. Payment of capital stock.

The capital stock of every bank shall be fully paid in, in cash, before it shall be authorized by the Commissioner of Banks to commence business and the full payment in cash of the capital stock shall be certified to the Commissioner of Banks under oath by the president, cashier, or secretary of the said bank. (1921, c. 4, s. 6; C.S., s. 217(e); 1927, c. 47, s. 3; 1931, c. 243, s. 5; 1989, c. 20.)

Cross References. — As to similar provision relating to industrial banks, see G.S. 53-140.

CASE NOTES

Capital Stock Required. — This section expressly requires that domestic banks must have capital stock. Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 53-7. Statement filed before beginning business.

Before such company shall begin the business of banking, banking and trust, fiduciary, or surety business, there shall be filed with the Commissioner of Banks a statement under oath by the president, cashier, or secretary, containing the names of all the directors and officers, with the date of their election or appointment, term of office, residence, and post-office address of each, the amount of capital stock of which each is the owner in good faith and the amount of money paid in on account of the capital stock. Nothing shall be received in payment of capital stock but money. (1921, c. 4, s. 7; C.S., s. 217(f); 1931, c. 243, s. 5; 1989, c. 187, s. 3.)

§ 53-8. Authorized to begin business.

Upon filing of such statement, the Commissioner of Banks shall examine into its affairs, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each director, the amount of capital stock of which each is the owner in good faith, and whether such corporation has complied with all the provisions of law required to entitle it to engage in business. If upon such examination it appears to the Commissioner of Banks that it is lawfully entitled to commence the business of banking, banking and trust, fiduciary, or surety business, he shall give to such corporation a certificate signed by the Commissioner of Banks, that such corporation has complied with all the provisions of the law required to be complied with, before commencing the business of banking, and that such corporation is authorized to commence business. (1921, c. 4, s. 8; C.S., s. 217(g); 1931, c. 243, s. 5.)

§ 53-9. Transactions preliminary to beginning business.

No such corporation shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized to do so by the Commissioner of Banks. (1921, c. 4, s. 9; C.S., s. 217(h); 1931, c. 243, s. 5.)

§ 53-9.1. Deposit insurance.

(a) Notwithstanding any other provision of law, no bank established under this Article shall engage in the business of banking without first securing insurance on its deposits from the Federal Deposit Insurance Corporation or any successor corporation created by an act of Congress.

(b) In order to secure deposit insurance as required by this section, a bank may enter into such contracts, incur such obligations, and generally do anything as may be necessary or appropriate in order to take advantage of any memberships, loans, subscriptions, contracts, grants, rights, or privileges that may at any time be available to banks or to their depositors, creditors, stockholders, conservators, receivers, or liquidators, as provided in Section 8 of the Federal Banking Act of 1933 (Section 12B of the Federal Reserve Act as amended) or in any other act or resolution of Congress, to aid, regulate, or safeguard banking institutions and their depositors. In order to secure deposit insurance as required by this section, a bank may also subscribe for and acquire stock, debentures, bonds, or any other securities of the Federal Deposit Insurance Corporation and may comply with the lawful regulations and requirements that may be imposed by the Federal Deposit Insurance Corporation. (1989, c. 187, s. 4.)

§ 53-10. Increase of capital stock.

(a) A corporation doing business under the provisions of this Chapter may increase its capital stock as provided by law for other corporations.

(b) A bank may, with the approval of the Commissioner of Banks and by the vote of the holders of at least two thirds of the stock of the particular class or classes of stock entitled to vote on such proposal, amend its charter to authorize an increase in the common stock of the bank in the category of authorized but unissued stock in an amount not to exceed ten percent (10%) of the outstanding shares of such class or classes of stock and shares so authorized shall be deemed released from preemptive rights. Such authorized but unissued stock may be issued from time to time to officers or employees of the bank pursuant to a stock option or stock purchase plan adopted in accordance with this Chapter. (1921, c. 4, s. 10; C.S., s. 217(i); 1965, c. 1032; 1967, c. 789, s. 3.)

§ 53-11. Decrease of capital stock.

A corporation doing business under the provisions of this Chapter may reduce its capital stock in the manner provided for other corporations upon a vote in favor of the decrease of two thirds in interest of each class of stockholders with voting powers: Provided, that no bank shall reduce its capital stock to an amount less than the minimum required by law. Such reduction shall not be valid or warrant the cancellation of stock certificates until it has been approved by the Commissioner of Banks. Such approval shall not be given except upon a finding by the Commissioner of Banks that the security of existing creditors of the corporation will not be impaired. (1921, c. 4, s. 11; C.S., s. 217(j); 1931, c. 243, s. 5.)

§ 53-12. Merger or consolidation of banks and savings associations.

(a) A bank may merge, consolidate with, or transfer its assets and liabilities to another bank or to a savings association, or a savings association may transfer its assets and liabilities to a bank. Before such merger or consolidation or transfer shall become effective, each bank or savings association concerned in such merger or consolidation or transfer shall file, with the Commissioner of Banks, certified copies of all proceedings had by its directors and stockholders, or in the case of a mutual savings association, its directors and membership. The proceedings of the stockholders or membership shall set forth that (i) holders of at least two-thirds of the stock of the bank voted in the affirmative on the proposition of merger or consolidation or, (ii) in the case of a stock or mutual savings association, such percentage of the stock or of the membership as the laws applicable to such institutions require, voted in the affirmative on the proposition of merger or consolidation. The proceedings of the stockholders or memberships shall also contain a complete copy of the agreement made and entered into between said banks or savings associations, with reference to such merger or consolidation or transfer. Upon the filing of the proceedings as required by this section, the Commissioner of Banks may make an investigation of each bank or savings association, or both, to determine whether the interests of the depositors, creditors, and stockholders or members of each bank or savings association are protected, and if such merger or consolidation is in the public interest, and that such merger or consolidation or transfer is made for legitimate purposes. The Commissioner's consent to or rejection of such merger or consolidation or transfer shall be based upon such investigation. No merger or consolidation or transfer shall be made without the consent of the Commissioner of Banks. The expenses of any investigation shall be paid by the banks or savings associations, or both, involved in the proposed merger or consolidation or transfer. Notice of such merger or consolidation or transfer shall be published once a week for four consecutive weeks before the same is to become effective, at the discretion of the Commissioner of Banks, in a newspaper published in the county in which each of said banks or savings associations, or both, is located. If no newspaper is published in such county, then the notice shall be published in a newspaper having a general circulation in such county. A certified copy of the notice shall be filed with the Commissioner of Banks. In case of either transfer or merger or consolidation, the rights of creditors shall be preserved unimpaired and the respective companies deemed to be in existence to preserve such rights for a period of three years. For the purposes of this section, the term "savings association" shall be construed to include a savings and loan association or a savings bank, whether organized under the laws of North Carolina or the United States.

(b) Unless otherwise required to be maintained, a bank may merge or otherwise consolidate into itself any subsidiary organized pursuant to G.S. 53-47, or acquired as a part of any merger or reorganization with another bank or bank holding company. (1921, c. 4, s. 12; C.S., s. 217(k); 1931, c. 243, s. 5; 1967, c. 789, s. 4; 1981, c. 671, s. 1; 1995, c. 479, s. 1.)

Cross References. — As to liquidation of banks, see G.S. 53-20. As to merger of corporations generally, see G.S. 55-11-01.

CASE NOTES

Presumption of Approval of Transaction. — Where under the provisions of this section a State bank transferred its assets to another State bank, the latter assuming the former's liabilities under a consolidation agreement, it was presumed that the former Corporation Commission had notice or knowledge of the transaction coming within the scope of its duties, and had approved the transaction. Corporation Comm'n v. Stockholders, 199 N.C. 586, 155 S.E. 445 (1930).

Cited in Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., 68 N.C. App. 246, 314 S.E.2d 801 (1984).

§ 53-13. Merged or consolidated banks and savings associations deemed one bank or savings association.

In case of merger or consolidation when the agreement of merger or consolidation is made, and a duly certified copy thereof is filed with the Secretary of State, together with a certified copy of the approval of the Commissioner of Banks to such merger or consolidation, the parties thereto, shall be held to be one company, possessed of the rights, privileges, powers, and franchises of the several companies, but subject to all the provisions of law under which it is created. The directors and other officers named in the agreement of consolidation shall serve until the first annual meeting for election of officers and directors, the date for which shall be named in the agreement. On filing such agreement, all and singular, the property and rights of every kind of the several companies shall thereby be transferred and vested in such surviving company in the case of merger or in such new company in the case of consolidation, and be as fully its property as they were of the companies parties to the agreement. (1921, c. 4, s. 13; C.S., s. 217(l); 1931, c. 243, s. 5; 1981, c. 671, s. 2; 1995, c. 479, s. 2.)

Cross References. — As to substitution of a consolidated bank as executor or trustee under will, see G.S. 31-19. As to fiduciary powers and liabilities of merged banks, see G.S. 53-17.

CASE NOTES

Right to Enforce Claim After Merger. — In a bank merger, the surviving bank or its transferee has the legal right to enforce a claim because the surviving bank succeeds to the merged bank's holder status by operation of law. Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., 68 N.C. App. 246, 314 S.E.2d 801 (1984).

§ 53-14. Reorganization.

Whenever any bank under the laws of this State or of the United States is authorized to dissolve, and shall have taken the necessary steps to effect dissolution, or upon a national bank making application to convert to a State-chartered bank, it shall be lawful for a majority of the directors of such bank, upon authority in writing of the owners of two thirds of its capital stock, with the approval of the Commissioner of Banks, to execute articles of incorporation as provided in this Chapter, which articles, in addition to the requirements of law, shall further set forth the authority derived from the stockholders of such national bank or State bank, and upon filing the same as hereinbefore provided for the organization of banks, the same shall become a bank under the laws of this State, and thereupon all assets, real and personal, of the dissolved national or State bank shall by operation of law be vested in and become the property of such State bank, subject to all liabilities of such national or State bank not liquidated under the laws of the United States or this State before such reorganization. (1921, c. 4, s. 14; C.S., s. 217(m); 1931, c. 243, s. 5; 1979, c. 483, s. 3.)

§ 53-15: Repealed by Session Laws 1947, c. 696.

§ 53-16. Consolidation, conversion or merger of State banks or trust companies with national banks.

(a) Nothing in the law of this State shall restrict the right of a State bank or trust company to consolidate, convert into, or merge with a national bank. The action to be taken by such consolidating, converting, or merging State bank and its rights and liability and those of its stockholders shall be the same as those prescribed by the law of the United States for national banks at the time of the action, except that a vote of the holders of two thirds of each class of voting stock of a State bank shall be required for the consolidation, conversion, or merger and that upon consolidation, conversion, or merger by a State bank with or into a national bank the rights of dissenting stockholders shall be those hereinafter specified.

(b) Upon consolidation, conversion, or merger the resulting national bank shall be the same business as each consolidating, converting, or merging bank with all the property rights, powers, and duties of each consolidating, converting, or merging bank, except as affected by the law of the United States and by the charter and bylaws of the resulting bank, and any reference to a consolidating, converting, or merging bank in any writing, whether executed or taking effect before or after the consolidation, conversion, or merger shall be deemed and taken a reference to the resulting bank if not inconsistent with the other provisions of such writing.

(c) The holders of shares of the stock of a State bank which were voted against a consolidation, conversion, or merger into a national bank shall be entitled to receive their value in cash, if and when the consolidation, conversion, or merger becomes effective, upon written demand, made to the resulting national bank at any time within 30 days after the effective date of the consolidation, conversion, or merger accompanied by the surrender of the stock certificate or certificates. The value of such shares shall be determined as of the date of the stockholders' meeting approving the consolidation, conversion, or merger, by three appraisers, one to be selected by the owners of two thirds of the dissenting shares involved, one by the board of directors of the resulting national bank and the third by the two so chosen. The valuation agreed upon by any two appraisers shall govern. If the appraisal is not completed within 90 days after the consolidation, conversion, or merger becomes effective, the Comptroller of the Currency shall cause an appraisal to be made.

(d) The amount fixed as the value of the shares of stock of the consolidating, converting, or merging bank at the time of the stockholders' meeting approving the consolidation, conversion, or merger and the amount fixed by the appraisal as hereinbefore provided, where the fixed value is not accepted, shall constitute a debt of the resulting national bank.

(e) Upon the completion of the consolidation, conversion, or merger the permit to operate of any consolidating, converting, or merging State bank shall automatically terminate. (1929, c. 148, s. 1; 1951, c. 1129, s. 1.)

§ 53-17. Fiduciary powers and liabilities of banks or trust companies merging or transferring assets and liabilities.

Whenever any bank, trust company, savings association, or savings bank, organized under the laws of North Carolina or the United States, and doing business in this State, shall consolidate or merge with or shall sell to and transfer its assets and liabilities to any other bank, trust company, savings association, or savings bank doing business in this State, as provided by the laws of North Carolina or the United States, all the then existing fiduciary rights, powers, duties and liabilities of such consolidating or merging or transferring institution, including the rights, powers, duties and liabilities as executor, administrator, guardian, trustee, and/or any other fiduciary capacity, whether under appointment by order of court, will, deed, or other instrument, shall, upon the effective date of such consolidation or merger or sale and transfer, vest in, devolve upon, and thereafter be performed by, the transferee institution or the consolidated or merged institution, and such latter institution shall be deemed substituted for and shall have all the rights and powers of the transferring institution. (1931, c. 207; 1941, c. 80; 1995, c. 479, s. 3.)

Legal Periodicals. — For notes dealing with sale and transfer of assets, see 9 N.C.L. Rev. 398 (1931) and 19 N.C.L. Rev. 457 (1941).

CASE NOTES

Distinction is drawn between "consolidation" and "merger." Braak v. Hobbs, 210 N.C. 379, 186 S.E. 500 (1936).

Consolidated Bank Succeeds to Power as Trustee Under Deed of Trust. — A bank, created as a result of a consolidation of several State banks, may properly exercise the power of sale contained in a deed of trust in which one of its constituent banks was named trustee, upon default by the trustor, since under this section the consolidated bank succeeds to such power. Braak v. Hobbs, 210 N.C. 379, 186 S.E. 500 (1936).

Retroactive Application of Section. — This section, although in form an independent statute, is in reality an amendment of Public Laws 1925, c. 77, codified as G.S. 53-15 (now repealed) and former G.S. 55-165 through 55-170, and is therefore applicable to a deed of trust executed prior to the enactment of this section and subsequent to the effective date of the 1925 act. Braak v. Hobbs, 210 N.C. 379, 186 S.E. 500 (1936).

§ 53-17.1. Supervisory acquisition of State association.

(a) A commercial bank may be chartered under the supervisory provisions provided in this section and may enter into and consummate the purchase and assumption transaction contemplated by subdivision (1) of this subsection if:

(1) The commercial bank proposes to purchase all or substantially all of the book assets and to assume all or substantially all of the book liabilities of an eligible State association; and

(2) The Commissioner of Banks approves such chartering and such purchase and assumption pursuant to subsection (c) of this section.

(b) A State association, as defined in G.S. 54B-4, is an eligible State association if it is insured by a mutual deposit guaranty association, as defined in Article 12, Chapter 54B of the General Statutes, which will provide financial assistance for a transaction authorized by this section, and if the Commissioner of Banks has found, pursuant to G.S. 54B-44, that such State association is unable to operate in a safe and sound manner.

(c) The Commissioner of Banks shall approve the chartering of a commercial bank, and the purchase and retention by such commercial bank of all or substantially all of the book assets and the assumption by such commercial bank of all or substantially all of the book liabilities, of an eligible State association, pursuant to this section if:

(1) Such commercial bank satisfies the requirements of G.S. 53-4; and

(2) The chartering and such purchase and assumption will promote the public interest.

(d) Notwithstanding any regulatory or statutory requirement or provision to the contrary, chartering of a commercial bank, the acquisition by such bank of the assets and assumption of the liabilities of an eligible State association and actions taken by the Commissioner of Banks pursuant to this section, are not subject to any notice or public hearing requirements, nor to the provisions of Chapter 150B of the General Statutes or any other administrative procedure requirements under Chapter 53 or Chapter 54B of the General Statutes, or otherwise, other than as stated in this section.

(e) Notwithstanding any other provision of the General Statutes of this State, any bank holding company, as defined in G.S. 53-210(4), may acquire a commercial bank chartered pursuant to this section, and a bank holding company which has acquired, directly or indirectly, such a commercial bank may acquire a North Carolina bank or a North Carolina bank holding company, each as defined in G.S. 53-210, on the same terms and conditions, and subject to the same regulatory requirements, as a North Carolina bank or North Carolina bank holding company could acquire a North Carolina bank holding company or a North Carolina bank. A purpose of this section is to remove the limitation imposed by Section 3(d) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1842(d)) on bank holding company acquisitions only to the extent of the limited supervisory circumstances provided for herein.

(f) A bank holding company which acquires a commercial bank chartered pursuant to this section, and such commercial bank, shall be deemed to be a North Carolina bank holding company and a North Carolina bank, respectively, as defined in, and for all purposes of G.S. 53-210.

(g) Notwithstanding any regulatory or statutory requirement or provision to the contrary, a commercial bank chartered pursuant to this section shall, except as provided in this section, be a "bank" for all purposes of Chapter 53 of the General Statutes.

(h) A commercial bank that is chartered pursuant to this section shall not receive any deposits, or conduct any other transactions with the public, until it has purchased the assets and assumed the liabilities of an eligible State association as contemplated by this section, and has received the certificate of authority provided for in G.S. 53-8.

(i) No commercial bank may be chartered under this section, and no purchase and assumption may be consummated in reliance upon the authority provided in this section, after September 30, 1986. (1985 (Reg. Sess., 1986), c. 948, s. 1; 2001-193, s. 2.)

§ 53-17.2. Conversion of savings association to a State bank.

(a) Any association, as defined in G.S. 54B-4, or any savings bank as defined in G.S. 54C-4(b), may convert to a State bank as provided in this section. As used in this section, the term "conversion" includes (i) a transaction in which a State bank assumes all or substantially all of the liabilities and purchases all or substantially all of the assets of an association or savings bank and (ii) any other transaction that results in a change of identity of an association or savings bank to a State bank. A transaction in which the resulting bank is a subsidiary or an affiliate of a bank holding company or bank which has been in existence for at least two years shall not be subject to the provisions of this section but shall be subject to the approval of the Commissioner of Banks.

(b) Upon a majority vote of its board of directors, any association or savings bank may apply to the Commissioner of Banks for permission to convert to a bank and for certification of appropriate amendments to its certificate of incorporation to effect the conversion. A mutual association or savings bank must also convert to a stock form of organization before completing conversion to a bank.

(c) The association or savings bank shall submit a plan of conversion as a part of the application to the Commissioner of Banks. The Commissioner of Banks may recommend approval of the plan of conversion with or without amendment. The Commissioner of Banks shall recommend approval of the plan of conversion if upon examination and investigation the Commissioner finds that:

(1) The resulting bank will operate in a safe, sound, and prudent manner with adequate capital, liquidity, and earnings prospects;

(2) The directors, officers, and other managerial officials of the association or savings bank are qualified by character and financial responsibility to control and operate in a legal and proper manner the bank proposed to be formed as a result of the conversion;

(3) The interest of the depositors, the creditors, and the public generally will not be jeopardized by the proposed conversion; and

(4) The proposed name will not mislead the public as to the character or purpose of the resulting bank, and the proposed name is not the same

as one already adopted or appropriated by an existing bank in this State or so similar as to be likely to mislead the public.

(d) Any action taken by the Commissioner of Banks pursuant to this section shall be subject to review by the State Banking Commission which may approve, modify, or disapprove any action taken or recommended by the Commissioner of Banks. The State Banking Commission may promulgate rules to govern conversions undertaken pursuant to this section. The requirements for a converting association or savings bank shall be no more stringent than those provided by rule or regulation applicable to other FDIC-insured commercial banks. The requirements for a converting association or savings bank shall be no less stringent than those provided by rule or regulation applicable to other FDIC-insured commercial banks, except as may be allowed during transition periods permitted by subdivisions (e)(4) and (h)(2) of this section.

(e) In the absence of the promulgation of rules under subsection (d), the conditions to be met for approval of the application for conversion should include the following:

(1) Condition. The applicant's general condition must reflect adequate capital, liquidity, reserves, earnings, and asset composition necessary for safe and sound operation of the resulting bank.

(2) Management. The management and the board of directors must be capable of supervising a sound banking operation and overseeing the changes that must be accomplished in the conversion from an association or savings bank to a bank.

(3) Public Convenience. The Commission must determine that the conversion will have a positive impact on the convenience of the public and will not substantially reduce the services available to the public in the market area.

(4) Transition. Within a reasonable time after the effective date of the conversion, the resulting bank must divest itself of all assets and liabilities that do not conform to State banking law or rules. The length of this transition period shall be determined by the Commissioner and shall be specified when the application for conversion is approved.

In evaluating each of these conditions, the Commission shall consider a comparison of the relevant financial ratios of the applicant with the average ratios of North Carolina banks of similar asset size. The Commission may not approve a conversion where the applicant presents an undue supervisory concern or has not been operated in a safe and sound manner.

(f) If the State Banking Commission approves the plan of conversion, then the association or savings bank shall submit the plan to the stockholders or members as provided in subsection (g). After approval of the plan of conversion, the Commissioner of Banks shall supervise and monitor the conversion process and shall ensure that the conversion is conducted pursuant to law and the association's or savings bank's approved plan of conversion.

(g) After lawful notice to the stockholders or members of the association or savings bank and full and fair disclosure of the plan of conversion, the plan must be approved by a majority of the total votes that stockholders or members of the association or savings bank are eligible and entitled to cast. The vote by the stockholders or members may be in person or by a proxy which has been executed within 45 days prior to the vote. Following the vote of the stockholders or members, the association or savings bank shall file with the Commissioner of Banks the results of the vote certified by an appropriate officer. The Commissioner of Banks shall then approve the requested conversion and the association or savings bank shall file with the Secretary of State amended articles of incorporation with the certificate of the Commissioner of Banks attached. The conversion to a bank shall be effective upon this filing.

(h) The Commissioner of Banks may authorize the resulting bank to do the following:

(1) Wind up any activities legally engaged in by the association or savings bank at the time of conversion but not permitted to State banks.

(2) Retain for a transitional period any assets and deposit liabilities legally held by the association or savings bank at the effective date of the conversion that may not be held by State banks.

The length, terms, and conditions of the transitional periods under subdivisions (1) and (2) are subject to the discretion of the Commissioner of Banks.

(i) Upon conversion of an association or savings bank to a bank, the legal existence of such institution does not terminate, and the resulting bank is a continuation of the former institution. The conversion shall be a mere change in identity or form of organization. All rights, liabilities, obligations, interest, and relations of whatever kind of the association or savings bank shall continue and remain in the resulting bank. Except as may be authorized during a transitional period by the Commissioner of Banks pursuant to subsection (h), a bank resulting from the conversion of an association or savings bank shall have only those rights, powers and duties which are authorized for banks by the laws of this State and the United States. All actions and legal proceedings to which the association or savings bank was a party prior to conversion shall be unaffected by the conversion and shall proceed as if the conversion had not taken place. (1989 (Reg. Sess., 1990), c. 845, s. 1; 1995, c. 142, s. 1.)

Cross References. — As to provisions for conversion of bank to stock association, see G.S. 54B-46.

ARTICLE 3.

Dissolution and Liquidation.

§ 53-18. Voluntary liquidation.

A bank may go into voluntary liquidation and be closed, and may surrender its charter and franchise as a corporation of this State by the affirmative votes of its stockholders owning two thirds of its stock, such vote to be taken at a meeting of the stockholders duly called by resolution of the board of directors, written notice of which, stating the purpose of the meeting, shall be mailed to each stockholder, or in case of his death, to his legal representative or heirs at law, addressed to his last known residence 10 days previous to the date of said meeting. Whenever stockholders shall by such vote at a meeting regularly called for the purpose, notice of which shall be given as herein provided, decide to liquidate such bank, a certified copy of all proceedings of the meeting at which said action shall have been taken, verified by the oath of the president and secretary, shall be transmitted to the Commissioner of Banks for his approval. If the Commissioner of Banks shall approve the same, he shall issue to the said bank, under his seal, a permit for such purpose. No such permit shall be issued by the Commissioner of Banks until said Commissioner of Banks shall be satisfied that provision has been made by such bank to satisfy and pay off all depositors and all creditors of such bank. If not so satisfied, the Commissioner of Banks shall refuse to issue a permit, and shall be authorized to take possession of said bank and its assets and business, and hold the same and liquidate said bank in the manner provided in this Chapter. When the Commissioner of Banks shall approve the voluntary liquidation of a bank, the directors of said bank shall cause to be published in a newspaper in the county in which such bank is located, or if no newspaper is published in such county, then in a newspaper having a general circulation in such county, a notice that the bank is closing up its affairs and going into liquidation, and notify its depositors and creditors to present their claims for payment. Such notice shall be published once a week for four consecutive weeks. When any bank shall be in process of voluntary liquidation, it shall be subject to examination by the Commissioner of Banks, and shall furnish such reports from time to time as may be called for by the Commissioner of Banks. All unclaimed deposits and dividends remaining in the hands of such bank shall be subject to the provisions of Chapter 116B. Whenever the Commissioner of Banks shall approve it, any bank may sell and transfer to any other bank, either State bank or national bank, all of its assets of every kind upon such terms as may be agreed upon and approved by the Commissioner of Banks and by two-thirds vote of its board of directors. A certified copy of the minutes of any meeting at which such action is taken, under the oath of the president and secretary, together with a copy of the contract of sale and transfer, shall be filed with the Commissioner of Banks. Whenever voluntary liquidation shall be approved by the Commissioner of Banks or the sale and transfer of the assets of any bank shall be approved by the Commissioner of Banks, a certified copy of such approval under seal of the Commissioner of Banks, filed in the office of the Secretary of State, shall authorize the cancellation of the charter of such bank, subject, however, to its continued existence, as provided by this Chapter and the general law relative to corporations. (1921, c. 4, s. 15; C.S., s. 218(a); 1927, c. 47, s. 4; 1929, c. 73; 1931, c. 243, s. 5; 1979, 2nd Sess., c. 1311, s. 3; 1995, c. 129, s. 2.)

Cross References. — As to dissolution and liquidation of corporations generally, see G.S. 55-14-05 et seq.

Legal Periodicals. — For article discussing the statutory changes made in the North Carolina banking law, see 11 N.C.L. Rev. 194 (1933).

CASE NOTES

Approval of Stockholders Not Necessary for Sale of Assets. — For a valid sale of assets to another bank the approval of the stockholders of the selling bank is not required by this section, and the section is not invalid for that reason. Planters' Sav. Bank v. Earley, 204 N.C. 297, 168 S.E. 225 (1933).

As to enforcement of former statutory liability of stockholders by purchasing bank, see Peoples Bank & Trust Co. ex rel. Wayne Nat'l Bank v. Roscower, 199 N.C. 653, 155 S.E. 560 (1930).

Applied in Douglass v. Dawson, 190 N.C. 458, 130 S.E. 195 (1925).

Cited in In re LaFayette Bank & Trust Co., 198 N.C. 783, 153 S.E. 452 (1930).

§ 53-19. When Commissioner of Banks may take charge.

The Commissioner of Banks may forthwith take possession of the business and property of any bank to which this Chapter is applicable whenever it shall appear that such bank:

(1) Has violated its charter or any laws applicable thereto;
(2) Is conducting its business in an unauthorized or unsafe manner;
(3) Is in an unsafe or unsound condition to transact its business;
(4) Has an impairment of its capital stock;
(5) Has refused to pay its depositors in accordance with the terms on which such deposits were received, or has refused to pay its holders of certificates of indebtedness or investment in accordance with the terms upon which such certificates of indebtedness or investment were sold;
(6) Has become otherwise insolvent;

(7) Has neglected or refused to comply with the terms of a duly issued lawful order of the Commissioner of Banks;
(8) Has refused, upon proper demand, to submit its records, affairs, and concerns for inspection and examination of a duly appointed or authorized examiner of the Commissioner of Banks;
(9) Its officers have refused to be examined upon oath regarding its affairs; or
(10) Has made a voluntary assignment of its assets to trustees.

Such banks may resume business as provided in G.S. 53-37. (1911, c. 25, s. 4; 1921, c. 4, s. 16; C.S., ss. 218(b), 242; 1931, c. 243, s. 5; 1995, c. 129, s. 3.)

Legal Periodicals. — For discussion of section, see 3 N.C.L. Rev. 79 (1925).

CASE NOTES

Bank Presumed to Have Complied with Prerequisites Before Resuming Operation. — See People's Bank v. Fidelity & Deposit Co., 4 F. Supp. 379 (M.D.N.C. 1933), aff'd, 72 F.2d 932 (4th Cir. 1934).

Disposition of Assigned Assets Where Assignee Bank Becomes Insolvent. — Where a bank assigned all its assets to another bank under an agreement, approved by the Commissioner of Banks, that the latter bank should pay all depositors and creditors of the former, but before the assignee bank had fully discharged the agreement it became insolvent and was taken over by the Commissioner, upon a showing that the assets of the assignor bank are sufficient to pay in full all its depositors and creditors, the assignor bank and its depositors and creditors may restrain the Commissioner from taking possession of the assigned assets, and, pending the trial of the issue involving the value of the assigned assets, they may restrain the Commissioner from levying upon and collecting the statutory liability of the stockholders of the assignor bank. Stanly Bank & Trust Co. v. Hood, 206 N.C. 543, 174 S.E. 503 (1934).

§ 53-20. Liquidation of banks.

(a) When Commissioner of Banks to Take Possession. — Whenever any State bank shall neglect or refuse for a period of 60 days to make a report to the Commissioner of Banks, as he may demand, or shall, after demand under seal of the Commissioner of Banks, fail, neglect or refuse to comply with any of the rules, regulations or requirements of the State Banking Commission, or the provisions of the banking law, or if at any time the Commissioner of Banks shall find a bank subject to the supervision of the Commissioner of Banks, in an insolvent, unsafe or unsound condition to transact the business for which it was organized, or in an unsafe, or unsound condition to continue its business, or if such institution shall neglect or refuse to correct any irregularity which may be called to the attention of the president, cashier or board of directors, by the Commissioner of Banks, or any of his assistants, then, in either of such events, the Commissioner of Banks, or any duly authorized agent of the Commissioner of Banks appointed under seal of the Commissioner of Banks, shall forthwith take possession of such bank, and all of its assets and business and shall retain possession thereof until such bank shall be authorized by the Commissioner of Banks to resume business, or its affairs shall be fully liquidated as herein provided, or possession thereof shall have been surrendered under order of a judge of the superior court under the provisions of this section.

(b) Directors May Act. — Any bank may place its assets and business under the control of the Commissioner of Banks for liquidation by a resolution of a majority of its directors upon notice to the said Commissioner of Banks, and, upon taking possession of said bank, the Commissioner of Banks, or duly appointed agent, shall retain possession thereof until such bank shall be authorized by the Commissioner of Banks to resume business or until the affairs of said bank shall be fully liquidated as herein provided, and no bank shall make any general assignment for the benefit of its creditors save and except by surrendering possession of its assets to the Commissioner of Banks, as herein provided. Whenever any bank for any reason shall suspend operations for any length of time, said bank shall, immediately upon such suspension of operations, be deemed in the possession of the Commissioner of Banks and subject to liquidation hereunder.

(c) Notice of Seizure to Court Bar to Attachment, etc.; Transfers Void. — When the Commissioner of Banks, or duly appointed agent, shall take possession of any bank under subsections (a) or (b) hereof he shall, within 48 hours, file with the clerk of the superior court in the county where said bank is located, a notice of his action which shall state the reason therefor; and such notice shall be deemed the equivalent of a summons and complaint against said bank in an action in the superior court except that it shall not be necessary to make service thereof, and the taking possession of any bank shall thereupon date from the time when such authority was exercised and from and after such time all assets and property of such bank, of whatever nature shall be deemed to be in possession of the Commissioner of Banks, and the exercise of such authority shall operate as a bar to any attachment, or other legal proceeding, against such bank or its assets and, after such exercise of authority, no lien shall be acquired, in any manner binding or affecting any of the assets of such bank and every transfer or assignment made thereafter by such bank, or by its authority, of the whole or any part of its assets, shall be null and void; and the Commissioner of Banks shall be substituted in place of the bank in all actions in the State or federal courts, pending at the time of the exercise of such authority.

(d) Notice to Banks; Corporations and Persons Holding Assets; Liens Not to Accrue. — On taking possession of the assets and business of any bank, the Commissioner of Banks, or duly appointed agent, shall forthwith give notice, by mail or otherwise, of such action to all banks or other persons or corporations holding, or having in possession, any assets of such bank. No bank or other person or corporation shall have a lien or charge for any payment, advance or clearance made, or liability incurred against any of the assets of said bank after possession has been taken as provided under this section, except as hereinafter provided.

(e) Permission to Resume Business. — After the Commissioner of Banks has taken possession of any bank, such bank may resume business as provided in G.S. 53-37.

(f) Remedy by Bank for Seizure; Answer to Notice; Injunction, etc.; Appeal. — Whenever any bank, of whose assets and business the Commissioner of Banks has taken possession as aforesaid, except where possession is taken under subsection (b) hereof, shall deem itself aggrieved thereby, it may, at any time within 10 days after the filing of the notice with the clerk of the superior court, file an answer to said notice and may also upon notice to the Commissioner of Banks, apply to the resident or the presiding judge of the district for an injunction to enjoin further proceedings by the said Commissioner of Banks, and the said judge may cite the said Commissioner of Banks to show cause within 10 days thereafter why further proceedings should not be enjoined, and after hearing the allegations and proof of the parties with respect to the condition of said bank, may dismiss such application for injunction or may enjoin further proceedings under this section by the Commissioner of Banks. If the judge shall enjoin further action of the Commissioner of Banks and permit the reopening of the bank, he shall have authority to require of the bank such surety bond as he may deem necessary to insure its solvency, payable to the Commissioner of Banks for the sole benefit of the general creditors of the bank, and upon such terms as said judge may deem proper. Either party shall have the right to appeal to the Supreme Court as in other actions.

(g) Collection of Debts and Claims; Sale or Compromise of Debts and Claims; Commissioner Succeeds to All Property of Bank. — Upon taking possession of the assets and business of any bank by the Commissioner of Banks, the Commissioner of Banks, or the duly appointed agent, is authorized to collect all money due such bank, and to do such other acts as are necessary to conserve its assets and property, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The Commissioner of Banks, or the duly appointed agent, shall collect all debts due and claims belonging to such bank, by suit, if necessary; and, by motion in the pending action, and upon authority of an order of the presiding or resident judge of the district may sell, compromise or compound any bad or doubtful debt or claim, and may upon such order, sell the real and personal property of such bank on such terms as the order may provide or direct, except that, where the sale is made under power contained in any mortgage or lien bond or other paper wherein the title is retained for sale and the terms of sale set out, sale may be made under said authority.

Upon taking possession of any bank under this section, the Commissioner of Banks and/or the duly appointed agent shall have the possession and the right to the possession of all the property, assets, choses in action, rights and privileges of the said bank, including the right to resign the trust or exercise the power in all mortgages, deeds of trust, and all other papers executed to secure the payment of money in any form in which the said bank shall have been named as trustee and/or pledgee, and such property rights and privileges shall vest in the said Commissioner and/or duly appointed liquidating agent absolutely, for the purpose of liquidating, and sales and conveyance of the same, together with any and all other incidental rights, privileges, and powers necessary and convenient for the enjoyment of the right of conveyance and sale and for the exercise of the same. Upon the motion made, the bank or any person interested, may be heard, but the judge hearing the motion shall enter his order as in his discretion will best serve the parties interested. The powers granted by the second preceding sentence shall be in addition to and not in derogation of any existing acts ratified at the 1931 session of the General Assembly.

The officers and directors of any bank, or any bank that is in liquidation as provided by law, shall not hereafter exercise any powers herein declared to be vested in the North Carolina Commissioner of Banks, and/or the duly appointed liquidating agent.

(h) Bond of Commissioner of Banks; Surety; Condition; Minimum Penalty. — Upon taking possession of any bank, the Commissioner of Banks, or the duly appointed agent, shall execute and file a bond payable to the State of North Carolina, with some surety company as surety thereon, with the clerk of the superior court of the county where the bank is located, conditioned upon the faithful performance of all duties imposed by reason of the liquidation of such bank by the said Commissioner of Banks, or the duly appointed agent, or any agent or assistant assisting in the liquidation of the said bank, the penal sum of said bond to be fixed by order of the Commissioner of Banks, which in no case shall be less than five thousand dollars ($5,000). Any person interested, by motion in the pending action, shall be heard by the resident or presiding judge as to the sufficiency of the bond; the judge hearing the motion may thereupon fix the bond; provided, that where such bank under this section is taken possession of by the Commissioner of Banks, he may, in his discretion with the approval of the State Banking Commission, appoint as his agent with the powers, duties and responsibilities of such agent under this section, the Federal Deposit Insurance Corporation or any corporation or agency established under and by virtue of the laws of the United States of America which is established for the purposes for which the said Federal Deposit Insurance

Corporation was created under the Banking Act of 1933, enacted by Congress; and provided further that such appointment may be made when and only when the liabilities of such bank to its depositors are insured by said corporation or agency, either in whole or in part. In the event of such appointment such corporation or agency, with the approval of the Commissioner of Banks, may serve as such agent without giving the bond required under all other circumstances in this subsection. Also, in the event of such appointment, the Commissioner of Banks shall thereafter be forever relieved from any and all responsibility and liability in respect to the liquidation of such bank.

(i) Inventory Necessary. — Within 30 days after the filing of the notice of the taking possession of any bank in the office of the clerk of the superior court, the Commissioner of Banks, or the duly appointed agent, shall make and state an inventory of the assets and liabilities of the said bank, and shall file one copy thereof with the clerk of the superior court in the pending action and shall keep one copy on file in the said bank. Such inventory shall be open for inspection during the usual banking hours, provided, that nothing herein shall require said bank to remain open unnecessarily.

(j) Notice and Time for Filing Claims; Copies Mailed. — Notice shall be given by advertisement once a week for four consecutive weeks in a newspaper published in said county; if no newspaper is published in said county, then in some newspaper having a general circulation in said county, calling on all persons who may have claims against the bank to present the same to the Commissioner of Banks at the office of the bank, and within the time to be specified in the notice, not less, however, than 90 days from the date of the first publication. A copy of this notice shall be mailed to all persons whose names appear as creditors upon the books of the bank. Affidavit by the Commissioner of Banks, or agent mailing the notice, to the effect that said notice was mailed shall be conclusive evidence thereof.

(k) Power to Reject Claims; Notice; Affidavit of Service; Action on Claim. — If the Commissioner of Banks, or the duly appointed agent, doubts the justice and validity of any claim or deposit, he may reject the same and serve notice of such rejection upon the claimant or depositor, either personally or by registered mail, and an affidavit of the service of such notice shall be filed in the office of the clerk of the superior court in the pending action, and shall be conclusive evidence of such notice. Any action or suit upon such claim so rejected must be brought by the claimant against the Commissioner of Banks in the proper court of the county in which the bank is located within 90 days after such service, or the same shall be barred. Objections to any claim or deposit not rejected by the Commissioner of Banks, or the duly appointed agent, may be made by any person interested by filing such objection in the pending action and by serving a copy thereof on the Commissioner of Banks, or duly appointed agent, and the Commissioner of Banks or duly appointed agent, after investigation, shall either allow such objection and reject the claim or deposit, or disallow the objection. If the objection is not allowed and the claim or deposit not rejected, the Commissioner of Banks or the duly appointed agent, shall file a notice to this effect in the pending action; and within 10 days thereafter, the person filing objection by motion in the pending action, a copy of which notice shall be served upon the person whose claim or deposit is objected to, may present to the court the question of the validity of said claim or deposit; and the questions of law and issues of fact shall thereupon be determined as in other civil actions.

(*l*) List of Claims Presented and Deposits; Copies; Proviso. — Upon the expiration of the time fixed for presentation of claims, the Commissioner of Banks, or the duly appointed agent, shall make a full and complete list of the claims presented and of the deposits as shown, including and specifying any claims or deposits which have been rejected by him, and shall file one copy in the office of the clerk of the superior court in the pending action, and shall keep one copy on file with the inventory in the office of the bank for examination. Any indebtedness against any bank which has been established or recognized as a valid liability of said bank before it went into liquidation, for which no claimant has filed claim, and/or any liability for which claim has been filed and disapproved, shall be listed in the office of the clerk of the superior court of the county in which the bank is located, by the liquidating agent, and the dividends accruing thereto shall be paid into the said office and shall be held for a period of three months after said liquidation is completed, and shall then be paid to the escheator of the State Treasurer. Any claim which may be presented after the expiration of the time fixed for the presentation of claims in the notice hereinbefore provided shall, if allowed, share pro rata in the distribution only of those assets of the bank in the hands of the Commissioner of Banks, and undistributed at the time the claim is presented: Provided, that when it is made to appear to the judge of the superior court, resident or presiding in the county, that the claim could not have been filed within said period, said judge may permit those creditors or depositors who subsequently file their claim to share as other creditors.

(m) Declaration of Dividends; Order of Preference in Distribution. — At any time after the expiration of the date fixed by the Commissioner of Banks, or the duly appointed agent, for the presentation of claims against the bank, and from time to time thereafter, the Commissioner of Banks, out of the funds in his hands, after the payment of expenses and priorities, may declare and pay dividends to the depositors and other creditors of such bank in the order now or hereafter provided by law; and a dividend shall be declared when and as often as the funds on hand subject to the payment of dividends shall be sufficient to pay ten per centum (10%) of all claims entitled to share in such dividends. In paying dividends and calculating the same, all disputed claims and deposits shall be taken into account, but no dividend shall be paid upon such disputed claims and deposits until the same shall have been finally determined. The following shall be the order and preference in the distribution of the assets of any bank liquidated hereunder:

(1) Taxes and fees due the Commissioner of Banks for examination or other services;
(2) Wages and salaries due officers and employees of the bank, for a period of not more than four months;
(3) Expenses of liquidation;
(4) Certified checks and cashier's checks in the hands of a third party as a holder for value and the amounts due on collections made and unremitted for or for which final actual payment has not been made by the bank;
(5) Amounts due creditors other than stockholders.

The word "asset" used herein shall not be deemed to include bailments or other property to which such bank has no title. Provided, that when any bank, or any officer, clerk, or agent thereof, receives by mail, express or otherwise, a check, bill of exchange, order to remit, note, or draft for collection, with request that remittance be made therefor, the charging of such item to the account of the drawer, acceptor, indorser, or maker thereof, or collecting any such item from any bank or other party, and failing to remit therefor, or the nonpayment of a check sent in payment therefor, shall create a lien in favor of the owner of such item on the assets of such bank making the collection, and shall attach from the date of the charge, entry or collection of any such funds. A statement of all dividends paid shall be filed in the office of the clerk of the superior court in the pending action, and said statements shall show the expenses deducted and the disputed claims and deposits considered in determining said dividend.

(n) Deposit of Funds Collected. — All funds collected by the Commissioner of Banks, in liquidating any bank, shall be deposited from time to time in such bank or banks as may be selected by him, and shall be subject to the check of the Commissioner of Banks. The payment of interest on the net average of such sums on deposit shall be controlled by the Governor and Council of State, who shall have full power and authority to determine for what periods of time payment of interest on such deposits shall or shall not be required, and to fix the rate of interest to be paid thereon.

(o) Employment of Local Attorneys; Expert Accountants and Other Experts; Compensation. — The Commissioner of Banks, for the purpose of liquidating banks as herein provided, shall employ such liquidating agents, competent local attorneys, accountants and clerks as may be necessary to properly liquidate and distribute the assets of said bank, and shall fix the compensation for all such agents, attorneys, accountants and clerks, and shall pay the same out of the funds derived from the liquidation of the assets of said bank: Provided, that all expenditure for the purpose herein provided shall be approved by the resident or presiding judge in the pending action at such time as the same may be reported, and such charges shall be a proper charge and lien on the assets of such bank until paid.

(p) Unclaimed Dividends Held in Trust. — The unclaimed dividends remaining in the hands of the Commissioner of Banks for six months after the order for final distributions shall be held in trust for the several depositors and creditors of the liquidated bank; and the money so held by him shall be paid over to the persons respectively entitled thereto as and when satisfactory evidence of their right to the same is furnished. In case of doubtful or conflicting claims the Commissioner of Banks shall have authority to apply to the superior court of the county, by motion in the pending action, for an order from the resident or presiding judge of the superior court directing the payment of the moneys so claimed. When issues of fact are raised by said motion, the same may, upon request of any claimant, be submitted to the jury for determination as other issues of fact are determined. The interest earned on the unclaimed dividend so held shall be applied toward defraying the expenses incurred in the distribution of such unclaimed dividends. The balance of interest, if any, shall be deposited and held as other funds of the banking department to the credit of the Commissioner of Banks. After the Commissioner of Banks has held the unclaimed dividends held in trust by him under the provisions of this statute for the several depositors and creditors of the liquidated bank for a period of 10 years, he is hereby given the authority to pay the principal amount of such unclaimed dividends to the State Treasurer, to be held by the State Treasurer without liability for profit or interest until a just claim therefor shall be preferred by the parties entitled thereto. Upon payment of the said unclaimed dividends to the State Treasurer, the Commissioner of Banks shall be fully discharged from all further liability therefor.

(q) Report by Commissioner of Banks. — If the assets of any bank when fully collected by the Commissioner of Banks are not more than sufficient to pay the depositors and creditors of said bank, the Commissioner of Banks after he shall have fully distributed as herein provided the sums so collected, then he shall cause to be filed in the office of the clerk of the superior court in the pending action a full and complete report of all his transactions in said liquidation; and the filing of such report shall act as a full and complete discharge of the Commissioner of Banks from all further liabilities by reason of the liquidation of the bank.

(r) Action by Commissioner of Banks after Full Settlement. — Whenever the Commissioner of Banks shall have paid all the expenses of liquidation and shall have paid to each and every depositor and creditor of such bank, whose claims shall have been duly proven and allowed, the full amount of such claims, and shall have made proper provision for unclaimed and unpaid deposits and disputed claims and deposits, and shall have in hand other assets of said bank, he shall call a meeting of the stockholders of said bank by giving notice thereof by publication once a week for four consecutive weeks in a newspaper published in said county, or if no newspaper is published in said county, then in a newspaper having general circulation in said county, and by mailing a copy of such notice to each stockholder addressed to him at his address as the same shall appear upon the books of the bank. Affidavit of the officer mailing the notice herein required and of the printer as to the publication shall be conclusive evidence of notice hereunder. At such meeting any stockholders may be represented by proxy and the stockholders shall elect, by a majority vote of the stock present, an agent or agents who shall be authorized to receive from the Commissioner of Banks all the assets of said bank then remaining in his hands; and the Commissioner of Banks shall cause to be transferred and delivered to the said agent, or agents, all such assets of said bank. The Commissioner of Banks shall thereupon cause to be filed in the office of the clerk of the superior court in the pending actions a full and complete report of all his transactions, showing the assets of said bank so transferred, together with the name of the agent or agents receipting for the same; and the filing of such report shall act as a full and complete discharge of the Commissioner of Banks from all further liabilities by reason of the liquidation of the bank. Such agent, or agents, shall convert the assets coming into his hands, or their hands, into cash, and shall make distribution to the stockholders of said bank as herein provided. Said agent, or agents, shall file semiannually a report of all transactions with the superior court of the county in which the bank is located, and with the Commissioner of Banks, and shall be allowed for such services such fees not in excess of five percent (5%), as may be fixed by the court. In case of death, removal or refusal to act, of any agent or agents elected by the stockholders, the Commissioner of Banks shall, upon report of such action on the part of such agent or agents to the superior court of the county in which the bank is located, turn over to said superior court for the stockholders of said bank, all the remaining assets of the bank, file his report and be discharged from any and all further liability to the stockholders as herein provided. Said assets, when turned over to the superior court hereunder, shall remain in the hands of the superior court until such time as, by order of court or by action of the stockholders, distribution shall be provided for.

(s) Annual Report of Commissioner of Banks; Items in Report of. — The Commissioner of Banks shall file, as a part of his annual report to the Governor, a list of the names of the banks so taken possession of and liquidated; and the Commissioner of Banks shall, from time to time, compile and make available for public inspection, reports showing the condition of each and all the banks so taken possession of; and the annual report of the Commissioner of Banks shall show the sum of unclaimed and unpaid deposits, with respect to each bank and shall show all depositories of all sums coming into the hands of the Commissioner of Banks under the provisions of this section.

(t) Compensation of Commissioner of Banks. — The Commissioner of Banks, for his services rendered in connection with the liquidation of banks hereunder, shall be entitled to actual expenses incurred in connection with the liquidation of each bank, including therein a reasonable sum for the time of the bank examiners and other agents of the Commissioner of Banks, which expenses shall be a prior lien on the assets of such bank so liquidated until paid in full; and the Commissioner of Banks shall have authority to prescribe reasonable rules and regulations for fixing such expenses.

(u) Exclusive Methods of Liquidation. — No bank created under the Banking Act or the Industrial Banking Act, and under the supervision of the

Commissioner of Banks, shall be liquidated in any other way or manner than that provided herein.

(v) Application of Act. — The applicable provisions of this section as enacted by Chapter 113 of the Public Laws of 1927 shall apply to all banks which on March 7, 1927, have suspended operations or are in the process of liquidation but for which no permanent receiver has been appointed by the court.

(w) Liquidation by Commissioner of Banks of All Banks in Receivership Required. — On and after the first day of January, 1936, the provisions of this section shall apply to all banks included in the definition or classification of banking institutions under this Chapter, and/or any amendment thereto, which at said time shall be in receivership in the State courts; and the said banks shall be liquidated exclusively in accordance with the provisions of this section and by said Banking Commissioner. The liquidation of said banks shall be made strictly in accordance with the terms of this section and the words "competent local attorneys," as set forth in subsection (o) of this section shall be defined to be any attorney or attorneys resident of the county in which the bank is being liquidated.

(x) Unlocated Depositor. — Any funds due a known but unlocated person shall be disposed in accordance with Chapter 116B of the General Statutes, except where the provisions of this Chapter specifically provide otherwise. (1921, c. 4, s. 17; C.S., s. 218(c); 1927, c. 113; 1931, c. 243, s. 5; cc. 385, 405; 1933, c. 175, s. 2; c. 546; 1935, c. 81, s. 4; c. 231, s. 1; c. 277; 1939, c. 91; 1947, c. 621, s. 1; 1971, c. 1135, s. 4; 1979, 2nd Sess., c. 1311, s. 4; 1991, c. 677, s. 1; 1995, c. 129, ss. 4, 5.)

Local Modification. — Buncombe: 1933, c. 27; Rutherford: 1933, c. 567.

Cross References. — As to conditions upon which closed banks may reopen, see G.S. 53-37. As to escheats generally, see G.S. 116B-1 et seq.

Legal Periodicals. — For brief discussion of the 1947 amendment, which added the last two sentences to subsection (p), and other provisions relating to escheats, see 25 N.C.L. Rev. 421 (1947) and 26 N.C.L. Rev. 110 (1948).

For comment on escheat of intangible property, see 2 Wake Forest Intra. L. Rev. 100 (1966).

CASE NOTES

I. General Consideration.
II. What Constitutes Assets.
III. Filing of Claims.
IV. Distribution of Assets and Preferences.

I. GENERAL CONSIDERATION.

Bank taken over by the Commissioner continues as a legal entity. It is not dissolved and does not cease to exist, but its powers are exercised by the Commissioner for the purpose of converting the assets, paying its liabilities, and distributing the surplus, if any, among the stockholders. People's Bank v. Fidelity & Deposit Co., 4 F. Supp. 379 (M.D.N.C. 1933), aff'd, 72 F.2d 932 (4th Cir. 1934).

Allowing Bank Officers to Continue Management Where Insolvency Imminent. — Among other powers conferred by statute, the Corporation Commission (now Commissioner of Banks) may, without taking possession of the business and property of a State bank, upon its appearing to be in imminent danger of insolvency, direct upon what conditions its officers may continue in its management and control, and thus avoid losses to depositors, creditors, and stockholders, necessarily incident to the closing of its doors. Taylor v. Everett, 188 N.C. 247, 124 S.E. 316 (1924), cited in People's Bank v. Fidelity & Deposit Co., 4 F. Supp. 379 (M.D.N.C. 1933), aff'd, 72 F.2d 932 (4th Cir. 1934).

Commissioner as Chancery Receiver. — The functions of the Commissioner of Banks are not limited to the provisions of this section, and the courts of equity have inherent power to permit him to exercise the functions of a chancery receiver in matters which are not inconsistent with his statutory duties. Blades v. Hood, 203 N.C. 56, 164 S.E. 828 (1932).

The Commissioner acts as a receiver under the inherent power of the court only in matters which are not provided for by statute, and his powers and duties in the collection and distribution of the assets of an insolvent bank are derived from the statute. Hoft v. Mohn, 215 N.C. 397, 2 S.E.2d 23 (1939).

Commissioner acts in a capacity equivalent to a receiver in taking over the assets of an insolvent bank, and in such capacity he represents the depositors and other creditors in the collection and distribution of the assets of the bank. Hood v. North Carolina Bank & Trust Co., 209 N.C. 367, 184 S.E. 51 (1936).

Commissioner as Representative of Bank. — Although the ultimate purpose of the collection of assets is for the benefit of the creditors and others entitled to final distribution, and in this sense the Commissioner undoubtedly represents them, yet, in the collection of specific items of debt, in a more technical sense he must be held to represent the bank to whose rights and privileges he has succeeded and which he exercises. He can assert no greater right than that of the bank against any debtor, nor can he avoid any defense which might not be made against the bank. In this respect, he is pro hac vice the bank. The payment by him of a judgment against the bank, out of its funds, has the same effect as it would have had if paid by the bank, and an assignment to him has the force and effect of an assignment to the bank. Hoft v. Mohn, 215 N.C. 397, 2 S.E.2d 23 (1939).

Vesting of Title to Assets in Receiver. — Upon the appointment of a receiver under the statute, whether voluntary or by act of the Corporation Commission (now the Commissioner of Banks), the title to all the bank's assets vests in the receiver to be administered for the benefit of its depositors, etc., alike. Douglass v. Dawson, 190 N.C. 458, 130 S.E. 195 (1925).

Proceeds of Sale of Bank's Property Cannot Be Paid to New Bank. — The court having jurisdiction is without power to authorize the sale of an insolvent bank's property under an agreement that the purchasers organize another bank and pay the purchase price to the newly-organized bank for distribution to the creditors and depositors, and thus relieve the Corporation Commission (now Commissioner of Banks) of its duty to collect and distribute the assets. In re LaFayette Bank & Trust Co., 198 N.C. 783, 153 S.E. 452 (1930).

Section Does Not Affect Jurisdiction to Restrain Commissioner. — The jurisdiction of the superior courts of this State to restrain the Commissioner of Banks, is not affected by this section. The Commissioner is an administrative officer of the State, and in the performance of his duties as prescribed by statute, is subject to the jurisdiction of the superior courts, in the exercise of their equitable jurisdiction. Stanly Bank & Trust Co. v. Hood, 206 N.C. 543, 174 S.E. 503 (1934); Hood v. Burrus, 207 N.C. 560, 178 S.E. 362 (1935).

When the Commissioner is made a party, he succeeds to the rights of the bank in the litigation pending and comes into the pending case for the purpose of protecting the rights of creditors in the recovery, not for the purpose of asserting a new and independent cause of action. Fidelity & Deposit Co. v. People's Bank, 72 F.2d 932 (4th Cir. 1934), cert. denied, 293 U.S. 627, 55 S. Ct. 348, 79 L. Ed. 714 (1935).

No new cause of action is created where Commissioner is made a party to a previous action by the bank on its cashier's fidelity bond. See People's Bank v. Fidelity & Deposit Co., 4 F. Supp. 379 (M.D.N.C. 1933), aff'd, 72 F.2d 932 (4th Cir. 1934).

Venue. — In determining residence for purposes of venue, the personal residence of the Commissioner of Banks controls, in the absence of statute. Hartford Accident & Indem. Co. v. Hood, 225 N.C. 361, 34 S.E.2d 204 (1945).

An action on a note by the Commissioner of Banks and the liquidating agent, etc., is properly brought in the county in which the insolvent bank is situate and of which the liquidating agent is a resident, and defendant's motion for change of venue to the county of their residence is properly refused. Hood v. Progressive Stores, 209 N.C. 36, 182 S.E. 694 (1935).

Action by Creditor Challenging Disposition of Assets. — A bank creditor may not maintain an action to interfere with the disposition of its assets by the Commissioner in the absence of any allegation of fraud, bad faith, or neglect on the part of the Commissioner, and a showing that a greater return would result from the disposition of the assets as contended for by the creditor. In re Hood, 208 N.C. 509, 181 S.E. 621 (1935).

Action to Recover for Wrongful Act of Officers and Directors. — Where the wrongful act of officers and directors is a breach of their duty to the bank, resulting in loss to the bank, the damages recoverable are assets of the bank. Upon its insolvency and upon the appointment of a receiver for the liquidation of the bank, such receiver, in the first instance, may alone maintain the action to recover the damages, as assets of the bank, to be administered by him for the benefit of all its depositors, creditors or stockholders. Bane v. Powell, 192 N.C. 387, 135 S.E. 118 (1926).

Order authorizing the Commissioner to sell a stock assessment judgment affected only the Commissioner and whoever purchased by virtue thereof, and so far as the stockholder against whom it was taken was concerned, the order was res inter alios acta. In re Hood, 208 N.C. 509, 181 S.E. 621 (1935).

Applied in Dixie Mercerizing Co. v. Hood, 207 N.C. 135, 176 S.E. 285 (1934); Williams v. Hood, 207 N.C. 737, 178 S.E. 669 (1935); In re Champion Bank & Trust Co., 207 N.C. 802, 178

S.E. 555 (1935); In re Hood, 208 N.C. 509, 181 S.E. 621 (1935); Hood v. Hewitt, 209 N.C. 810, 185 S.E. 161 (1936).

Cited in Underwood v. Hood, 205 N.C. 399, 171 S.E. 364 (1933); State v. Davidson, 205 N.C. 735, 172 S.E. 489 (1934); Pritchard v. Hood, 205 N.C. 790, 172 S.E. 485 (1934); Edgerton v. Hood, 205 N.C. 816, 172 S.E. 481 (1934); In re Central Bank & Trust Co., 205 N.C. 822, 172 S.E. 484 (1934); In re Bank of Murphy, 205 N.C. 840, 172 S.E. 181 (1934); Hood v. Mitchell, 206 N.C. 156, 173 S.E. 61 (1934); Hood v. Johnson, 208 N.C. 77, 178 S.E. 855 (1935); Hood v. Elder Motor Co., 209 N.C. 303, 183 S.E. 529 (1936); In re United Bank & Trust Co., 209 N.C. 389, 184 S.E. 64 (1936); Hood v. Clark, 211 N.C. 693, 191 S.E. 732 (1937); Windley v. Lupton, 212 N.C. 167, 193 S.E. 213 (1937); Briley v. Crouch, 115 F.2d 443 (4th Cir. 1940).

II. WHAT CONSTITUTES ASSETS.

"Assets" Defined. — The term "assets" is broad enough to cover anything available to pay the bank's creditors. Hill v. Smathers, 173 N.C. 642, 92 S.E. 607 (1917).

Right of Action Against Officers and Directors as Asset. — The right of action by the receiver of an insolvent bank for loss or depreciation of the bank's assets, due to the willful or negligent failure of its officers and directors to perform their official duties, is one enforceable for the benefit of the bank as well as for its creditors, and such liability of the officers and directors is an asset of the bank. Corporation Comm'n v. Merchants Bank & Trust Co., 193 N.C. 113, 136 S.E. 362 (1927).

Recoverable Damages as Assets. — Where the wrongful act of officers and directors is a breach of their duty to the bank, resulting in loss to the bank, the damages recoverable are assets of the bank. Bane v. Powell, 192 N.C. 387, 135 S.E. 118 (1926).

III. FILING OF CLAIMS.

When Claim Not Barred by Elapsing of 90-Day Period. — In an action against the statutory receiver of an insolvent bank to recover bonds held by the bank for safekeeping, where the agent of the receiver advised plaintiffs that no claim was necessary for the bonds, and the defendant (receiver) contended that, under this section, the claim was barred for failure to bring suit within 90 days after the time designated for presenting claims, or in 90 days after the claim was presented and disallowed upon notice to plaintiffs, plaintiffs were not "creditors" or "claimants" within the meaning of this section and therefore it was not applicable to the action, and further, even conceding it was applicable, it would be inequitable and unconscionable for defendant to be allowed to set same up as a defense. Bright v. Hood, 214 N.C. 410, 199 S.E. 630 (1938).

IV. DISTRIBUTION OF ASSETS AND PREFERENCES.

Taxes on Bank Property Constitute Preferred Claim. — Where a bank, owning the land upon which the bank building was situate, closed its doors and the Commissioner of Banks took possession for purposes of liquidation and at the time of closing there was an outstanding mortgage, all of which was unpaid and in default and county and town taxes were duly assessed and subsequently the mortgagee duly exercised the power of sale and became the purchaser of the property, the bank, the mortgagor, was the real owner and it was liable for taxes unpaid at the time of the sale. Such taxes constitute a preferred claim against the assets of the insolvent bank. Hood v. McGill, 206 N.C. 83, 173 S.E. 20 (1934).

Purchaser of Bank Draft or Check Not Entitled to Preference. — The purchase of a bank draft, a cashier's check, or a certified check creates the relation of debtor and creditor between the bank and the purchaser, and the purchaser is not entitled to a preference over other general creditors of the bank from which it was purchased. Great Atl. & Pac. Tea Co. v. Hood, 205 N.C. 313, 171 S.E. 344 (1933).

If a depositor in a bank takes a cashier's check for his deposit, and thereafter surrenders the cashier's check, purchasing with the proceeds a draft for the purchase price of certain bonds, and the bank is closed before the draft is paid, such transaction does not constitute a preference as defined by this section. In re Bank of Pender, 204 N.C. 143, 167 S.E. 561 (1933).

No Preference to Check or Draft on Another Bank. — Where a check was purchased from a bank, which a few days later became insolvent and the bank on which the check was drawn refused to honor it, the purchaser could not claim a preference under this section. Great Atl. & Pac. Tea Co. v. Hood, 205 N.C. 313, 171 S.E. 344 (1933).

Nor Where Draft Sent to Drawee Bank for Collection Not Charged to Drawer's Account. — Where a depositor drew a draft on his local bank against a general deposit and the payee forwarded the draft to the drawee bank for collection and it was returned with notice of the bank's insolvency, it was held that the drawer's claim was not entitled to a statutory preference under this section for the reason that the bank did not charge the draft to the account of the drawer; and if the bank's failure to return the draft within 24 hours after its receipt by mail implied an acceptance under the provisions of former G.S. 25-143 and 25-144, such acceptance did not ipso facto create a preference. Lamb v. Hood, 205 N.C. 409, 171 S.E. 359 (1933).

Nor Where Cashier's Check Issued but Proceeds Not Yet Remitted. — Where a bank debits an account with the amount of a check drawn by the depositor and issues its cashier's check for the amount but the bank is placed in a receiver's hands before remitting the proceeds to a third person, as instructed to do by the depositor, the cashier's check does not constitute a preference as defined by this section. Board of Educ. v. Hood, 204 N.C. 353, 168 S.E. 522 (1933).

No Preference in Assets of Failed Collecting Bank. — Where a certificate of deposit sent by an insurance company to a national bank for collection was used in clearance, a draft for the balance on the clearance transaction being received by the bank and its draft being sent to the company for the amount collected on the certificate; and the clearance draft not being paid, the collecting bank stopped payment on its draft and subsequently became insolvent, as did the other bank to the clearance transaction; and the collecting bank's receiver filed claim with the receiver of the other bank for the amount of the clearance draft, which was paid in full as a preferred claim under subsection (m) of this section; a debtor and creditor relationship in regard to the certificate arose between the insurance company and the collecting bank, and the company's successor was not entitled to a preference in the distribution of the collecting bank's assets. Citizens Nat'l Bank v. Fidelity & Cas. Co., 86 F.2d 4 (4th Cir. 1936), cert. denied, 299 U.S. 612, 57 S. Ct. 315, 81 L. Ed. 452 (1937).

Words "or otherwise" in the proviso in subsection (m) of this section, are to be construed in connection with the other parts of subsection (m), meaning any mode of transportation analogous to those specified in subsection (m), requiring "remitting" or "sending" the money to the payee of the check. Morecock v. Hood, 202 N.C. 321, 162 S.E. 730 (1932).

Lien Under Subsection (m) Not Applicable to Solvent Banks. — The proviso of subsection (m) of this section, relating to lien for amount of check, etc., collected and not remitted for, was not intended to apply to solvent banks. Spradlin v. Royal Mfg. Co., 73 F.2d 776 (4th Cir. 1934).

Nor to National Banks. — The proviso in subsection (m) of this section relating to the distribution of the assets of insolvent banks has no application to the assets of national banks. The National Banking Act provides how the assets of insolvent national banks shall be distributed, and state statutes cannot affect this distribution. Spradlin v. Royal Mfg. Co., 73 F.2d 776 (4th Cir. 1934).

Where a national bank received a draft for collection and remitted therefor a draft drawn on one of its correspondents, but failed before this draft could be paid, the owner of the draft collected had no lien on the assets of the insolvent bank in the hands of the receiver. There was no augmentation of the assets of the bank as a result of the collection, but merely a shifting of credits, and consequently no basis for the declaration of a tract. Spradlin v. Royal Mfg. Co., 73 F.2d 776 (4th Cir. 1934).

Check Presented over Counter Not Within Proviso. — Where a depositor presented his check for payment over the counter of a bank, which charged his account with the amount thereof and gave him a draft drawn on another bank, which was returned unpaid, he was not entitled to a preference in the assets of the bank drawing the draft, the transaction not coming within the proviso in subsection (m), as the check was not received by mail, express, or otherwise. Morecock v. Hood, 202 N.C. 321, 162 S.E. 730 (1932).

§ 53-21. Sale of stocks of defunct banks validated.

All private sales of stocks in resident corporations, joint stock companies and limited partnerships, made prior to March 20, 1935, by the Commissioner of Banks or a duly appointed agent in the course of the liquidation of a defunct bank, where such sale was made by and with the approval of a liquidation board duly selected by the creditors and stockholders of such bank and upon authority of an order of the presiding or resident judge of the district in which the principal office of such bank was located, are hereby in all respects validated, ratified and confirmed. (1935, c. 113.)

§ 53-22. Statute relating to receivers applicable to insolvent banks.

The provisions of G.S. 1-507.1 through 1-507.11, both inclusive, relating to receivers, when not inconsistent with the provisions of G.S. 53-20, shall apply to liquidation of insolvent banks. (1921, c. 4, s. 19; 1923, c. 148, s. 4; C.S., s. 218(e); 1931, c. 215; 1955, c. 1371, s. 4.)

CASE NOTES

Cited in Douglass v. Dawson, 190 N.C. 458, 130 S.E. 195 (1925); Blades v. Hood, 203 N.C. 56, 164 S.E. 828 (1932); Hoft v. Mohn, 215 N.C. 397, 2 S.E.2d 23 (1939).

§ 53-23. Disposition of books, records, etc.

All books, papers, and records of a bank which has been finally liquidated shall be deposited by the receiver in the office of the clerk of the superior court for the county in which the office of such bank is located, or in such other place as in his judgment will provide for the proper safekeeping and protection of such books, papers, and records. The books, papers, and records herein referred to shall be held subject to the orders of the Commissioner of Banks and the clerk of the superior court for the county in which such bank was located. (1921, c. 4, s. 20; C.S., s. 218(f); 1931, c. 243, s. 5.)

§ 53-24. Destruction of records of liquidated insolvent banks.

After the expiration of 10 years from the date of filing in the office of the clerk of the superior court of a final order approving the liquidation by the banking department of any insolvent bank and the delivery to the clerk or into his custody of the records of such bank, the said records may be destroyed by the clerk of the superior court holding said records by burning the same in the presence of the register of deeds and the sheriff of said county, who shall join with the clerk in the execution of a certificate as to the destruction of said records. The certificate shall be filed by the clerk in the court records of the liquidation of the bank whose records are thus destroyed.

After 10 years from the filing by the Commissioner of Banks of a final report of liquidation of any insolvent bank, the said Commissioner, by and with the consent of the State Banking Commission or its successor, may destroy by burning the records of any insolvent bank held in the Department of the Commissioner of Banks in connection with the liquidation of such bank: Provided, that in connection with any unpaid dividends the Commissioner of Banks shall preserve the deposit ledger or other evidence of indebtedness of the bank with reference to the unpaid dividend until the dividend shall have been paid.

Nothing in this section shall be construed to authorize the destruction by the clerk of the superior court of any county or by the Commissioner of Banks of any of the formal records of liquidation, nor shall the Commissioner of Banks have authority under this section to destroy any of the records made in his office with reference to the liquidation of any insolvent bank. (1939, c. 91, s. 1; c. 135.)

§ 53-25. Trust terminated on insolvency of trustee bank.

Whenever any bank created under the laws of this State, which has heretofore been, or shall hereafter be, appointed trustee in any indenture, deed of trust or other instrument of like character, executed to secure the payment of any bonds, notes or other evidences of indebtedness, has been or shall be by reason of insolvency, or for any other cause provided by law, taken over for liquidation by the Commissioner of Banks of this State or by any other legally constituted authority, the powers and duties of such bank as trustee in any such instrument shall, upon the entry of an order of the clerk of the superior court appointing a successor trustee, upon a petition as hereinafter provided, immediately cease and determine. (1931, c. 250, s. 1; 2001-263, s. 5.)

§ 53-26. Petition for new trustee; service upon parties interested.

In all cases of such insolvency and liquidation mentioned in G.S. 53-25, the clerk of the superior court of any county in which such indenture, deed of trust or other instrument of like character is recorded shall, upon the verified petition of any person interested in any such trust, either as trustee, beneficiary or otherwise, which interest shall be set out in said petition, enter an order directing service on all interested parties either personally or by the publication in a newspaper published in the county, or if no newspaper is published in the county where such application is made, then in a newspaper having a general circulation in such county, of a notice directed to all persons concerned, commanding and requiring all persons having any interest in said trust, to be and appear at his office at a day designated in said order and notice, not less than 30 days from the date thereof, and show cause why a new trustee shall not be appointed. (1931, c. 250, s. 2; 1995, c. 129, s. 6.)

§ 53-27. Publication and contents of notice.

Such notice shall be published in the manner required by law for service of summons by publication, and shall set forth the names of the parties to the indenture, deed of trust or other such instrument, the date thereof, and the place or places where the same is recorded. (1931, c. 250, s. 3.)

§ 53-28. Appointment where no objection made.

If, upon the day fixed in said notice, no person shall appear and object to the appointment of a substitute trustee, the clerk shall, upon such terms as he deems advisable to the best interest of all parties, appoint some competent person, or corporation authorized to act as such, substitute trustee, who shall be vested with and shall exercise all the powers conferred upon the trustee named in said instrument. (1931, c. 250, s. 4.)

§ 53-29. Hearing where objection made; appeal from order.

If objection shall be made to the appointment of a new trustee, the clerk shall hear and determine the matter, and from his decision an appeal may be prosecuted as in case of special proceedings generally. (1931, c. 250, s. 5.)

§ 53-30. Registration of final order.

The final order of appointment of such new trustees shall be certified by the clerk of the superior court in which such order is entered and shall be recorded in the office of the register of deeds in the county or counties in which the instrument under which such appointment has been made is recorded, and a minute of the same shall be entered by the register of deeds on the margin of the record where said original instrument is recorded. (1931, c. 250, s. 6.)

§ 53-31. Petition and order applicable to all instruments involved.

The petition and the order appointing such new trustee may include and relate and apply to any number of indentures, deeds of trust or other instruments, wherein the same trustee is named. (1931, c. 250, s. 7.)

§ 53-32. Additional remedy.

Sections 53-25 to 53-31 shall be in addition to and not in substitution for any other remedy provided by law. (1931, c. 250, s. 8.)

Legal Periodicals. — For discussion of this section and other remedies, see 9 N.C.L. Rev. 403 (1931).

§ 53-33. Validation of acts of officers of insolvent banks as trustees in deeds of trust.

Whenever any State bank, prior to January 1, 1931, shall have become insolvent and its assets and business been placed in the hands of the Commissioner of Banks or taken control of by the Commissioner of Banks for liquidation, and the board of directors of said bank shall have thereafter by resolution authorized or directed the officers of said bank or some of them to perform or exercise in the name of the bank as trustee any power or duty of such bank as trustee under any deed in trust to it recorded in any county in this State, provided said resolution was passed prior to the eleventh day of May, 1931, the performance or exercise of any such power or duty heretofore or hereafter by any officer or officers so authorized shall be effective and binding on all parties concerned as the act of such bank as trustee as aforesaid, to the same extent and in the same manner as if such bank had not become insolvent and its assets and business had not been placed in the hands of the Commissioner of Banks or taken control of by the Commissioner of Banks for liquidation. (1931, c. 403.)

Editor's Note. — Pursuant to Session Laws 1931, c. 243, s. 5, "Commissioner of Banks" has been substituted for "Corporation Commission" in four places. See G.S. 53-92.

§ 53-34. Validation of sales by Commissioner of Banks under mortgages, etc., giving banks power of sale.

Whenever it appears that either the Commissioner of Banks or any liquidating agent appointed pursuant to the provisions of G.S. 53-20, has undertaken to exercise the power of sale set up in any mortgage, deed of trust, or other written instrument for the security of the payment of money in which any bank then in liquidation was named trustee, the said acts including the acts of resigning the trust, of the Commissioner of Banks and/or liquidating agent appointed as aforesaid, are hereby validated and declared to be of the same force and effect as if done by the bank named as trustee in the mortgage, deed of trust, or other instrument. (1931, c. 132.)

Editor's Note. — This section appears to have been intended to overcome the effect of Mitchell v. Shuford, 200 N.C. 321, 156 S.E. 513 (1931). In view, however, of this case, and of Booth v. Hairston, 193 N.C. 278, 136 S.E. 879 (1927), rehearing denied, 195 N.C. 8, 141 S.E. 480 (1928), doubt has been cast upon the constitutionality of the validating act. It is believed, however, that the facts of the situation aimed at by the validating act can be distinguished. The future policy is stated in G.S. 53-25 et seq., and in the 1931 amendment to G.S. 53-20, subsection (g).

Pursuant to Session Laws 1931, c. 243, s. 5, "Commissioner of Banks" has been substituted for "North Carolina Corporation Commission, the chief State bank examiner" and for "North Carolina Corporation Commission and/or chief State bank examiner." See G.S. 53-92.

Legal Periodicals. — For discussion of section, see 9 N.C.L. Rev. 401 (1931).

§ 53-35. Foreclosures and execution of deeds by Commissioner of Banks validated.

Whereas, the Commissioner of Banks, created by Chapter 243 of the Public Laws of 1931, was given general supervision over the banks of this State; and

Whereas, the Commissioner of Banks, under authority of Chapter 385 of the Public Laws of 1931, succeeded to all the property of banks in liquidation, including fiduciary powers under the mortgages and deeds of trust; and

Whereas, the Commissioner of Banks, in his own name and in the name of a number of conservators or liquidating agents of banks in the process of liquidation under his supervision, has foreclosed a large number of deeds of trust in which such banks were the named trustee, and has executed under the powers contained therein a large number of trustee's deeds under authority thereof: Now, therefore, all the deeds and acts of the Commissioner of Banks and/or conservators or liquidating agents of such banks in the process of liquidation, as in the preamble to this section described, are hereby in all respects ratified, validated and confirmed.

This section shall not affect litigation pending April 3, 1939. (1939, c. 368.)

§ 53-36. Commissioner to report to Secretary of State certain matters relative to liquidation of closed banks; publication.

The Commissioner of Banks of the State of North Carolina shall on or before the first day of June, 1933, and on the first day of January and July of each year thereafter file with the Secretary of the State of North Carolina a report showing all banks under liquidation in the State of North Carolina, and the names of any and all auditors together with the amounts paid to them for auditing each of said banks, and the names of any and all attorneys employed in connection with the liquidation of said banks together with the amount paid or contracted to be paid to each of said attorneys. If any attorney has been employed on a fee contingent upon recovery said report must state in substance the contract.

Within five days from the receipt of said report the Secretary of the State of North Carolina shall cause same to be published one time in some newspaper published in each county in which a bank or banks are under liquidation, if there be a newspaper published in said county. If not, the Secretary of the State of North Carolina shall cause a copy of said report to be posted at the courthouse door in said county. (1933, c. 483.)

Article 4.

Reopening of Closed Banks.

§ 53-37. Conditions under which banks may reopen.

Whenever the Commissioner of Banks has taken in possession any bank, such bank may, with the consent of the Commissioner of Banks, resume business upon such terms and conditions as may be approved by the State Banking Commission. When such banks have been taken in possession under the provisions of G.S. 53-20, subsections (a) or (b), such conditions shall be fully stated in writing and a copy thereof shall be filed with the clerk of the superior court in the action required to be commenced in such cases against said bank under the provisions of G.S. 53-20, subsection (c): Provided, however, no bank or banking institution which has been taken in possession by the Commissioner of Banks under the provisions of the State banking laws shall be reopened to receive deposits or for the transaction of a banking business unless and until:

(1) The bank has been completely restored to solvency;
(2) The capital stock, if impaired, has been entirely restored in cash; or
(3) It shall clearly appear to the Commissioner of Banks that such bank may be reopened with safety to the public and such reopening is necessary to serve the business interests of the community. (1921, c. 4, s. 16; C.S., s. 218(q); 1927, c. 113, s. 1; 1931, c. 243, s. 5; c. 388, s. 1; 1939, c. 91, s. 2; 1995, c. 129, s. 7.)

§ 53-38. Certain contracts not affected.

Nothing in G.S. 53-37 shall impair or affect any contracts made by banks and depositors of banks reopened prior to May 12, 1931, under the permission of the State Banking Department. (1931, c. 388, s. 4.)

Cross References. — As to when Commissioner may take charge, see G.S. 53-19. As to liquidation, see G.S. 53-20.

CASE NOTES

Applied in Taylor v. Everett, 188 N.C. 247, 124 S.E. 316 (1924).

ARTICLE 5.

Stockholders.

§ 53-39. New State banks to set up surplus fund.

The common stockholders of any bank organized after March 17, 1933, under the laws of the State of North Carolina shall pay in, in cash, a surplus fund equal to fifty per centum (50%) of its common capital stock before the bank shall be authorized to commence business. (1933, c. 159, s. 2; 1935, c. 79, s. 1.)

Legal Periodicals. — For discussion of this section, see 11 N.C.L. Rev. 200 (1933) and 13 N.C.L. Rev. 91 (1935).

§ 53-40. Executors, trustees, etc., not personally liable.

Persons holding stock as executors, administrators, guardians, or trustees shall not personally be subject to any liabilities as stockholders, but the estate and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust fund would be if living and competent to hold stock in his own name. (1921, c. 4, s. 23; C.S., s. 219(c).)

CASE NOTES

This section extends to every trust relation, however created, and attaches liability to the estate and funds in the hands of the trustee. Hood v. North Carolina Bank & Trust Co., 209 N.C. 367, 184 S.E. 51 (1936).

Exemption Limited to Express and Ac-

tive Trusts. — This section refers not only to trustees appointed by will, or by order of a court or of a judge, but to any trust relation, however created. But the exemption is limited to cases of express and active trusts, where there is a probability of some estate to respond to the liability. American Trust Co. v. Jenkins, 193 N.C. 761, 138 S.E. 139 (1927).

Former Statutory Liability of Stockholders Abolished. — Public Laws 1935, c. 99, amending C. S. G.S. 219(a), abolished the former statutory liability of stockholders in the banks of this State. Fidelity Sec. Co. v. Hight, 211 N.C. 117, 189 S.E. 174 (1937); Hood v. Richardson Realty, 211 N.C. 582, 191 S.E. 410 (1937).

Liability of Bank Trustee to Trust Estate Cannot Be Set Off Against Liability of Estate. — The liability of a bank trustee to the trust estate for its negligence could not be set up as a counterclaim or setoff against the former statutory liability (abolished by Public Laws 1935, c. 99) of the estate upon the insolvency of the bank. In re United Bank & Trust Co., 209 N.C. 389, 184 S.E. 64 (1936).

Assignee of Judgment Against Executor as Such Not Entitled to Set Up Personal Liability of Executor. — The assignment of a judgment against an executor in his representative capacity for a stock assessment made on shares of stock of a bank in liquidation transfers only the rights of the assignor of the judgment in his status of judgment creditor and not his personal rights not incident to such status. The assignee is not entitled to set up the personal liability of the executor. Jones v. Franklin's Estate, 209 N.C. 585, 183 S.E. 732 (1936).

§ 53-41. Stock sold if subscription unpaid.

Whenever any stockholder, or his assignee, fails to pay any installment on the stock, when the same is required by law to be paid, the directors of the bank shall sell the stock of such delinquent stockholder at public or private sale, as they may deem best, having first given the delinquent stockholder 20 days' notice, personally or by mail, at his last known address. If no party can be found who will pay for such stock the amount due thereon to the bank with any additional indebtedness of such stockholder to the bank, the amount previously paid shall be forfeited to the bank, and such stock shall be sold, as the directors may order, within 30 days of the time of such forfeiture, and if not sold, it shall be canceled and deducted from the capital stock of the bank. (1921, c. 4, s. 25; C.S., s. 219(e).)

§ 53-42. Impairment of capital; assessments, etc.

The Commissioner of Banks shall notify every bank whose capital shall have become impaired from losses or any other cause, and the surplus and undivided profits of such bank are insufficient to make good such impairment, to make the impairment good within 60 days of such notice by an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made: Provided, that such bank may reduce its capital to the extent of the impairment, as provided in G.S. 53-11. If any stockholder of such bank neglects or refuses to pay such assessment as herein provided, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such stockholder or stockholders to be sold at public auction, upon 30 days' notice given by posting such notice of sale in the office of the bank and by publishing such notice in a newspaper in the county where the bank is located, and if none therein, a newspaper having general circulation in the county in which the bank is located, to make good the deficiency, and the balance, if any, shall be returned to the delinquent shareholder or shareholders. If any such bank shall fail to cause to be paid in such deficiency in its capital stock for three months after receiving such notice from the Commissioner of Banks, the Commissioner of Banks may forthwith take possession of the property and business of such bank until its affairs be finally liquidated as provided by law. A sale of stock, as provided in this section, shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall make the certificate null and void, and a new certificate shall be issued by the bank to the purchaser of such stock. (Ex. Sess. 1921, c. 56, s. 3; C.S., s. 219(f); 1925, c. 117; 1931, c. 243, s. 5; 1959, c. 157; 1995, c. 129, s. 8.)

Cross References. — As to the amount of reserve required, see G.S. 53-50 and 53-51.

CASE NOTES

Similarity to Former Federal Act. — This section is substantially similar to the former Nationally Banking Act, 6 Federal Statutes Annotated G.S. 5205, which was designed principally for the purpose of strengthening banks whose capital had become impaired. Elon Banking & Trust Co. v. Burke, 189 N.C. 69, 126 S.E. 163 (1925).

"Payable in Cash" Construed. — The expression "payable in cash" merely means that the account is presently due, and its payment may be presently enforced, but only by the methods the statute specifies. Elon Banking & Trust Co. v. Burke, 189 N.C. 69, 126 S.E. 163 (1925).

Retroactive Application of Provisions for Assessment Against Stockholders Unconstitutional. — The act of 1925, amending this section by providing for personal liability of stockholders for the amount by which the sale of their stock failed to realize a sum sufficient to pay the assessment, provided a new remedy, and to permit the bank to maintain the action against a stockholder who purchased his stock prior to the enactment of the amendment of 1925 would violate due process of law, and would impair the obligations of the contract, and hence the act of 1925 cannot be given retroactive effect. Bank of Pinehurst v. Derby, 218 N.C. 653, 12 S.E.2d 260 (1940).

§ 53-42.1. Change in bank control or management.

(a)(1) No person shall acquire voting stock of any bank or bank holding company, as defined in section 2 of the Bank Holding Company Act of 1956 as amended, which will result in a change in the control of the bank or bank holding company unless the Commissioner of Banks shall have approved the proposed acquisition.

(2) Written application for the proposed change in control of a bank or bank holding company must be filed with the Commissioner of Banks in such form as he may prescribe and contain such information as he may require at least 60 days prior to effective date of the proposed acquisition. The Commissioner of Banks shall approve the proposed change of control, unless upon examination and investigation he finds that

a. The character, competence, general fitness, experience or integrity of any acquiring person or of any of the proposed management personnel shows that it would not be in the interest of the depositors of the bank, or in the interest of the public to permit such person to control the bank or bank holding company; or

b. The financial condition of any acquiring person is such as might jeopardize the financial stability of the bank or bank holding company or prejudice the interests of the depositors of the bank.

All information contained in any application or report filed under this section and all information produced by examination and investigation of any application or report by the Commissioner of Banks shall be confidential and not available for public inspection.

(3) The provisions of this subsection shall not apply to the following transactions:

a. The acquisition of bank shares or assets which is subject to approval under section 3 of the Bank Holding Company Act as amended (12 U.S.C. 1842);
b. The acquisition of shares of a bank holding company as defined by section 2 of the Bank Holding Company Act as amended (12 U.S.C. 1841) which bank holding company has a national bank as its principal banking subsidiary;
c. The acquisition of shares in connection with securing, collecting, or satisfying a debt previously contracted in good faith;
d. The acquisition of shares by will or through intestate succession; and
e. The acquisition of shares by gift, unless such gift is made for the purpose of circumventing this section.

In the event of an acquisition of shares which is exempted by c, d, or e above, the person acquiring the shares shall report the transaction to the Commissioner of Banks within 30 days after the acquisition. The report shall contain such information and be in such form as the Commissioner shall request and prescribe.

(4) As used in this section the following terms shall have the following meanings:
a. "Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policy of the bank or bank holding company, or ownership of as much as ten percent (10%) of the outstanding voting stock in a bank or bank holding company; and
b. "Person" means an individual or a corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization or any other form of entity not specifically listed herein.

(b) Whenever a loan or loans are made by a bank, which loan or loans are, or are to be, secured by ten percent (10%) or more of the voting stock of a bank, the president or other chief executive officer of the bank which makes the loan or loans shall report such fact to the Commissioner of Banks within 24 hours after obtaining knowledge of such loan or loans, except when the borrower has been the owner of record of the stock for a period of one year or more, or the stock is of a newly organized bank prior to its opening. The report shall show the identity of borrower, the name of the bank issuing the stock securing the loan, the number of shares securing the loan and the amount of the loan or loans, and this report shall be in addition to any report that may be required pursuant to other provisions of law.

(c) Repealed by Session Laws 1981, c. 671, s. 6.

(d) Each bank shall report to the Commissioner of Banks within 24 hours any changes in chief executive officers or directors, including in its report a statement of the past and current business and professional affiliations of new chief executive officers or directors. (1967, c. 789, s. 5; 1981, c. 671, ss. 3-6.)

Legal Periodicals. — For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

CASE NOTES

Applied in Citicorp v. Currie, 75 N.C. App. 312, 330 S.E.2d 635 (1985).

ARTICLE 6.

Powers and Duties.

§ 53-43. General powers.

In addition to the powers conferred by law upon private corporations, banks shall have the power:

(1) To exercise by its board of directors, or duly authorized officers and agents, subject to law, all such powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of indebtedness, by receiving deposits, by buying and selling exchange, coin, and bullion, and by loaning money on personal security or real and personal property. Such corporation at the time of making loans may not take and receive interest or discounts in advance where the effective rates of interest or discounts collected shall exceed the maximum rates of interest provided under this section, G.S. 24-1.1 and 24-1.2 if such interest or discount had not been collected in advance.

(2) To adopt regulations for the government of the corporation not inconsistent with the Constitution and laws of this State.

(3) To purchase, hold, and convey real estate for the following purposes:

a. Such as shall be necessary for the convenient transaction of its business, including furniture and fixtures, with its banking offices and other spaces to rent as a source of income, which investment shall not exceed fifty percent (50%) of its unimpaired capital fund: Provided, that this fifty percent (50%) limitation shall not apply to banking houses, furniture and fixtures leased for the purposes set forth in this subdivision. Provided, further, that if any bank shall demonstrate to the satisfaction of the Commissioner of Banks that an investment of more than fifty percent (50%) of its unimpaired capital fund in its banking houses, furniture and fixtures, would promote the convenience of the general public in transacting its banking business and would not adversely affect the financial stability of the bank, the Commissioner of Banks may, in his discretion, authorize any bank to invest more than fifty percent (50%) of its unimpaired capital fund in its banking houses, furniture and fixtures.

b. Such as is mortgaged to it in good faith by way of security for loans made or moneys due to such banks.

c. Such as has been purchased at sales upon foreclosures of mortgages and deeds of trust held or owned by it, or on judgments or decrees obtained and rendered for debts due to it, or in settlements affecting security of such debts. All real property referred to in this subdivision shall be sold by such bank within five years after it is acquired unless, upon application by the board of directors, the Commissioner of Banks extends the time within which such sale shall be made. Any and all powers and privileges heretofore granted and given to any person, firm, or corporation doing a banking business in connection with a fiduciary and insurance business, or the right to deal to any extent in real estate, inconsistent with this Chapter, are hereby repealed.

(4) Nothing contained in this section shall be deemed to authorize banking corporations to engage in the business of dealing in investment securities: Provided, however, that the term "dealing in invest-

ment securities" as used herein, shall not be deemed to include the purchasing and selling of securities without recourse, solely upon order, and for the account of, customers; and provided further, that "investment securities," as used herein, shall not be deemed to include obligations of the United States, or general obligations of any state or of any political subdivision thereof, or of cities, towns, or other corporate municipalities of any state or obligations issued under authority of the Federal Farm Loan Act, as amended, or issued by the federal home loan banks or the Home Owner's Loan Corporation.

Any provision in conflict with this subdivision contained in the articles of incorporation heretofore issued to any banking corporation is hereby revoked.

(5) Repealed by Session Laws 1989, c. 187, s. 5.

(6) Maintain separate departments and deposit in its commercial department to the credit of its trust department all uninvested fiduciary funds of cash and secure, under rules and regulations of the State Banking Commission, all such deposits in the name of the trust department whether in consolidated deposits or for separate fiduciary accounts, by segregating and delivering to the trust department such securities as may be eligible for the investment of the sinking funds of the State of North Carolina, equal in market value to such deposited funds, or readily marketable commercial bonds having not less than a recognized "A" rating equal to one hundred and twenty-five per centum (125%) of such deposits. Such securities shall be held by the trust department as security for the full payment or repayment of all such deposits, and shall be kept separate and apart from other assets of the trust department. Until all of such deposits shall have been accounted for to the trust department or to the individual fiduciary accounts, no creditor of the bank shall have any claim or right to such security. When fiduciary funds are deposited by the trust department in the commercial department of the bank, the deposit thereof shall not be deemed to constitute a use of such funds in the general business of the bank and the bank in such instance shall not be liable for interest on such funds. To the extent and in the amount such deposits may be insured by the Federal Deposit Insurance Corporation, the amount of security required for such deposits by this section may be reduced.

The Banking Commission shall have power to make such rules and regulations as it may deem necessary for the enforcement of the provisions of the preceding paragraph, and such authority shall exist and is hereby conferred under the general authority heretofore conferred upon said Commission as well as by this paragraph.

(7) To issue, advise and confirm letters of credit authorizing the beneficiaries thereof to draw upon the institution or its correspondents.

(8) To receive money for transmission.

(9) To become a member of a clearinghouse association and to pledge assets required for its qualification.

(10) To provide for the performance of bank service corporation services, such as data processing services and bookkeeping, subject to such rules and regulations as may be adopted by the State Banking Commission. (1921, c. 4, s. 26; 1923, c. 148, s. 5; C.S., s. 220(a); Ex. Sess. 1924, c. 67; 1925, c. 279; 1927, c. 47, s. 5; 1931, c. 243, s. 5; 1933, c. 303; 1935, c. 81, s. 1; c. 82; 1937, c. 154; 1941, c. 77; 1943, c. 234; 1955, c. 590; 1961, c. 954; 1967, c. 789, s. 6; 1969, c. 541, s. 8; c. 1303, ss. 8, 9; 1979, c. 483, s. 4; 1981, c. 671, s. 7; 1983, c. 214, s. 2; 1989, c. 187, s. 5; 1995, c. 129, s. 9.)

Cross References. — As to forms for corporate conveyances, see G.S. 47-41.01, 47-41.02. As to powers conferred upon business corporations, see G.S. 55-3-02.

Editor's Note. — Section 24-1.2, referred to in subdivision (1) above, has been repealed.

Legal Periodicals. — For comment on subdivision (6), see 19 N.C.L. Rev. 544 (1941).

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

CASE NOTES

State banks have no powers beyond those expressly granted, or those fairly incidental thereto, in this Article. Sparks v. Union Trust Co., 256 N.C. 478, 124 S.E.2d 365 (1962).

Negotiations of Evidences of Debt. — In the course of its dealings and for a lawful purpose, a bank may negotiate notes, drafts, bills of exchange, and other evidences of indebtedness embraced by this section. Richmond County v. Page Trust Co., 195 N.C. 545, 142 S.E. 786 (1928).

Power to Become Surety or Lend Credit. — In the absence of an express grant of authority, a banking corporation, as a rule, does not have the power to become the guarantor or surety of the obligation of another person, or to lend its credit to any person. Indiana Quarries Co. v. Angier Bank & Trust Co., 190 N.C. 277, 129 S.E. 619 (1925).

A bank is not authorized to become a guarantor, except where it is necessary to protect its rights where the guaranty relates to commercial paper and is an incident to the purchase and sale thereof, or when the guaranty is especially authorized by law. Indiana Quarries Co. v. Angier Bank & Trust Co., 190 N.C. 277, 129 S.E. 619 (1925).

It is general banking practice to require that interest be paid in advance. Huski-Bilt, Inc. v. First-Citizens Bank & Trust Co., 271 N.C. 662, 157 S.E.2d 352 (1967).

Nothing in common law prohibits an order requiring production of bank records as part of an investigation of criminal activities of the bank's customers, and, if anything, the common law courts affirmatively possessed such power. By extension, then, the Superior Courts of North Carolina continue to possess such power where the interests of justice so require. In re Superior Court Order Dated April 8, 1983, 70 N.C. App. 63, 318 S.E.2d 843, rev'd on other grounds, 315 N.C. 378, 338 S.E.2d 307 (1986).

Cited in Lambeth v. Lambeth, 249 N.C. 315, 106 S.E.2d 491 (1959); Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 53-43.1. Obligations of agencies supervised by Farm Credit Administration as securities for deposits of public funds.

Notwithstanding any restrictions or limitations on securities for deposits of public funds contained in any law of this State, federal farm loan bonds issued by federal land banks pursuant to the Federal Farm Loan Act as amended, federal intermediate credit bank debentures issued by federal intermediate credit banks pursuant to the Federal Farm Loan Act as amended, and debentures issued by Central Bank for Cooperatives and regional banks for cooperatives pursuant to the Farm Credit Act of 1933 as amended, or by any of such banks, or any notes, bonds, debentures, or similar type obligations, consolidated or otherwise, issued by any farm credit institution pursuant to authorities contained in the Farm Credit Act of 1971 (Public Law 92-181), as amended, shall be without limitation, authorized securities for all deposits of public funds for the State of North Carolina, of agencies of the State of North Carolina, of counties of North Carolina, and of municipalities and other political subdivisions of the State of North Carolina. This section shall be cumulative to all other laws relating to securities for deposits of such funds. (1957, c. 507; 1973, c. 239, s. 2.)

§ 53-43.2. Obligations of agencies supervised by Federal Home Loan Bank Board as securities for deposits of public funds.

Notwithstanding any restrictions or limitations on securities for deposits of public funds contained in any law of this State, federal home loan banks securities issued by federal home loan banks pursuant to the Federal Home Loan Bank Act of 1932 as amended shall be without limitation, authorized securities for all deposits of public funds for the State of North Carolina, of agencies of the State of North Carolina, of counties of North Carolina, and of municipalities and other political subdivisions of the State of North Carolina. This section shall be cumulative to all other laws relating to securities for deposits of such funds. (1959, c. 1069, s. 1.)

§ 53-43.3. Officers and employees; share purchase and option plans.

Subject to any applicable rules or regulations of the State Banking Commission, a bank (i) may grant options to purchase, sell or enter into agreements to sell shares of its capital stock to its officers, directors, or employees, or all of such groups, for a consideration of not less than one hundred percent (100%) of the fair market value of the shares on the date the option is granted and (ii) may, pursuant to the terms of a stock purchase plan for the benefit of officers and employees, sell shares of the bank's capital stock for a consideration of not less than eighty-five percent (85%) of the fair market value of the shares on the date the purchase price is fixed. Provided, any stock option plan for the benefit of officers, directors, and employees or any stock purchase plan for the benefit of officers and employees shall not be effective until adopted by the board of directors of the bank and approved by the holders of at least two-thirds of the particular class or classes of stock entitled to vote on such proposal and by the Commissioner of Banks. In no event shall the option to purchase such shares be for a consideration less than the par value thereof. (1967, c. 789, s. 7; 1973, c. 1127; 1981, c. 671, s. 8; 1989, c. 187, s. 6.)

§ 53-43.4. Issuance of capital notes and debentures.

A bank shall have authority to issue capital notes or debentures, convertible or otherwise, subject to such regulations as the Banking Commission may adopt with respect thereto. (1967, c. 789, s. 7.)

§ 53-43.5. Minors' deposits and safe-deposit agreements.

(a) Deposits. — A bank, including an industrial bank, may operate a deposit account in the name of a minor or in the name of two or more persons, one or more of whom are minors, with the same effect upon its liability as if such minors were of full age. This section shall not affect the law governing transactions with minors in cases outside the scope of this section.

(b) Dealings with Minor. — A bank, including an industrial bank, may lease a safe-deposit box to and in connection therewith deal with a minor with the same effect as if leasing to and dealing with a person of full legal capacity. This section shall not affect the law governing transactions with minors in cases outside the scope of this section.

(c) Safe-Deposit Agreements. — An institution, including an industrial bank, may rent a safe-deposit box or other receptacle for safe deposit of property to, and receive property for safe deposit from, a married minor and spouse, whether adult or minor, jointly. This section shall not affect the law governing transactions with minors in cases outside the scope of this section. (1967, c. 789, s. 7; 1981, c. 599, s. 17.)

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Cited in Gastonia Personnel Corp. v. Rogers, 276 N.C. 279, 172 S.E.2d 19 (1970).

§ 53-43.6. School thrift or savings plan.

(a) A bank may arrange for the collection of savings from school children by the principal of the school, by the teachers, or by collectors, pursuant to regulations issued by the State Banking Commission and approved, in the case of public schools, by the board of education or board of trustees of the city or district in which the school is situated. The principal, teacher, or person authorized by the bank to make collections from the school children shall be the agent of the bank and the bank is liable to the pupil for all deposits made with such principal, teacher, or other authorized person to the same extent as if the deposits were made directly with the bank.

(b) The acceptance of deposits in furtherance of a school thrift or savings plan by an officer, employee or agent of a bank at any school shall not be construed as the establishment or operation of a branch or branch facility. (1967, c. 789, s. 7.)

§ 53-43.7. Safe-deposit boxes; unpaid rentals; procedure; escheats.

(a) If the rental due on a safe-deposit box has not been paid for 90 days, the lessor may send a notice by registered mail or certified mail, return receipt requested, to the last known address of the lessee stating that the safe-deposit box will be opened and its contents stored at the expense of the lessee unless payment of the rental is made within 30 days. If the rental is not paid within 30 days from the mailing of the notice, the box may be opened in the presence of an officer of the lessor and of a notary public who is not a director, officer, employee or stockholder of the lessor. The contents shall be sealed in a package by the notary public who shall write on the outside the name of the lessee and the date of the opening. The notary public shall execute a certificate reciting the name of the lessee, the date of the opening of the box and a list of its contents. The certificate shall be included in the package and a copy of the certificate shall be sent by registered mail or certified mail, return receipt requested, to the last known address of the lessee. The package shall then be placed in the general vaults of the lessor at a rental not exceeding the rental previously charged for the box.

(b) Any property, including documents or writings of a private nature, which has little or no apparent value, need not be sold but may be destroyed by the lessor if the Treasurer declines to receive the property under G.S. 116B-69(a).

(c) If the contents of the safe-deposit box have not been claimed within two years of the mailing of the certificate, the lessor may send a further notice to the last known address of the lessee stating that, unless the accumulated charges are paid within 30 days, the contents of the box will be delivered to the State Treasurer as abandoned property under the provisions of Chapter 116B.

(d) The lessor shall submit to the Treasurer a verified inventory of all of the contents of the safe-deposit box upon delivery of the contents of the box or such part thereof as shall be required by the Treasurer under G.S. 116B-55; but the lessor may deduct from any cash of the lessee in the safe-deposit box an amount equal to accumulated charges for rental and shall submit to the Treasurer a verified statement of such charges and deduction. If there is no cash, or insufficient cash to pay accumulated charges, in the safe-deposit box, the lessor may submit to the Treasurer a verified statement of accumulated charges or balance of accumulated charges due, and the Treasurer shall remit to the lessor the charges or balance due, up to the value of the property in the safe-deposit box delivered to the Treasurer, less any costs or expenses of sale; but if the charges or balance due exceeds the value of such property, the Treasurer shall remit only the value of the property, less costs or expenses of sale. Any accumulated charges for safe-deposit box rental paid by the Treasurer to the lessor shall be deducted from the value of the property of the lessee delivered to the Treasurer.

(e) Repealed by Session Laws 1979, 2nd Session, c. 1311, s. 5.

(f) An explanation of the contractual provisions pertaining to default, together with reference to this section shall be printed on every contract for rental of a safe-deposit box. (1967, c. 789, s. 7; 1979, 2nd Sess., c. 1311, s. 5; 1997-311, s. 1; 1999-460, ss. 9, 10.)

§ 53-44. Investment in bonds guaranteed by United States.

(a) Authority to Make Investments. — Any bank, building and loan association, land and loan association, savings and loan association, insurance company, title insurance company, land mortgage company, fraternal order or benevolent association, or any other corporation incorporated under the laws of this State, and operating under the supervision of the Commissioner of Banks, Insurance Commissioner, or Superintendent of Savings and Loan Associations; the State Treasurer, as custodian of the assurance fund provided under the Torrens Act, or any officer charged with the investment of sinking funds of the State, any county, city, town, incorporated village, township, school district, school taxing district, or other district or political subdivision of government of the State; the North Carolina State Thrift Society, any clerk of the court holding money by color of his office or as receiver; and any person, firm or corporation acting as executor, administrator, guardian, trustee, or other person acting in a fiduciary capacity may invest in bonds issued, or in bonds which are fully and unconditionally guaranteed as to principal and interest by the United States, to the same extent as the same are now or may be hereafter authorized to invest in any obligation of the United States: Provided that all investments authorized hereunder shall be guaranteed, both as to the payment of principal and interest thereon, by the United States treasury.

(b) Security for Loans and Deposits. — No bank shall be required to maintain a reserve against deposits secured by any of the above-mentioned bonds equal in market value to the amount of such deposits, and such bonds shall be valid security for all loans and deposits to the same extent as are any obligations of the United States.

(c) Bonds Deemed Cash in Settlements by Fiduciaries. — In settlements by guardians, executors, administrators, trustees and others acting in a fiduciary capacity, the bonds and securities herein mentioned shall be deemed cash to the amount actually paid for same, including the premium, if any, paid for such bonds, and may be paid as such by the transfer thereof to the persons entitled and without any liability for a greater rate of interest than the amount actually accruing from such bonds. (1935, c. 164; 1937, c. 433.)

Cross References. — For other provisions as to investment of funds in hands of clerks of court by color of their office, see G.S. 7A-112. As to power of fiduciary to invest generally, see G.S. 36A-2.

Legal Periodicals. — For discussion of section, see 13 N.C.L. Rev. 362 (1935).

§ 53-44.1. Investments in obligations of agencies supervised by Farm Credit Administration.

Notwithstanding any restrictions or limitations on investments contained in any law of this State, federal farm loan bonds issued by federal land banks pursuant to the Federal Farm Loan Act as amended, federal intermediate credit bank debentures issued by federal intermediate credit banks pursuant to the Federal Farm Loan Act as amended, and debentures issued by Central Bank for Cooperatives and regional banks for cooperatives pursuant to the Farm Credit Act of 1933 as amended, or by any of such banks, or any notes, bonds, debentures, or similar type obligations, consolidated or otherwise, issued by any farm credit institution pursuant to authorities contained in the Farm Credit Act of 1971 (Public Law 92-181), as amended, shall be, without limitation, authorized investments of funds of banks, savings banks, trust companies, insurance companies, building and loan associations, savings and loan associations, credit unions, fraternal organizations, pension and retirement funds, and of fiduciary funds of executors, administrators, guardians and trustees, unless such trust and fiduciary funds are required to be otherwise invested by will, deed, order or decree of court, gift, grant or other instrument creating or fixing the trust. This section shall be cumulative to all other laws relating to investments of such funds. (1957, c. 508; 1973, c. 239, s. 3.)

§ 53-44.2. Investments in obligations of agencies supervised by Federal Home Loan Bank Board.

Notwithstanding any restrictions or limitations on investments contained in any law of this State, federal home loan banks securities issued by federal home loan banks pursuant to the Federal Home Loan Bank Act of 1932 as amended shall be without limitation, authorized investments of funds of banks, savings banks, trust companies, insurance companies, building and loan associations, savings and loan associations, credit unions, fraternal organizations, pension and retirement funds, and of fiduciary funds of executors, administrators, guardians and trustees, unless such trust and fiduciary funds are required to be otherwise invested by will, deed, order or decree of court, gift, grant or other instrument creating or fixing the trust. This section shall be cumulative to all other laws relating to investments of such funds. (1959, c. 1069, s. 2.)

§ 53-45. Banks, fiduciaries, etc., authorized to invest in securities approved by the Secretary of Housing and Urban Development, Federal Housing Administration, Veterans Administration, etc.

(a) Insured Mortgages and Obligation of National Mortgage Associations and Federal Home Loan Banks. — It shall be lawful for all commercial and industrial banks, trust companies, building and loan associations, savings and loan associations, insurance companies, mortgagees and loan correspondents approved by the Secretary of Housing and Urban Development or Federal Housing Administration, and other financial institutions engaged in business in this State, and for guardians, executors, administrators, trustees or others acting in a fiduciary capacity in this State to invest, to the same extent that such funds may be invested in interest-bearing obligations of the United States, their funds or moneys in their custody or possession which are eligible for investment, in bonds or notes secured by a mortgage or deed of trust insured or guaranteed by the Federal Housing Administration, Secretary of Housing and Urban Development or the Veterans Administration, or in mortgages or deeds of trust on real estate which have been accepted for insurance or guarantee by the Federal Housing Administration, Secretary of Housing and Urban Development or Veterans Administration, and in obligations of a national mortgage association which obligations are insured or guaranteed by the United States Government, or bonds, debentures, consolidated bonds, or other obligations of any federal home loan bank or banks.

(b) Insured or Guaranteed Loans; Loans Purchased by National Mortgage Associations and Federal Home Loan Banks. — All such banks, trust companies, building and loan associations, savings and loan associations, insurance companies, mortgagees and loan correspondents approved by the Secretary of Housing and Urban Development, or Federal Housing Administration, and other financial institutions, and also all such guardians, executors, administrators, trustees or others acting in a fiduciary capacity in this State, may make such loans, secured by real estate, as the Secretary of Housing and Urban Development, the Federal Housing Administration, a national mortgage association, or the Veterans Administration has insured or guaranteed, or has made a commitment to insure or guarantee, and may obtain such insurance or guarantee; provided, further, that the above designated financial institutions, may make loans, secured by real estate, that are eligible and committed for sale to a national mortgage association, federal home loan bank, federal home loan mortgage corporation or other agency or instrumentality of the United States.

(c) Eligibility for Credit Insurance. — All banks, trust companies, building and loan associations, savings and loan associations, insurance companies, mortgagees and loan correspondents approved by the Secretary of Housing and Urban Development, or Federal Housing Administration and other financial institutions, on being approved as eligible for credit insurance by the Secretary of Housing and Urban Development, the Federal Housing Administration, or the Veterans Administration, may make such loans as are insured by the Secretary of Housing and Urban Development or Federal Housing Administration or insured or guaranteed by the Veterans Administration.

(d) Certain Securities Made Eligible for Collaterals, etc. — Whenever by statute of this State, collateral is required as security for the deposit of public or other funds; or deposits are required to be made with any public official or department; or an investment of capital or surplus, or a reserve or other fund is required to be maintained, consisting of designated securities, bonds, and notes secured by a mortgage or deed of trust insured or guaranteed by the Secretary of Housing and Urban Development, Federal Housing Administration, or Veterans Administration, debentures issued by the Secretary of Housing and Urban Development or the Federal Housing Administration and obligations of a national mortgage association shall be eligible for such purposes.

(e) General Laws not Applicable. — No law of this State prescribing the nature, amount or form of security or requiring security upon which loans or investments may be made, or prescribing or limiting the rates or time of payment of the interest any obligation may bear, or prescribing or limiting the period for which loans or investments may be made, shall be deemed to apply to loans or investments made pursuant to the foregoing paragraphs. (1935, cc. 71, 378; 1937, c. 333; 1959, c. 364, s. 1; 1961, c. 291; 1971, c. 888.)

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

§ 53-46. Limitations on investments in securities.

The investment in any bonds or other debt obligations of any one firm, individual, or corporation, unless it be the obligations of the United States, or agency thereof, or other obligations guaranteed by the United States Government, State of North Carolina, or other state of the United States, or other political subdivision of the State of North Carolina, or other state of the United States in which the bank maintains a branch, shall at no time exceed fifty thousand dollars ($50,000) plus ten percent (10%) of all amounts in excess of two hundred fifty thousand dollars ($250,000) of the bank's unimpaired capital fund. (1921, c. 4, s. 27; C.S., s. 220(b); 1927, c. 47, s. 6; 1931, c. 243, s. 5; 1933, c. 359; 1935, c. 199; 1937, c. 186; 1967, c. 789, s. 8; 1979, c. 483, s. 5; 1995, c. 129, s. 10.)

Cross References. — As to the suspension of this section, see G.S. 53-49. As to limitation of amount of bank acceptances, see G.S. 53-56.

CASE NOTES

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 53-46.1. Investments in mutual funds.

Subject to rules adopted by the Banking Commission, a bank may invest a portion of its unimpaired capital in mutual funds. Any limitation imposed by rule on the amount of such investment shall be in addition to a bank's limitations on investment in stocks provided in G.S. 53-47. (1995, c. 129, s. 11.)

§ 53-47. Limitations on investment in stocks.

(a) In addition to any powers or investments authorized by any other section of this Chapter, a bank may invest in the capital stock or other securities of any other state, national or foreign bank or trust company, and in any other industrial bank, savings bank, Morris Plan bank, savings and loan association, bankers' bank or other deposit taking entity chartered or existing under any federal, state, or foreign law including, but not limited to, the capital stock of clearing corporations defined in G.S. 25-8-102, the capital stock or other securities of central reserve banks whose capital stock exceeds one million dollars ($1,000,000) and the capital stock of an Edge or Agreement corporation. As used in this Chapter, the term "bankers' bank" means an insured depository financial institution, organized and chartered to do business exclusively with other banks and savings institutions, and the stock of which, or the stock of the holding company which controls such bank, is owned exclusively (except to the extent directors' qualifying shares are required by law) by banks or savings institutions. To constitute a central reserve bank as contemplated by this Chapter, at least fifty percent (50%) of the capital stock of such bank shall be owned by other banks. The investment of any bank in the capital stock of such central reserve bank or bank organized under the "Edge Act", (12 U.S.C. § 611 et seq.) shall at no time exceed ten percent (10%) of the paid-in capital and permanent surplus of the bank making the investment.

(b) A bank may invest, without limitation, in a corporation, firm, partnership, or company:

(1) Which is a bank operating subsidiary, or

(2) To protect the bank from loss.

(c) In addition to the foregoing, upon 30 days prior written notice to the Commissioner of Banks, providing such detail as the Commissioner may require, a bank may invest, in the aggregate, up to seventy-five percent (75%) of its unimpaired capital fund in the stock or assets of other corporations, firms, partnerships, or companies which are:

(1) Primarily engaging in activities permissible for national banks or bank holding companies under applicable laws, rules, regulations or orders;

(2) Primarily engaging in activities of a financial nature, including the transmission or processing of information or data relating to such activities. For the purpose of this subsection, activities of a financial nature shall include, but not be limited to, all forms of securities activities, including underwriting, distribution, and brokerage, together with such other activities as the Commissioner of Banks shall determine by regulation or order;

(3) Engaging in any other activity approved by the Commissioner of Banks.

(d) Any state or national bank subsidiary which engages in an activity subject to licensure and/or regulation under other than Chapter 53 of the General Statutes shall be subject to licensure and/or regulation on a basis that does not arbitrarily discriminate by the appropriate regulatory agency which licenses and/or regulates nonbanks which engage in the same activity.

(e) Unless otherwise notified by the Commissioner within 30 days following receipt of the written notice, a bank may complete its investment in the stock or assets of the other corporation, firm, partnership, or company, or commence a new activity through an existing subsidiary. The Commissioner may extend the 30-day period if the Commissioner determines that the proposed investment or activity raises issues which require additional information or additional time for analysis. If the 30-day period is extended, the bank may proceed with respect to the proposed investment or activity only upon written approval of the Commissioner of Banks.

(f) The Commissioner of Banks shall monitor the impact of investment activities of banks under this section on the safety and soundness of such banks. Any stocks owned or hereafter acquired in excess of the limitations herein imposed shall be disposed of at public or private sale within six months after the date of acquiring the stocks, and if not so disposed of, they shall be charged to profit and loss account, and no longer carried on the books as an asset. The limit of time in which said stocks shall be disposed of or charged off the books of the bank may be extended by the Commissioner of Banks if in the Commissioner's judgment it is for the best interest of the bank that such extension be granted; provided that the limitations imposed in this section on the ownership of stock in or securities of corporations are suspended only to the extent that any bank operating under the supervision of the Commissioner of Banks may subscribe for and purchase shares of stock in or debentures, bonds, or other types of securities of any corporation organized under the laws of the United States for the purposes of insuring to depositors a part or all of their funds on deposit in banks where and to such extent as such stock or security ownership is required in order to obtain the benefits of such deposit insurance for its depositors. (1921, c. 4, s. 28; C.S., s. 220(c); 1931, c. 243, s. 5; 1935, c. 81, s. 3; 1973, c. 497, s. 7; 1983, c. 214, s. 3; 1991, c. 677, s. 2; 1995, c. 417, s. 1; 1997-181, s. 25.)

§ 53-48. Limitation of loans.

(a) The total loans and extensions of credit, both direct and indirect, by a bank to a person, other than a municipal corporation for money borrowed, including in the liabilities of a firm the liabilities of the several members thereof, outstanding at one time and not fully secured, as determined in a manner consistent with subsection (b) of this section, by collateral having a market value at least equal to the amount of the loan or extension of credit shall not exceed the greater of fifteen percent (15%) of the unimpaired capital fund of the bank or the percentage permitted for national banks in this State by statute or regulation of the Comptroller of the Currency.

(b) The total loans and extensions of credit, both direct and indirect, by a bank to a person outstanding at one time and fully secured by readily marketable collateral having a market value, as determined by reliable and continuously available price quotations, at least equal to the amount of the loan or extension of credit outstanding shall not exceed the greater of ten percent (10%) of the unimpaired capital fund of the bank or the percentage permitted for national banks by statute or regulation of the Comptroller of the Currency. This limitation shall be separate from and in addition to the limitation contained in subsection (a) of this section.

(c) The discount of bills of exchange drawn in good faith against actual existing values, the discount of solvent trade acceptances or other solvent commercial or business paper actually owned by the person negotiating the same, loans or extensions of credit secured by a segregated deposit account in the lending bank, the purchase of bankers acceptances of the kind described in section 13 of the Federal Reserve Act and issued by other banks, and the purchase of any notes and the making of any loans, secured by not less than a like face amount of bonds of the United States, or an agency of the United States, or other obligations guaranteed by the United States Government, or State of North Carolina or certificates of indebtedness of the United States, or agency thereof, or other obligations guaranteed by the United States Government, shall not be considered as money borrowed within the meaning of this section: Provided, however, that the limitations of this section shall not apply to loans or obligations to the extent that they are secured or covered by guarantees or by commitments or agreements to take over or purchase the same, made by any federal reserve bank or by the United States or any department, board, bureau, commission or establishment of the United States, including any corporation wholly owned directly or indirectly by the United States.

(d) For purposes of this section, the term "person" shall be deemed to include an individual, or a corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization or any other form of entity not specifically listed herein. Loans or extensions of credit to one person include loans made to other persons when the proceeds of the loans or extensions of credit are to be used for the direct benefit of the first person or the persons are engaged in a common enterprise. The Commissioner of Banks shall monitor the lending activities of banks under this section for undue credit concentrations and inadequate risk diversification which could adversely affect the safety and soundness of such banks. (1921, c. 4, s. 29; 1923, c. 148, s. 6; C.S., s. 220(d); 1925, c. 119, s. 1; 1927, c. 47, s. 7; 1937, c. 419; 1943, c. 204; 1945, c. 127, s. 1; 1967, c. 789, s. 9; 1979, c. 483, s. 6; 1983, c. 214, s. 4; 2004-171, s. 1.)

Cross References. — As to the suspension of this section, see G.S. 53-49. As to limitation of amount of bank acceptances, see G.S. 53-56.

Editor's Note. — Session Laws 2004-171, s. 17, provides: "The Legislative Research Commission shall undertake a comprehensive study of those laws, including Chapters 53, 54B, and 54C of the General Statutes, which affect the establishment and operation of banks in North Carolina and shall make recommendations to the 2005 General Assembly, prior to the convening of the 2006 Regular Session as to which laws (i) are obsolete, unnecessary, or duplicative, (ii) are unnecessarily inconsistent in the treatment of banks, savings and loan associations, and savings banks, and (iii) unnecessarily restrict, impede, or prohibit activities of banks, savings and loan associations, and savings banks or the ability of the Commissioner of Banks to regulate banks and savings institutions in an effective, efficient, and equitable manner.

"In preparing its recommendations, the Commission shall actively solicit and consider information received from representatives of banks, savings and loan associations, savings banks, the State Banking Commission, the Commissioner of Banks and the Commissioner's staff, other interested parties, and the general public."

CASE NOTES

Purpose. — The wisdom of this section and G.S. 53-111 is manifest; banks whose business is conducted in strict compliance therewith seldom become insolvent. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Section Not Retroactive. — The statutory limitation upon a bank making loans to any one person or class of common interest does not apply to loans, or extensions or renewals thereof, existing at the date of the ratification of this section. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Loss of Assets Must Be Shown in Action for Violation of Section. — In an action against the managing officials of a bank for wrongful depletion of assets in mismanagement of the affairs of the bank in making loans in excess of the limit set forth in this section, the evidence is insufficient to be submitted to a jury, if it appears that no loss to the assets of the bank has been caused by the acts of the officials. Gordon v. Pendleton, 202 N.C. 241, 162 S.E. 546 (1932).

Liability of Bank's Officers. — A bank must act through its officers and directors, and where they have violated the provisions of this section as to lending the bank's money, the offense is committed by them under the meaning of the statute, and they are individually indictable therefor. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925); State v. Davidson, 205 N.C. 735, 172 S.E. 489 (1934).

Showing of Knowledge of Violation Is Sufficient for Conviction. — Where the official position of an officer of a bank is such as necessarily to acquaint him of the violation of the statute respecting the making of loans, and to fix him as a party thereto, it is sufficient evidence to sustain his conviction of the misdemeanor prescribed by G.S. 53-134. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Intent to Defraud Not Element of Offense. — An intent to defraud the bank or others is not required to be either alleged in the indictment or proved upon the trial of the issue raised by a plea of not guilty. Neither the bank nor any of its officers or directors have any discretion as to the making of loans which are thus forbidden. Intent is, therefore, not an element of the crime. The willful doing of the unlawful act constitutes the crime declared by G.S. 53-134 to be a misdemeanor. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Consolidation of Indictments under This Section and § 53-111. — An indictment charging the officer of the bank of violating G.S. 53-111, and also unlawfully making loans for the bank to certain persons in excess of the maximum percentage of the capital stock and permanent surplus, in violation of this section, alleges the commission of crimes of the same class. Where there are two indictments thereof against the same person they may be consolidated and tried together by the court. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 53-49. Suspension of investment and loan limitation.

The board of directors of any bank, may by resolution duly passed at a meeting of the board, request the Commissioner of Banks to suspend temporarily the limitations on loans and investments as the same may apply to any particular loan or investment in excess of the limitations of G.S. 53-46, 53-47, and 53-48 which the bank desires to make. Upon receipt of a duly certified copy of such resolution, the Commissioner of Banks may, in his discretion, suspend the limitations on loans and investments insofar as they would apply to the loan or investment which the bank desires to make: Provided, however, such loan shall be amply secured and shall be for a period not longer than 120 days. (1921, c. 4, s. 30; C.S., s. 220(e); 1931, c. 243, s. 5; 1933, c. 239, s. 1.)

§ 53-50. Requirement of reserve fund.

(a) A bank which is not a member of the federal reserve system shall maintain at all times a reserve fund in such amounts and/or ratios as shall be fixed by regulation of the Banking Commission. In fixing the amounts and/or ratios of the reserve fund the Banking Commission shall take into consideration the level of liquidity necessary to assure the safety and soundness of the State banking system.

(b) A bank which is a member of the federal reserve system shall maintain at all times a reserve fund in accordance with the requirements applicable to a member bank under the laws of the United States.

(c) A bank shall give written notice to the Commissioner of Banks, in the manner prescribed by the Commissioner for such notice, of any deficiency in the reserve fund required under subsection (a) or (b) of this section within three business days after the close of any scheduled averaging period during which such deficiency occurs. (1921, c. 4, s. 31; C.S., s. 220(f); 1967, c. 789, s. 10; 1973, c. 554; 1981, c. 671, s. 9.)

Cross References. — As to effect of impaired capital upon reserve, see G.S. 53-42. As to authority to join federal reserve bank, see G.S. 53-61. As to failure to maintain required reserve, see G.S. 53-111.

CASE NOTES

Applied in State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 53-51. Reserve and cash defined.

(a) Reserve shall consist of:

(1) Cash on hand;

(2) Balances payable on demand, due from other approved solvent banks, which have been designated depositories as hereinafter provided in this Chapter; and

(3) Subject to rules and regulations, duly adopted by the State Banking Commission, fixing the maximum percentage of required reserves that may consist of such obligations, the following prescribed unencumbered, interest-bearing obligations, which shall not have more than 120 days to final maturity:

a. Obligations of the United States Treasury and of any agency of the United States which are guaranteed by the United States Government; and

b. General obligation of the State of North Carolina and of any political subdivision thereof which has received an investment rating of A or higher by a nationally recognized rating service.

(4) Balances maintained at a federal reserve bank either directly or on a pass-through basis to meet the reserve requirements of the federal reserve system.

(b) For purposes of this section, cash shall include both lawful money of the United States and exchange of any clearinghouse association. (1903, c. 275, s. 29; Rev., s. 232; 1919, c. 58; 1921, c. 4, s. 32; C.S., s. 220(g); 1979, c. 483, s. 7; 1981, c. 671, s. 10.)

§ 53-52: Repealed by Session Laws 1981, c. 599, s. 19.

Cross References. — For present provisions relating to bank's liability for payment of forged check, see G.S. 25-4-406.

§ 53-53: Repealed by Session Laws 1981, c. 599, s. 18.

§ 53-54. Transactions not performed during banking hours.

Nothing in any law of this State shall in any manner whatsoever affect the validity of, or render void or voidable, the payment, certification, or acceptance of a check or other negotiable instrument or any other transaction by a bank in this State, because done or performed during any time other than regular banking hours. Nothing herein shall be construed to require a bank doing business in this State to be open when it may otherwise lawfully be closed or to prohibit a bank from conducting a transaction at times other than its regularly scheduled hours of operation. (1921, c. 4, s. 35; C.S., s. 220(j); 1995, c. 129, s. 12.)

§ 53-55. Commercial and business paper defined.

The term "commercial or business paper," as used in this Chapter, is hereby defined to mean a promissory note, and the term "trade acceptance" to mean a draft or bill of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used or are to be used for such purposes, but such definition shall not include notes, drafts, or bills of exchange covering merely investments, or issued or drawn for the purpose of carrying on or trading in stocks, bonds, or other investment securities, except bonds and notes of the government of the United States and State of North Carolina. (1921, c. 4, s. 36; 1923, c. 148, s. 7; C.S., s. 220(k); 1941, c. 268.)

§ 53-56. Bank acceptances defined.

Any bank doing business under this Chapter may accept for payment at a future date, drafts or bills of exchange having not more than six months' sight to run, drawn upon it by its customers under acceptance agreements, and which grow out of transactions involving the importation or exportation of goods; and issue letters of credit authorizing the holders thereof to draw upon it or its correspondents, provided that there is a definite bona fide contract for the shipment of goods within a specified reasonable time, and the existence of such contract is certified in the acceptance agreement; or which grow out of transactions involving the domestic shipment of goods, provided that shipping documents, conveying or securing to the accepting bank title to readily marketable goods, are attached or in the hands of an agent of the accepting bank, independent of the drawer, for his account, at the time of acceptance, or which are secured at the time of acceptance by warehouse receipts or other documents conveying or securing to the accepting bank title to readily marketable goods fully covered by insurance, the warehouse receipts or other documents to be those of a responsible warehouse, independent of the drawer, the acceptance to remain secured during the life of the acceptance unless suitable security of same character, or cash, be substituted: Provided, no bank shall accept drafts or bills of exchange under this section to an aggregate amount at any time more than equal to the sum of its capital and permanent surplus: Provided further, that no bank shall accept, whether in a foreign or domestic transaction, for any one person, firm, or corporation, to any amount at any time equal to more than twenty-five percent (25%) of its capital and permanent surplus, unless the accepting bank is secured either by attached documents or those held for its account by its agent, independent of the drawer, or by some other actual security of the same character. Should the accepting bank purchase or discount its own acceptances, such acceptances will be considered as a direct loan to the drawer, and be subject to the limitation on loans hereinbefore provided in this Chapter. The State Banking Commission may issue such further regulations as to such acceptances as it may deem necessary in conformity with this Chapter. As used herein, the word "goods" shall be construed to mean and include goods, wares, merchandise, or agricultural products, including livestock. (1921, c. 4, s. 37; C.S., s. 220(l); 1931, c. 243, s. 5; 1939, c. 91, s. 2.)

§§ 53-57, 53-58: Repealed by Session Laws 1965, c. 700, s. 2.

Cross References. — For provisions of the UCC as to bank deposits and collections, see G.S. 25-4-101 to 25-4-504.

§ 53-59: Repealed by Session Laws 1991, c. 677, s. 3.

§ 53-60. Authorized investment in farm loan bonds.

Any bank or insurance company organized under the laws of this State, and any person acting as executor, administrator, guardian, or trustee, may invest in federal farm loan bonds issued by any federal farm loan bank or joint-stock land bank organized pursuant to an act entitled "An act of Congress to provide capital for agricultural development, to create standard forms of investment based upon farm mortgages to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create government depositories, and financial agents for the United States, and for other purposes," approved the seventeenth day of July, 1916, or any notes, bonds, debentures, or similar type obligations, consolidated or otherwise, issued by any farm credit institution pursuant to authorities contained in the Farm Credit Act of 1971 (Public Law 92-181), as amended. (1921, c. 4, s. 41; C.S., s. 220(p); 1973, c. 239, s. 4.)

§ 53-61. Authority to join federal reserve bank.

(a) Terms Defined. — The words "Federal Reserve Act," as herein used, shall be held to mean and to include the act of Congress of the United States, approved December 23, 1913, as heretofore and hereafter amended. The words "Federal Reserve Board" shall be held to mean the Federal Reserve Board created and described in the Federal Reserve Act. The words "federal reserve banks" shall be held to mean federal reserve banks created and organized under the authority of the Federal Reserve Act. The words "member bank" shall be held to mean any national or state bank or bank and trust company which has become or which becomes a member of one of the federal reserve banks created by the Federal Reserve Act.

(b) Membership in Bank. — Any bank incorporated under the laws of this State shall have the power to subscribe to the capital stock and become a member of a federal reserve bank.

(c) Powers Vested by Federal Reserve Act. — Any bank incorporated under the laws of this State which is, or which may become, a member of the federal reserve bank is by this Chapter vested with all powers conferred upon member banks of the federal reserve banks by terms of the Federal Reserve Act as fully and completely as if such powers were specifically enumerated and described therein, and such powers shall be exercised subject to all restrictions and limitations imposed by the Federal Reserve Act, or by regulations of the Federal Reserve Board made pursuant thereto. The right, however, is expressly reserved to revoke or to amend the powers herein conferred.

(d) Compliance with Reserve Requirements. — A compliance on the part of any such bank with the reserve requirements of the Federal Reserve Act shall be held to be a full compliance with the provisions of the laws of this State, which require banks to maintain cash balances in their vaults or with other banks, and no such bank shall be required to carry or maintain reserve other than such as is required under the terms of the Federal Reserve Act.

(e) Supervision and Examination of Bank. — Any such bank shall continue to be subject to the supervision and examination required by the laws of this State, except that the Federal Reserve Board shall have the right, if it deems necessary, to make examinations; and the authorities of this State having supervision over such banks may disclose to the Federal Reserve Board, or to the examiners duly appointed by it, all information in reference to the affairs of any bank which has become, or desires to become, a member of a federal reserve bank. (1921, c. 4, s. 42; C.S., s. 220(q).)

Cross References. — As to the amount of reserve required, see G.S. 53-50.

CASE NOTES

Taxation Under Employment Security Law. — A bank organized under the laws of this State is not an instrumentality of the federal government so as to exempt it from the tax imposed by the Employment Security Law, Chapter 96, notwithstanding that the bank may be a member of the Federal Reserve System. Unemployment Comp. Comm'n v. Wachovia Bank & Trust Co., 215 N.C. 491, 2 S.E.2d 592 (1939).

§ 53-62. Establishment of branches; limited service facilities; and off-premises customer-bank communications terminals.

(a) The word "capital" as used in this section means capital stock and unimpaired surplus.

(b) A bank doing business under this Chapter may establish branches or limited service facilities within this State after having first obtained the written approval of the Commissioner of Banks, which approval may be given or withheld by the Commissioner of Banks, in his discretion. The Commissioner of Banks, in exercising such discretion, shall take into account, but not by way of limitation, such factors as the financial history and condition of the applicant bank, the adequacy of its capital structure, its future earnings prospects, and the general character of its management. Such approval shall not be given until he shall find (i) that the establishment of such branch or limited service facility will meet the needs and promote the convenience of the community to be served by the bank, and (ii) that the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch or limited service facility and of the existing bank or banks in said community.

(c)(1) A branch or limited service facility of a bank shall be operated as a branch or office of and under the name of the bank, and under the control and direction of the board of directors and executive officers of the bank. The board of directors of the bank shall elect such officers as may be required to properly conduct the business of any branch or limited service facility.

(2) The Commissioner of Banks shall not authorize the establishment of a branch until he is satisfied that the applicant bank has sufficient capital to maintain a minimum capital to asset ratio as the Commissioner of Banks, in his discretion, may require. In determining such ratio the Commissioner of Banks shall give due consideration to (i) the amount of capital required to support the bank's projected growth, (ii)

the bank's earnings history and projected earnings, (iii) the quality of the bank's assets, (iv) compliance with the fixed asset limitation contained in G.S. 53-43(3), and (v) the business experience and reputation of bank management.

(3) The Commissioner of Banks may, on written application by a bank, in his discretion authorize the bank to establish a limited service facility after considering the criteria and making the findings required in subsection (b).

(d) A limited service facility, upon written request to the Commissioner of Banks, and after meeting the requirements of subsection (c) may convert to a branch. If branch status is granted then the branch shall be subject to all of the conditions and requirements of that type of banking office.

Upon 30 days written notice to the Commissioner of Banks, a bank may discontinue any limited service facility operation; provided, however, if a limited service facility has within five years preceding the proposed closing date been a branch of any bank, it shall comply with the requirements of subsection (e) below before closing.

(d1) Subject to such rules and regulations as may be prescribed by the State Banking Commission with regard to their use, maintenance and supervision, any bank may establish off the premises of any principal office, branch or limited service facility a customer-bank communications terminal, point-of-sale terminal, automated teller machine, automated banking facility or other direct or remote information-processing device or machine, whether manned or unmanned, through or by means of which information relating to any financial service or transaction rendered to the public is stored and transmitted, instantaneously or otherwise, to or from a bank or other nonbank terminal; and the establishment and use of such a device or machine shall not be deemed a branch or limited service facility, and the capital requirements and standards for approval of a branch or limited service facility, all as set forth in subsections (b) and (c) of this section, shall not be applicable to the establishment of any such off-premises terminal device or machine.

(e) A bank may, upon resolution by the board of directors, discontinue a branch office subject to the following:

(1) The bank shall notify the Commissioner in writing of its intent to close a branch not later than 90 days prior to the proposed closing date. Such notice shall include a detailed statement of the reasons for the decision to close a branch and statistical or other information in support of such reasons.

(2) The bank shall provide a notice of its intent to close a branch to its customers. Such notice shall be posted in a conspicuous manner on the branch premises for a period of 30 days prior to the proposed closing date, and shall either be included in at least one of any regular account statements mailed to customers of such branch, or in a separate mailing to such customers. The later notice shall be given at least 90 days prior to the proposed closing date.

No branch shall be closed until approved by the Commissioner of Banks, provided, however, the consolidation of two or more branches into a single location in the same vicinity shall not be considered a closure subject to the provisions of this subsection.

(f) Any action taken by the Commissioner of Banks pursuant to this section shall be subject to review by the State Banking Commission which shall have the authority to approve, modify or disapprove any action taken or recommended by the Commissioner of Banks. (1921, c. 4, s. 43; Ex. Sess. 1921, c. 56, s. 2; C.S., s. 220(r); 1927, c. 47, s. 8; 1931, c. 243, s. 5; 1933, c. 451, s. 1; 1935, c. 139; 1947, c. 990; 1953, c. 1209, ss. 2, 5; 1963, c. 793, s. 3; 1967, c. 789, s. 11; 1975, cc. 553, 850; 1983, c. 214, s. 5; 1989, c. 187, s. 7; 1995, c. 129, s. 13; 2002-29, s. 1.)

Legal Periodicals. — For comment on amendments, see 11 N.C.L. Rev. 199 (1933); 13 N.C.L. Rev. 360 (1935).

CASE NOTES

I. General Consideration.
II. Needs and Convenience Test.
III. Solvency Test.
IV. Branches of National Banks.

I. GENERAL CONSIDERATION.

Purpose. — The motivation for this section was to minimize the danger of a run on a bank due to a rumor of insolvency. State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972).

The purpose of subsection (b) of this section was to require that each separate branch contribute to the solvency of the system. State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972).

The purpose to be accomplished by subsection (b) was protection of the solvency of banks. State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972).

What Commission Must Find. — As a condition precedent to the establishment of a branch, the Commissioner of Banks must find that such branch will meet the needs of the community and the probable volume of business will be sufficient to assure and maintain the solvency of such branch. State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972).

No Provision for Approval Where Subsection (b) Test Not Met. — No provision is made for the approval of any branch that fails to meet the requirements of subsection (b)(i) and (ii). State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972).

Consolidation of Applications for Hearing. — Applications for branches may be consolidated and heard together, but the evidence and finding must be sufficient to support each application independent of the other. State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972).

While two applications by a bank to establish branches in the same city may be consolidated for hearing, each application must be treated as a separate application and be approved or denied on the basis of the evidence relating thereto, and separate findings and conclusions must be made as to each application. State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972).

Applied in First-Citizens Bank & Trust Co. v. Camp, 409 F.2d 1086 (4th Cir. 1969); First-Citizens Bank & Trust Co. v. Camp, 432 F.2d 481 (4th Cir. 1970); State ex rel. Banking Comm'n v. Bank of Rocky Mount, 12 N.C. App. 112, 182 S.E.2d 625 (1971); State ex rel. Banking Comm'n v. Lucama-Kenly Bank, 17 N.C. App. 557, 195 S.E.2d 69 (1973).

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

II. NEEDS AND CONVENIENCE TEST.

No Conflict with Federal Antitrust Statutes. — There is no conflict between the policies of the federal antitrust statutes and the "need and convenience" test for the establishment of a branch bank. First Nat'l Bank v. Wachovia Bank & Trust Co., 448 F.2d 637 (4th Cir. 1971).

Needs of Community Is an Administrative Question. — With respect to banking, what will serve the needs of the community is, to a substantial degree, an administrative question involving a multiplicity of factors which cannot be given inflexible consideration. State ex rel. Banking Comm'n v. Avery County Bank, 14 N.C. App. 283, 188 S.E.2d 9, cert. denied, 281 N.C. 514, 189 S.E.2d 35 (1972); State ex rel. Banking Comm'n v. Cabarrus Bank & Trust Co., 15 N.C. App. 183, 189 S.E.2d 496 (1972).

But Banking Commission Does Not Have Untrammeled Discretion. — The Banking Commission does not have untrammeled discretion in determining what will meet the needs and promote the convenience of the community. State ex rel. Banking Comm'n v. Avery County Bank, 14 N.C. App. 283, 188 S.E.2d 9, cert. denied, 281 N.C. 514, 189 S.E.2d 35 (1972).

Factors Used to Determine Need and Convenience. — Determination of whether a proposed branch bank will meet the needs and promote the convenience of the community to be served should involve a consideration of at least the following factors: (1) whether existing banks provide a full complement of banking services at competitive rates and fees; (2) the need for specialized services offered by the applicant bank not presently available through existing banks, examples of such services being: a. larger lending limits, b. trust department services, c. consumer and commercial loan expertise, d. international banking, e. farm development services, f. industrial development services, g. automated accounting and check clearance services; (3) the extent to which management of existing banks has been active and vigorous as evidenced by the assumption of leadership and participation in the economic growth of the community; (4) the composition of the population and its prospects for growth; (5) the nature and strength of the economy and its prospects for growth; (6) the extent to which competition from the entry of a new bank in the area will stimulate the economy and make for a more healthy banking business; and (7) the extent to which the entry of the new bank has public support in the community. Bank of New Bern v. Wachovia Bank & Trust Co., 353 F. Supp. 643 (E.D.N.C. 1972).

Factors Bearing on Need and Convenience Not Specified in Section. — This section does not provide any degree of specificity as to the factors, proof of which would show the presence or absence of "need and convenience" for a new branch bank. First-Citizens Bank & Trust Co. v. Camp, 409 F.2d 1086 (4th Cir. 1969); State ex rel. Banking Comm'n v. Cabarrus Bank & Trust Co., 15 N.C. App. 183, 189 S.E.2d 496 (1972).

Applicant Need Not Establish Existence of Specific Unmet Banking Need. — Subsection (b) of this section does not require that an applicant bank establish the existence of specific, unmet banking needs as a prerequisite to the establishment of a branch bank. State ex rel. Banking Comm'n v. Avery County Bank, 14 N.C. App. 283, 188 S.E.2d 9, cert. denied, 281 N.C. 514, 189 S.E.2d 35 (1972); State ex rel. Banking Comm'n v. Cabbarrus Bank & Trust Co., 15 N.C. App. 183, 189 S.E.2d 496 (1972).

But Merely Offering to Provide Alternative Banking Services Is Not Sufficient. — Absent some indication that additional competition is desirable, merely offering to provide alternative banking services is not sufficient under the statute. State ex rel. Banking Comm'n v. Avery County Bank, 14 N.C. App. 283, 188 S.E.2d 9, cert. denied, 281 N.C. 514, 189 S.E.2d 35 (1972).

Fact that applicant is the largest bank in North Carolina is irrelevant, alone, in determining needs and convenience. Bank of New Bern v. Wachovia Bank & Trust Co., 353 F. Supp. 643 (E.D.N.C. 1972).

Quantum of Proof Required. — Quantum of proof to show need and convenience for the establishment of a branch office in a suburban area would be much less than that required to show need and convenience for the establishment of an entirely new banking facility in the city. Bank of New Bern v. Wachovia Bank & Trust Co., 353 F. Supp. 643 (E.D.N.C. 1972).

Test of Substantial Evidence Not Met. — Where the evidence is uncontradicted that the existing bank offer a full complement of banking services at competitive rates, that the only specialized services offered by the applicant which are not offered by the existing banks are larger lending limits and international banking for which the likelihood of any need now or in the future has not been shown, and that there is no indication the proposed branch has public support in the community, the decision that a new bank is necessary does not meet the test of substantial evidence. Bank of New Bern v. Wachovia Bank & Trust Co., 353 F. Supp. 643 (E.D.N.C. 1972).

III. SOLVENCY TEST.

Solvency tests under subsection (b) are twofold: Each new branch must not endanger the solvency of the parent bank and it must not endanger the solvency of another bank already in the field. State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972).

Branch may not be established which would be financial failure or would endanger solvency of another bank already in the field. State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972).

IV. BRANCHES OF NATIONAL BANKS.

State Laws Govern Branching of National Banks. — The Comptroller of the Currency must look to State law to determine if a branch bank can be opened. Security Bank & Trust Co. v. Heimann, 452 F. Supp. 776 (M.D.N.C. 1978).

National branch banking is limited to states the laws of which permit it, and even there only to the extent that the state laws permit branch banking. First Nat'l Bank v. Wachovia Bank & Trust Co., 325 F. Supp. 523 (M.D.N.C. 1971), aff'd, 448 F.2d 637 (4th Cir. 1971).

All statutory law requirements of the State dealing with the establishment of branch State banks must be complied with before a branch national bank can be lawfully approved by the Comptroller of the Currency of the United States. First Citizens Bank & Trust Co. v. Camp, 281 F. Supp. 786 (E.D.N.C. 1968), aff'd, 409 F.2d 1086 (4th Cir. 1969).

The Comptroller of the Currency of the United States is bound by State law in considering the applications of national banks to establish branch banks. Citizens Nat'l Bank v. Wachovia Bank & Trust Co., 329 F. Supp. 585 (M.D.N.C. 1971).

National Bank Branch Must Meet "Need and Convenience" Test. — In accordance with subsection (b)(i) of this section, the Comptroller of the Currency must find that the establishment of a branch bank "will meet the needs and promote the convenience of the community." First Nat'l Bank v. Wachovia Bank &

Trust Co., 448 F.2d 637 (4th Cir. 1971); State ex rel. Banking Comm'n v. Cabarrus Bank & Trust Co., 15 N.C. App. 183, 189 S.E.2d 496 (1972); Security Bank & Trust Co. v. Heimann, 452 F. Supp. 776 (M.D.N.C. 1978).

And Solvency Test. — The plain wording of subsection (b)(ii) of this section, which is the second part of the test made applicable to the Comptroller of the Currency by North Carolina law, indicates that a new bank branch and the existing bank or banks must meet the solvency test. The statute does not say that the new branch and the existing branch or branches in the area must meet the test. First Nat'l Bank v. Wachovia Bank & Trust Co., 448 F.2d 637 (4th Cir. 1971); State ex rel. Banking Comm'n v. Cabarrus Bank & Trust Co., 15 N.C. App. 183, 189 S.E.2d 496 (1972); Security Bank & Trust Co. v. Heimann, 452 F. Supp. 776 (M.D.N.C. 1978).

Needs and Convenience of Community, Not Individuals, Considered. — To show that the needs of a community will be met by a proposed branch bank does not require evidence from potential bank customers of their individual needs which existing banks are unwilling or unable to provide; rather, the Comptroller of the Currency of the United States is free to apply the expertise of his office to determine if the proposed branch will meet the needs and promote the convenience of the community to be served, and if his decision is supported by substantial evidence it will be sustained. Bank of New Bern v. Wachovia Bank & Trust Co., 353 F. Supp. 643 (E.D.N.C. 1972).

Standard for Judicial Review of Informal Administrative Agency Action. — The appropriate standard to be used by a federal district court in reviewing an administrative agency's justification for informal action is not the substantial evidence test, which is appropriate when reviewing findings made on a hearing record, but rather whether the comptroller's adjudication was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Where a fact-finding hearing is held, clearly the standard of review is substantial evidence. Security Bank & Trust Co. v. Heimann, 452 F. Supp. 776 (M.D.N.C. 1978).

If the Comptroller of the Currency followed the State law in determining if a branch bank could be opened, his decision must be affirmed unless it was arbitrary, capricious, or an abuse of discretion. Security Bank & Trust Co. v. Heimann, 452 F. Supp. 776 (M.D.N.C. 1978).

The decision of the Comptroller of the Currency authorizing the opening of a branch bank must be affirmed unless it was arbitrary and capricious. Security Bank & Trust Co. v. Heimann, 452 F. Supp. 776 (M.D.N.C. 1978).

Standard for Judicial Review of Fact-Gathering Hearing. — Where a hearing on the establishment of a branch bank was held and the hearing was merely to gather facts, that is a fact-gathering procedure, the standard of review is the lesser arbitrary and capricious test. Security Bank & Trust Co. v. Heimann, 452 F. Supp. 776 (M.D.N.C. 1978).

Sufficient Findings Must Be Approved Even If Late and Grudgingly Made. — Where the Comptroller of the Currency of the United States has made, even though belated and grudgingly, legally sufficient findings and conclusions on the criteria prescribed by this section, and such findings are supported by substantial evidence, his action would be neither arbitrary nor capricious and must be approved. Citizens Nat'l Bank v. Wachovia Bank & Trust Co., 329 F. Supp. 585 (M.D.N.C. 1971).

And Despite Avowed Intention Not to Comply with Section. — Where the opinion of the Comptroller of the Currency of the United States took into account the factors required to be considered by this section, his findings sufficed to satisfy the requirements of this section, notwithstanding his avowed intention not to do so. First Citizens Bank & Trust Co. v. Southern Nat'l Bank, 329 F. Supp. 186 (E.D.N.C. 1971).

§ 53-63. Unlawful issuing of certificate of deposit.

It shall be unlawful for any bank to issue any certificate of deposit or other negotiable instrument of its indebtedness to the holder thereof except for lawful money of the United States, checks, drafts, or bills of exchange which are the actual equivalent of such money. Any officer or employee of any bank violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1921, c. 4, s. 44; C.S., s. 220(s); 1993, c. 539, s. 418; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 129, s. 14.)

CASE NOTES

Cited in City of Southport v. Williams, 290 F. 488 (E.D.N.C. 1923).

§ 53-64. Loans secured by bank's own stock or stock of parent bank holding company.

(a) It shall be lawful for a bank to make a loan secured by the pledge of its own shares of stock or the stock of its parent holding company; provided that whenever any bank shall exercise its security interest in the shares of the bank or its parent holding company upon a loan default or other transfer, it shall dispose of all of such shares of stock within a period of six months. If such stock has not been disposed of within six months, the same shall be charged to profit and loss and no longer carried as an asset of the bank. The Commissioner may extend the six-month period not to exceed an additional six months.

(b) A bank may not make a loan to finance the purchase of or to carry its stock or the stock of its parent holding company. For purposes of this subsection, the phrase "to carry" shall have the meaning set forth in 12 C.F.R. Part 221, by the Board of Governors of the Federal Reserve System.

(c) A bank may not purchase any portion of its shares of stock, nor the stock of its parent holding company, unless the same is purchased or pledged to the bank to prevent a loss upon a debt previously contracted in good faith. In the event the bank shall become the owner of its shares, or those of its parent holding company, the bank shall dispose of the same as provided in subsection (a) of this section. (1921, c. 4, s. 45; C.S., s. 220(t); 1927, c. 47, s. 9; 1983, c. 214, s. 6; 1995, c. 296, s. 1.)

CASE NOTES

Taking Stock in Payment of Note. — A payee bank may not cancel a note in consideration of shares of its stock delivered to it by the maker of the note, it not appearing that he was insolvent, or that the transaction was necessary to prevent loss to the bank, and payment so made is not a valid defense in the hands of another bank to which the note had been indorsed before maturity by the payee bank as collateral security. White v. Whitehurst, 194 N.C. 305, 139 S.E. 598 (1927).

As to lien on stock under former law, see Boyd v. Redd, 120 N.C. 335, 27 S.E. 35 (1897); First Nat'l Bank v. Riggins, 124 N.C. 534, 32 S.E. 801 (1899); In re W.W. Mills Co., 162 F. 42 (E.D.N.C. 1908).

§ 53-65. Deposits payable on demand.

Any bank may receive deposits of funds subject to withdrawals or to be paid upon the checks of the depositor. All deposits in such banks shall be payable on demand, without notice, except when the contract of deposit shall otherwise provide. (1921, c. 4, s. 46; C.S., s. 220(u).)

Cross References. — As to definition of "demand deposits," see G.S. 53-1.

§ 53-66: Repealed by Session Laws 1983, c. 214, s. 7.

§ 53-67. Banks controlled by boards of directors.

The corporate powers, business, and property of banks doing business under this Chapter shall be exercised, conducted, and controlled by its board of directors, which shall meet at least quarterly. Such board shall consist of not less than five directors, to be chosen by the stockholders, and shall hold office for the term for which they are elected, and until their successors are elected and qualified. The annual meeting of stockholders for the election of directors shall be held at such time as may be designated by the charter or the bylaws of the bank but shall be held not later than June 30 each year; provided, however, that any bank which has been open for business for fewer than 12 months as of June 30 of the current year shall hold its first annual meeting by not later than June 30 of the following year. In addition to the foregoing powers relating to the fixing of the number and the election of directors, the stockholders of a bank, at any stockholders' meeting, special or annual, may authorize not more than two additional directorships which may be left unfilled and to be filled in the discretion of the directors of the institution during the interval between such stockholders' meetings. Aside from the specific provisions of this section, the number, election, term and classification of the directors of banks doing business under this Chapter shall be governed by the provisions of the North Carolina Business Corporation Act. (1921, c. 4, s. 48; C.S., s. 220(w); 1925, c. 170; 1965, c. 188; 1967, c. 789, s. 12; 1983, c. 24, ss. 1, 2; 1989, c. 187, s. 8; 1989 (Reg. Sess., 1990), c. 1024, s. 3; 2004-171, s. 2.)

Editor's Note. — Session Laws 2004-171, s. 17, provides: "The Legislative Research Commission shall undertake a comprehensive study of those laws, including Chapters 53, 54B, and 54C of the General Statutes, which affect the establishment and operation of banks in North Carolina and shall make recommendations to the 2005 General Assembly, prior to the convening of the 2006 Regular Session as to which laws (i) are obsolete, unnecessary, or duplicative, (ii) are unnecessarily inconsistent in the treatment of banks, savings and loan associations, and savings banks, and (iii) unnecessarily restrict, impede, or prohibit activities of banks, savings and loan associations, and savings banks or the ability of the Commissioner of Banks to regulate banks and savings institutions in an effective, efficient, and equitable manner.

"In preparing its recommendations, the Commission shall actively solicit and consider information received from representatives of banks, savings and loan associations, savings banks, the State Banking Commission, the Commissioner of Banks and the Commissioner's staff, other interested parties, and the general public."

This section, as amended by Session Laws 2004-171, s. 2, effective October 1, 2004, is applicable to acts occurring and transactions or agreements entered into on or after that date.

Legal Periodicals. — For note, "The Need for Antitrust Legislation Tailored to the Specific Concerns of Bank-Nonbank Director Interlocks," see 1982 Duke L.J. 938.

§ 53-68. Statements showing deposits of State and State officials.

All banks in which any money is on deposit by the State of North Carolina or any of the officials thereof shall, in their published statements as by law required, show the amount of money on deposit in such bank to the credit of the State or of any official thereof; and no officials of the State shall deposit money in any bank which shall refuse to comply with the provisions of this section. (1923, c. 211, s. 1; C.S., s. 220(x).)

Cross References. — As to deposit of State funds, see G.S. 147-77 et seq.

§ 53-69: Repealed by Session Laws 1945, c. 635.

§ 53-70. No fees on remittances covering checks.

No bank or trust company in this State shall charge a fee on remittances covering checks. (1921, c. 20, s. 1; C.S., s. 220(z); 1971, c. 244, s. 1.)

§ 53-71. Checks payable in exchange.

In order to prevent accumulation of unnecessary amounts of currency in the vaults of the banks and trust companies chartered by this State, all checks drawn on said banks and trust companies shall, unless specified on the face thereof to the contrary by the maker or makers thereof, be payable at the option of the drawee bank, in exchange drawn on the reserve deposits of said drawee bank when any such check is presented by or through any federal reserve bank, post office, or express company, or any respective agents thereof. (1921, c. 20, s. 2; C.S., s. 220(aa).)

Cross References. — As to checks exempt from section, see G.S. 53-73.

Legal Periodicals. — For discussion of section, see 1 N.C.L. Rev. 133 (1923); 2 N.C.L. Rev. 36 (1924); 8 N.C.L. Rev. 55 (1930).

CASE NOTES

Constitutionality. — This section does not violate the Constitution of the United States. F & M Bank v. Federal Reserve Bank, 262 U.S. 649, 43 S. Ct. 651, 67 L. Ed. 1157 (1923), overruling 183 N.C. 546, 112 S.E. 252 (1922); Federal Land Bank v. Barrow, 189 N.C. 303, 127 S.E. 3 (1925).

Purpose and Effect. — This section was enacted to relieve banks and trust companies, chartered by this State, of embarrassments growing out of the policy theretofore pursued by the federal reserve bank with respect to the collection of checks drawn on said banks and trust companies. It does not deal with or purport to deal with the rights or liabilities of depositors who in the transaction of their business draw checks on their deposits with said banks and trust companies. The purpose of the section and its only effect is to confer upon such banks and trust companies the right, in certain instances, to pay checks drawn on them in a medium other than money, and to deprive the payee or holder of such checks of the right to demand payment in money. Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929).

The effect of this section is as though the provision of the law is written into the face of the check; and consequently where the maker or drawer does not specify cash payment, he agrees, as does the payee in accepting it, that if presented by or through a federal reserve bank, express company, etc., the check shall be payable by an exchange draft drawn by the payee bank on its reserved deposits. F & M Bank v. Federal Reserve Bank, 262 U.S. 649, 43 S. Ct. 651, 67 L. Ed. 1157 (1923); Cleve v. Craven Chem. Co., 18 F.2d 711 (4th Cir. 1927).

Construed Strictly. — This section should be construed strictly. Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929).

Section does not change the general rule that when a depositor draws his check on a bank or trust company chartered by this State, such check is payable in money, or at the option of the holder, in a medium other than money — such payment being at the risk of holder. Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929).

Federal reserve banks cannot require payment in any other medium than the exchange. Federal Land Bank v. Barrow, 189 N.C. 303, 127 S.E. 3 (1925).

Right to Require Payment in Money. — Under this section the drawer has the right to specify on the face of the check that payment shall be made in money, and in such case the drawee bank or trust company must pay in money, in any event. Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929).

Payment in money may be required if the check is presented for payment, in person, or by an agent for collection other than as prescribed by this section. Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929).

Certificates of Deposit. — This section has no application to certificates of deposit. Citizens Nat'l Bank v. Fidelity & Cas. Co., 86 F.2d 4 (4th Cir. 1936), cert. denied, 299 U.S. 612, 57 S. Ct. 315, 81 L. Ed. 452 (1937).

Liability Where Exchange Unpaid. — Under this section, a drawee bank cannot charge checks drawn on it by its customers to the accounts of such customers, remit in drafts or exchange to the forwarding bank, and thereby be released, notwithstanding that said drafts or exchange are, for valid and lawful reasons, not paid. Where a check drawn on a bank or trust company chartered by this State is presented to the drawee bank, "by or through any federal reserve bank, post office or express company or any respective agent thereof," and such bank or trust company, in the exercise of the option conferred by said statute, sends to the forwarding bank its draft on its reserve deposits in payment of such check, it will not be discharged of liability for the collection of its depositor's check until such draft on its reserve deposit has been paid. Graham v. Proctorville Whse., 189 N.C. 533, 127 S.E. 540 (1925).

Where the payee of a check deposits it in a bank for collection and does not thereon indicate that the collecting bank is to require payment in money, he authorizes the collecting bank to collect in due course of mail and comes within the provisions of this section and former G.S. 53-57 as being a check presented by or through a "post office." The collecting bank is not liable for accepting the check of the drawee bank on another bank, resulting ultimately in nonpayment, and the payee must suffer the loss thereon. Braswell v. Citizens Nat'l Bank, 197 N.C. 229, 148 S.E. 236 (1929).

Where a bank receives a check in payment of a note and elects to put it in the hands of a federal reserve bank for collection, which bank accepts the check of the drawee bank on another bank in payment, when the check would have been paid in course of collection had cash been demanded, the drawer and endorsers on the original check are relieved of liability thereon, and may not be held if the check of the drawee bank was not paid because of its later insolvency; and this result is not affected by this section since the payee bank has the option of presenting the check for payment through the federal reserve bank or not. Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929), criticizing Cleve v. Craven Chem. Co., 18 F.2d 711 (4th Cir. 1927).

Charging Check to Drawer's Account as Payment. — When the drawee bank has to the credit of the drawer funds sufficient and available for the payment of his check, and accepts and charges the check to the drawer's account, the check is paid, and the drawer is discharged from liability, not only on the check, but also for the debt in payment of which the check was drawn. Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929).

§ 53-72: Repealed by Session Laws 1971, c. 244, s. 3.

§ 53-73. Checks exempted.

All checks drawn on the banks and trust companies in this State in payment of obligations due the State of North Carolina or the federal government shall be exempt from the provisions of G.S. 53-71. (1921, c. 20, s. 4; C.S., s. 220(cc); 1971, c. 244, s. 2.)

§ 53-74: Repealed by Session Laws 1971, c. 244, s. 3.

§ 53-75. Statement of account from bank to depositor deemed final adjustment if not objected to within five years; statements of account to be rendered annually or on request.

When a statement of account has been rendered by a bank to a depositor accompanied by vouchers, if any, which are the basis for debit entries in such account, or the depositor's passbook has been written up by the bank showing the condition of the depositor's account and delivered to such depositor with like accompaniment of vouchers, if any, such account shall, after the period of five years from the date of its rendition in the event no objection thereto has been theretofore made by the depositor, be deemed finally adjusted and settled and its correctness conclusively presumed and such depositor shall thereafter be barred from questioning the incorrectness of such account for any cause. Every bank operating under this Chapter shall render a statement of account for each deposit account, including NOW or similar accounts, at least annually to the last known address of the depositor; provided, however, such statements are not required for time deposits, or for savings deposits evidenced by passbooks. Every bank operating under this Chapter shall render a statement of account for each deposit account, including demand, time, savings, NOW, and other similar accounts upon receipt of an appropriate request reasonably made by a depositor. (1929, c. 188, s. 1; 1981, c. 671, s. 11.)

§ 53-76. Depositor not relieved from exercising diligence as to errors.

Nothing in the preceding section [G.S. 53-75] shall be construed to relieve the depositor from the duty now imposed by law of exercising due diligence in the examination of such account and vouchers, if any, when rendered by the bank. (1929, c. 188, s. 2; 1981, c. 599, s. 19.)

Cross References. — As to bank customer's duty to discover and report unauthorized signatures or alterations, see G.S. 25-4-406.

§ 53-77. Governor empowered to proclaim banking holidays.

The Governor is hereby authorized and empowered, by and with the advice and consent of the Council of State, to name and set apart such day or days, as he may from time to time designate, as banking holidays. During such period of holidays, all the ordinary and usual operations and business of all banking corporations, State or national, in this State shall be suspended, and during such period no banking corporation shall pay out or receive deposits, make loans or discounts, transfer credits, or transact any other banking business whatsoever: Provided, however, that during any such holiday, including the holiday validated in this section, the Commissioner of Banks, with the approval of the Governor, may permit any or all such banking institutions to perform any or all of the usual banking functions.

The banking holiday heretofore proclaimed by the Governor of this State for Monday, Tuesday and Wednesday, March 6, 7, and 8, 1933 is hereby approved and validated, and the said days are hereby declared to be banking holidays in the State of North Carolina. (1933, c. 120, ss. 1, 2.)

Legal Periodicals. — For discussion of section, see 11 N.C.L. Rev. 195 (1933).

CASE NOTES

Cited in Hood v. Clark, 211 N.C. 693, 191 S.E. 732 (1937).

§ 53-77.1: Repealed by Session Laws 1989, c. 187, s. 9.

§ 53-77.1A. Days and hours of operation.

A bank as defined in G.S. 53-1 or G.S. 53-136, or any branch or limited service facility thereof located in this State, may operate on such days and during such hours, and may observe such holidays, as the bank's board of directors shall designate. (1989, c. 187, s. 10; 1995, c. 129, s. 15; 1995 (Reg. Sess., 1996), c. 556, s. 2.)

Cross References. — As to legal banking holidays, see G.S. 53-77.1A. For list of legal public holidays, see G.S. 103-4.

§ 53-77.2: Repealed by Session Laws 1971, c. 319, s. 2.

§ 53-77.2A: Repealed by Session Laws 1995 (Regular Session, 1996), c. 556, s. 1.

§ 53-77.3. Banks suspending business during an emergency.

(a) As used in this section, unless the context otherwise requires:

(1) "Bank" includes commercial banks, industrial banks, trust companies, any branch or agency of a foreign banking organization, any person or

association of persons lawfully carrying on the business of banking, whether incorporated or not, and, to the extent that the provisions hereof are not inconsistent with and do not infringe upon paramount federal law, also includes national banks.

(2) "Emergency" means any condition or occurrence, which may interfere physically with the conduct of normal business operations at one or more or all of the offices of a bank, or which poses an imminent or existing threat to the safety or security of persons or property, or both. Without limiting the generality of the foregoing, an emergency may arise as a result of any one or more of the following: fire; flood; earthquake; hurricanes; wind, rain, or snow storms; labor disputes and strikes; power failures; transportation failures; interruption of communication facilities; shortages of fuel, housing, food, transportation or labor; robbery or attempted robbery; actual or threatened enemy attack; epidemics or other catastrophes; riots, civil commotions, and other acts of lawlessness or violence, actual or threatened.

(3) "Office" means any place at which a bank transacts its business or conducts operations related to its business.

(4) "Officers" means the person or persons designated by the board of directors, board of trustees, or other governing body of a bank, to act for the bank in carrying out the provisions of this section or, in the absence of any such designation or of the officer or officers so designated, the president or any other officer currently in charge of the bank or of the office or offices in question.

(b) Whenever the Commissioner of Banks is of the opinion that an emergency exists, or is impending, in this State or in any part or parts of this State, he may authorize banks located in the affected area or areas to close any or all of their offices. In addition, if the Commissioner is of the opinion that an emergency exists, or is impending, which affects, or may affect, a particular bank or banks, or a particular office or offices thereof, but not banks located in the area generally, he may authorize the particular bank or banks, or office or offices so affected, to close. In addition, the Commissioner of Banks may in the interest of national defense authorize any bank, or any of its offices, to open or close, for the transaction of business. The office or offices so closed shall remain closed until the Commissioner declares that the emergency has ended, or until such earlier time as the officers of the bank determine that one or more offices, previously closed because of the emergency, should reopen, and, in either event, for such further time thereafter as may reasonably be required to reopen.

In the event communications systems should be so disrupted as to make it impossible or impractical for a bank official to communicate with the Commissioner of Banks, the bank officer or manager or other person in charge of any such bank or branch bank may close said office without prior approval of the Commissioner of Banks provided he gives prompt notice thereof to the Commissioner as soon as communications have been restored.

(c) Any day on which a bank, or any one or more of its offices, is closed during all or any part of its normal banking hours pursuant to the authorization granted under this section shall be, with respect to such bank or, if not all of its offices are closed, then with respect to any office or offices which are closed, a legal holiday for all purposes with respect to any banking business of any character. No liability, or loss of rights of any kind, on the part of any bank, or director, officer, or employee thereof, shall accrue or result by virtue of any closing authorized by this section.

(d) The provisions of this section shall be construed and applied as being in addition to, and not in substitution for or limitation of, any other law of this State or of the United States authorizing the closing of a bank or excusing the delay by a bank in the performance of its duties and obligations because of emergencies or conditions beyond the bank's control, or otherwise. (1971, c. 465; 1985, c. 677, s. 5; 1989, c. 187, s. 12.)

Editor's Note. — Session Laws 1985, c. 677, which amended subdivision (a)(1), provided in s. 7: "The provisions of this act shall not apply to any institution chartered as a savings bank prior to the effective date of this act and any such institution shall continue to be regulated and supervised in accordance with the laws of the State of North Carolina in effect prior to ratification of this act." The act was ratified July 10, 1985, and became effective on that date.

ARTICLE 7.

Officers and Directors.

§ 53-78. Appointment of executive and loan committees by directors.

The board of directors shall appoint an executive committee or committees, each of which shall be composed of at least three of its members with such duties and powers as are defined by the regulations or bylaws, who shall serve until their successors are appointed. Such executive committee or committees shall meet as often as the board of directors may require, except that the executive committee or committees shall meet at least once during each month in which there is no meeting of the board of directors, and approve or disapprove all loans and investments. All loans and investments shall be made under such rules and regulations as the board of directors may prescribe.

The board of directors may appoint, in addition to the executive committee or committees, a general loan committee, the membership of which shall include at least three directors and such officers of the bank as may be appointed, with such duties and powers with respect to making loans and investments as are defined in the bylaws or by resolution of the board of directors, the members of such general loan committee to serve until their successors are appointed. Such general loan committee, if appointed, shall meet as often as the bylaws or resolution of the board of directors may require, which shall not be less frequently than once each month, and approve or disapprove all such loans and investments as may be required by the bylaws or by resolution of the board of directors to be submitted to the general loan committee. The board of directors of any bank, which has branches, may appoint, in addition to a general loan committee, a loan committee for the parent bank and for any branch, each of which committees shall include at least three members who are officers or members of the local advisory board for such parent bank or branch, with such duties and powers with respect to approving or disapproving loans and investments as may be defined in the bylaws or by resolution of the board of directors, and under such rules and regulations as the board of directors may prescribe. Such loans and investments as are authorized or approved by a general loan committee or either of the other loan committees hereinabove provided for may, but need not, be approved or disapproved by the executive committee or committees. All loans and investments made, however, shall be authorized or approved by either the executive committee or committees, a general loan committee, or one of the other loan committees herein provided for. (1921, c. 4, s. 49; C.S., s. 221(a); 1951, c. 167, s. 1; 1989, c. 187, s. 13; 1995, c. 129, s. 16.)

§ 53-79. Minutes of meetings of directors and executive and loan committees.

Minutes shall be kept of all meetings of the board of directors, executive committee or committees, and of the loan committee or committees, if appointed, and the same shall be recorded in a book or books which shall be kept for that purpose; which book or books shall be kept on file in the bank. Such minutes shall show a record of the action taken by the board of directors, the executive committee or committees and the loan committee or committees on all loans, discounts, and investments made, authorized or approved, and such further action as the board of directors and the executive committee or committees shall take concerning the conduct, management and welfare of the bank. The minutes of the executive committee and all committees authorizing or approving loans and investments, showing the actions taken by such committees since the last meeting of the board of directors, shall be submitted to the board of directors at each meeting of the board. (1921, c. 4, s. 50; C.S., s. 221(b); 1951, c. 167, s. 2.)

CASE NOTES

Effect of Not Writing Minutes. — Where the proper officer fails to actually make a written minute or record of the proceedings, they may be proved by parol testimony where they are not so recorded, since proceedings of a corporate meeting of stockholders or directors are facts. Bailey v. Hassell, 184 N.C. 450, 115 S.E. 166 (1922); Everett v. Staton, 192 N.C. 216, 134 S.E. 492 (1926).

§ 53-80. Qualifications of directors.

Every director of a bank doing business under this Chapter shall be the owner and holder of shares of stock in the bank representing not less than one thousand dollars ($1,000) book value as of the last business day of the calendar year immediately prior to the election of such director. For the purpose of this section, book value shall consist of common capital stock, unimpaired surplus, undivided profits, and reserves for contingencies if any such reserves are segregations of capital. Where directors are appointed during the interval between stockholders' meetings pursuant to the provisions of G.S. 53-67, such directors shall hold the required qualifying shares as of the time of their appointment. Notwithstanding the proviso at the end of this section, where the bank is a wholly owned subsidiary, the required qualifying shares shall be shares in the parent corporation, whether or not the bank was doing business before February 18, 1921. And every such director shall hold the shares in the director's own name unpledged and unencumbered in any way. Provided, however, shares of the bank or parent corporation stock held in an individual retirement account or other retirement account of a bank director, over which the director has investment authority, shall be considered qualifying shares for the purpose of this section. The office of any director at any time violating any of the provisions of this section shall immediately become vacant, and the remaining directors shall declare that director's office vacant and proceed to fill such vacancy forthwith. Not less than one-half of the directors of every bank doing business under this Chapter shall be residents of the State of North Carolina or any state in which the bank has a branch: Provided, that as to banks doing business before February 18, 1921, the requirements as to amount of stock owned by a director shall not apply unless the Commissioner of Banks shall rule that the director is not bona fide discharging the director's duties. (1921, c. 4, s. 51; C.S., s. 221(c); 1931, c. 243, s. 5; 1979, c. 483, s. 8; 1983, c. 214, s. 8; 1999-72, s. 1; 2001-263, s. 8.)

§ 53-81. Directors shall take oath.

Every director shall, within 30 days after his election, take and subscribe, in duplicate, an oath that he will diligently and honestly perform his duties in such office; and that he is the owner in good faith of the shares of stock of the bank required to qualify him for such office, standing in his own name on its books, and one of such oaths shall forthwith be filed with the Commissioner of Banks, and the other shall be kept on file in the bank. (1921, c. 4, s. 52; C.S., s. 221(d); 1931, c. 243, s. 5.)

§ 53-82. Liability of directors.

Any director of any bank who shall knowingly violate, or who shall knowingly permit to be violated by any officers, agents, or employees of such bank, any of the provisions of this Chapter shall be held personally and individually liable for all damages which the bank, its stockholders or any other person shall have sustained in consequence of such violation. Any aggrieved stockholder in any bank in liquidation may prosecute an action for the enforcement of the provisions of this section. Only one such action may be brought. The procedure shall follow as nearly as may be that prescribed by G.S. 44-14, relative to suits on bonds of contractors with municipal corporations. (1921, c. 4, s. 53; C.S., s. 221(e); 1935, c. 464.)

Cross References. — As to criminal liability, see G.S. 53-126 to 53-134.

Editor's Note. — Section 44-14, referred to in this section, was repealed by Session Laws 1973, c. 1194. See now G.S. 44A-25 et seq.

CASE NOTES

Liability for False and Misleading Statement. — A false and misleading statement made by the directors by which one was led to make deposits gave a cause of action against the directors. It was also held that the directors are presumed to know the condition of the bank. Townsend v. Williams, 117 N.C. 330, 23 S.E. 461 (1895); Tate v. Bates, 118 N.C. 287, 24 S.E. 482 (1896); Solomon v. Bates, 118 N.C. 311, 24 S.E. 478, motion to modify opinion dismissed, 118 N.C. 321, 24 S.E.2d 746 (1896); Houston v. Thornton, 122 N.C. 365, 29 S.E. 827 (1898).

Who May Prosecute Action. — An action for damages against the directors, for false statements as to the bank's solvency made to private persons and in the bank's report to the Commission, is solely maintainable by the receiver of the bank unless the private person can show an injury peculiar to him as distinguished from the loss among the creditors generally. Douglass v. Dawson, 190 N.C. 458, 130 S.E. 195 (1925).

Cited in State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

§ 53-83. Examining committee of directors.

A committee of at least three directors or stockholders shall be appointed annually to examine, or to superintend the examination of the assets and the liabilities of the bank, and to report to the board of directors the result of such examination. The committee, with the approval of the board of directors, may provide for such examinations by a certified public accountant or clearinghouse examiner in any city where such examination is provided for by the rules of such clearinghouse association. A copy of such report of examination, which is herein required to be made, attested, and verified under oath by the signature of at least three members of such committee, shall forthwith be filed with the Commissioner of Banks. (1921, c. 4, s. 54; C.S., s. 221(f); 1931, c. 243, s. 5.)

§ 53-84. Depositories designated by directors.

By resolution of the board of directors, other banks organized under the laws of this State, or of another state, or under the laws of the United States, shall be designated as depositories or reserve banks in which a part of such bank's reserve shall be deposited, subject to payment on demand. A copy of such resolution shall, upon its adoption, be forthwith certified to the Commissioner of Banks and the depository so designated shall be subject to the approval of the Commissioner of Banks. For causes which he may deem adequate, the Commissioner of Banks shall have authority at any time to withdraw such approval.

A bank may deposit funds in a bank of a foreign country, but such deposits shall not constitute any part of its reserve as defined in G.S. 53-51. (1921, c. 4, s. 55; C.S., s. 221(g); 1931, c. 243, s. 5; 1967, c. 789, s. 14; 1991, c. 677, s. 8.)

Local Modification. — Guilford: 1933, c. 568; Haywood: 1935, c. 95; Nash: 1933, c. 568; town of Bailey: 1935, c. 95; town of Hobgood: 1935, c. 95; town of Spring Hope: 1933, c. 568.

Cross References. —As to the amount, etc., of the reserve, see G.S. 53-50.

CASE NOTES

Cited in State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

§ 53-85. Shareholders' book.

The directors shall provide a book in which shall be kept the name and resident address of each shareholder of record, the number of shares held by each, the time when such person became a shareholder, together with all transfer of stock, stating the time when made, the number of shares and by whom transferred, which book shall be subject to the inspection of the directors, officers, and shareholders of record of the bank at all times during the usual hours for the transaction of business. (1921, c. 4, s. 56; C.S., s. 221(h); 1989, c. 187, s. 14.)

CASE NOTES

Right to Inspect. — Under this section the right to inspect stock books in banks is specifically given. White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

Cited in Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 53-86. Directors, officers, etc., accepting fees, etc.

No gift, fee, commission, or brokerage charge shall be received, directly or indirectly, by any officer, director, or employee of any bank doing business under this Chapter, on account of any transaction to which the bank is a party. Any officer, director, employee, or agent who shall violate the provisions of this section shall be guilty of a Class 3 misdemeanor, and shall be and thereafter remain ineligible as an officer, director, or employee of any bank doing business under this Chapter. Nothing in this section shall be construed to prevent the payment of necessary and proper fees to any licensed attorney or licensed real estate broker or salesman, who is a director but not an officer or employee of the bank for professional services rendered, and nothing in this section shall be construed to apply to commissions on insurance and surety bond premiums. (1921, c. 4, s. 57; C.S., s. 221(i); 1947, c. 695; 1971, c. 272; 1993, c. 539, s. 419; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 53-87. Directors may declare dividends.

The board of directors of any bank may declare a dividend of so much of its undivided profits as they may deem expedient, subject to the requirements hereinafter provided. When the surplus of any bank having a capital stock of fifteen thousand dollars ($15,000) or more is less than fifty percent (50%) of its paid-in capital stock, such bank shall not declare any dividend until it has transferred from undivided profits to surplus twenty-five percent (25%) of said undivided profits, or any lesser percentage that may be required to restore the surplus to an amount equal to fifty percent (50%) of the paid-in capital stock. When the surplus of any bank having a capital stock of less than fifteen thousand dollars ($15,000) is less than one hundred percent (100%) of its paid-in capital stock, such bank shall not declare any dividend until it has transferred from undivided profits to surplus fifty percent (50%) of said undivided profits, or any lesser percentage that may be required to restore the surplus to an amount equal to one hundred percent (100%) of the paid-in capital stock. In order to ascertain the undivided profits from which such dividend may be made, there shall be charged and deducted from the actual profits:

(1) All ordinary and extraordinary expenses, paid or incurred, in managing the affairs and transacting the business of the bank;
(2) Interest paid or then due on debts which it owes;
(3) All taxes due;
(4) All overdrafts over one thousand dollars ($1,000) which have been standing on the books of the bank for a period of 60 days or longer;
(5) All losses sustained by the bank. In computing the losses, there shall be included debts owing the bank which have become due and are not in process of collection, and on which interest for one year or more is due and unpaid, unless said debts are well secured; and debts reduced to final judgments which have been unsatisfied for more than one year and on which no interest has been paid for a period of one year, unless said judgments are well secured.
(6) All investments carried on its books, which are prohibited under the provisions of this Chapter, or rules and regulations made by the Commissioner of Banks, pursuant to the powers conferred under this Chapter. (1921, c. 4, s. 58; C.S., s. 221(j); 1927, c. 47, s. 10; 1931, c. 243, s. 5; 1991, c. 677, s. 4.)

§ 53-87.1. Payment of dividends on preferred shares issued to the United States Treasury.

(a) Notwithstanding any other provision of this Chapter, the board of directors of any bank may declare and pay a dividend on preferred shares issued by the bank to the United States Treasury in connection with and as a condition of the bank's participation in the Capital Purchase Program authorized by Title I of the Emergency Economic Stabilization Act of 2008 (Public Law 110-343).

(b) Notwithstanding any other provision of this Chapter, with the prior approval of the Commissioner of Banks and subject to any conditions the Commissioner may impose, a bank may issue preferred or preference shares and pay dividends thereon, in order to recapitalize itself. (2009-28, s. 1.)

Editor's Note. — Session Laws 2009-28, s. 2, made this section effective May 20, 2009.

§ 53-88. Use of surplus.

The surplus of any bank doing business under this Chapter shall not be used for the purpose of paying expenses or losses until the credit to undivided profits has been exhausted. But any portion of such surplus may be converted into capital stock and distributed as a stock dividend, provided that such surplus shall not thereby be reduced below fifty percent (50%) of the paid-in capital of such bank, having a paid-in capital of fifteen thousand dollars ($15,000) or more. When the surplus of any bank having a capital stock of less than fifteen thousand dollars ($15,000) shall reach an amount equal to one hundred percent (100%) of its paid-in capital, the board of directors of such bank shall declare a dividend of fifty percent (50%) of said surplus and distribute the same as a stock dividend: Provided, that where the distribution of such a stock dividend would increase the capital stock of any bank to an amount greater than fifteen thousand dollars ($15,000), the board of directors of such bank may, in its discretion, declare a stock dividend of only so much of said surplus as will be necessary to increase the stock of the said bank to fifteen thousand dollars ($15,000). (1921, c. 4, s. 59; C.S., s. 221(k).)

Cross References. — As to definition of "surplus," see G.S. 53-1.

§ 53-89. Overdrafts, payment by officer, etc.

Any officer (other than a director), or employee of a bank, who shall permit any customer or other person to overdraw his account, or who shall pay any check or draft, the paying of which shall overdraw any account, unless the same shall be authorized by the board of directors or by a committee of such board authorized to act, shall be personally and individually liable to such bank for the amounts of such overdrafts. (1921, c. 4, s. 60; C.S., s. 221(l).)

§ 53-90. Officers and employees shall give bond.

The active officers and employees of any bank before entering upon their duties shall give bond to the bank in a bonding company authorized to do business in North Carolina, in the amount required by the directors and upon such form as may be approved by the Commissioner of Banks, the premium for same to be paid by the bank. The Commissioner of Banks or directors of such bank may require an increase of the amount of such bond whenever they may deem it necessary. If injured by the breach of any bond given hereunder, the bank so injured may put the same in suit and recover such damages as it may have sustained. (1921, c. 4, s. 61; Ex. Sess., 1921, c. 18; C.S., s. 221(m); 1927, c. 47, s. 11; 1929, c. 72, s. 2; 1931, c. 243, s. 5.)

CASE NOTES

Section Enters into and Forms Part of Bond. — The provision of this section requiring officers and employees of a bank to give bond in an amount required by the directors and upon such form as may be approved by the Commissioner of Banks, is the only statutory provision which becomes a part of the bond. Hartford Accident & Indem. Co. v. Hood, 226 N.C. 706, 40 S.E.2d 198 (1946). See Hood v. Simpson, 206 N.C. 748, 175 S.E. 193 (1934).

Effect of Renewal of Bond. — When a bond, which guarantees the fidelity of a bank cashier and guarantees the bank against loss by reason of embezzlement, etc., of said cashier, is executed for an indefinite term and thereafter is kept in force by the payment of annual premiums, for each year the officer was re-elected, then each and every renewal thereof is a separate and distinct bond or independent contract. Hood v. Simpson, 206 N.C. 748, 175 S.E. 193 (1934).

Where a bond guaranteeing the payment of any loss sustained through the dishonesty of a bank official, while "in the continuous employment of a bank" after a specified date, is kept in force for a period of years by the payment of the stipulated annual premium, recovery on the bond is limited to the maximum liability, therein stipulated for losses, occurring during the life of the bond, and the contention that the surety is liable for defalcations to the amount of the penal sum of the bond for each of the years during which the bond is kept in force, is untenable. Hartford Accident & Indem. Co. v.

Hood, 226 N.C. 706, 40 S.E.2d 198 (1946), distinguishing Hood v. Simpson, 206 N.C. 748, 175 S.E. 193 (1934).

Fidelity bond interpretation. — Because, under an ambiguous termination clause couched in the present tense in a fidelity bond, as interpreted, coverage only terminated when the insured bank initially discovered, after the coverage period's commencement, an employee's dishonest conduct, summary judgment was properly granted in favor of the bank on its claim arising out of the embezzlement of over $1,000,000 from an account of a customer of the bank by an assistant vice president, whom the bank knew had been previously convicted of embezzlement. Home Sav. Bank v. Colonial Am. Cas. & Sur. Co., 165 N.C. App. 189, 598 S.E.2d 265, 2004 N.C. App. LEXIS 1147 (2004), cert. dismissed, — N.C. —, 609 S.E.2d 770 (2005), cert. denied, — N.C. —, 609 S.E.2d 770 (2005).

§ 53-91: Repealed by Session Laws 1995, c. 129, s. 17.

§ 53-91.1. Assets to be written off.

Every bank doing business under this Chapter shall be required to write off any asset, or portion thereof, which, following the most recent report of examination issued by the Commissioner of Banks, is classified as uncollectible. Provided, however, such asset need not be written off if the same is secured by collateral acceptable to the Commissioner. (1991, c. 677, s. 5.)

§ 53-91.2. Loans to executive officers.

No bank may extend credit to any of its executive officers nor a firm or partnership of which such executive officer is a member, nor a company in which such executive officer owns a controlling interest, unless the extension of credit is made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions by the bank with persons who are not employed by the bank, and provided further that the extension of credit does not involve more than the normal risk of repayment. This general prohibition shall not prevent an executive officer from obtaining loans on terms and conditions that are available to all employees of the bank. For the purposes of this section, the term "executive officer" shall mean an officer who has authority to participate in major policy-making functions of the bank. Provided further, the maximum amount of such loans shall be that as prescribed by applicable federal banking regulations. (1995, c. 129, s. 18; 1999-72, s. 2.)

§ 53-91.3. Directors defined; appointment of advisory directors.

(a) Unless otherwise expressly provided, reference to "director" or "board of directors" shall mean a director of the banking corporation as elected by the shareholders pursuant to North Carolina corporation law.

(b) The board of directors so elected by the shareholders may, consistent with a bank's articles of incorporation or bylaws, appoint advisory directors to perform such duties as prescribed by the board with respect to local offices and branches of any bank chartered under Chapter 53 of the General Statutes. (1995, c. 129, s. 18.)

Article 8.

Commissioner of Banks and State Banking Commission.

§ 53-92. Appointment of Commissioner of Banks; State Banking Commission.

(a) On or before April 1, 1983, and quadrennially thereafter, the Governor shall appoint a Commissioner of Banks subject to confirmation by the General

Assembly by joint resolution. The name of the Commissioner of Banks shall be submitted to the General Assembly on or before February 1, of the year in which the term of his office begins. The term of office for the Commissioner of Banks shall be four years. In case of a vacancy in the office of Commissioner of Banks for any reason prior to the expiration of his term of office, the name of his successor shall be submitted by the Governor to the General Assembly, not later than four weeks after the vacancy arises. If a vacancy arises in the office when the General Assembly is not in session, the Commissioner of Banks shall be appointed by the Governor to serve on an interim basis pending confirmation by the General Assembly.

(b) The State Banking Commission, which has heretofore been created, shall consist of the State Treasurer, who shall serve as an ex officio member thereof, 19 members appointed by the Governor, and two members appointed by the General Assembly under G.S. 120-121, one of whom shall be appointed upon the recommendation of the President Pro Tempore of the Senate and one of whom shall be appointed upon the recommendation of the Speaker of the House of Representatives. The Governor shall appoint five practical bankers, 11 persons selected primarily as representatives of the borrowing public, and two chief executive officers of State savings institutions. The person appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate shall be a practical banker. The person appointed by the General Assembly upon the recommendation of the Speaker of the House shall be a person selected primarily as a representative of the borrowing public. The persons selected primarily as representatives of the borrowing public shall not be employees or directors of any financial institution nor shall they have any interest in any regulated financial institution other than as a result of being a depositor or borrower. Under this section, no person shall be considered to have an interest in a financial institution whose interest in any financial institution does not exceed one-half of one percent (1/2 of 1%) of the capital stock of that financial institution. These members of the Commission shall be selected so as to fully represent the consumer, industrial, manufacturing, professional, business and farming interests of the State. No person shall serve on the Commission for more than two complete consecutive terms. As the terms of office of the appointive members of the Commission expire, their successors shall be appointed by the person appointing them, for terms of four years each. Any vacancy occurring in the membership of the Commission shall be filled by the appropriate appointing officer for the unexpired term, except that vacancies among members appointed by the General Assembly shall be filled in accordance with G.S. 120-122. The appointed members of the Commission shall receive subsistence and travel expenses at the rates set forth in G.S. 120-3.1. The subsistence and travel expenses shall be paid from the fees collected from the examination of banks as provided by law.

(c) The Banking Commission shall meet at such time or times, and not less than once every three months, as the Commission shall, by resolution, prescribe, and the Commission may be convened in special session at the call of the Governor, or upon the request of the Commissioner of Banks. The State Treasurer shall be chairman of the said Commission.

No member of said Commission shall act in any matter affecting any bank in which he is financially interested, or with which he is in any manner connected. No member of said Commission shall divulge or make use of any information coming into his possession as a result of his service on such Commission, and shall not give out any information with reference to any facts coming into his possession by reason of his services on such Commission in connection with the condition of any State banking institution, unless such information shall be required of him at any hearing at which he is duly subpoenaed, or when required by order of a court of competent jurisdiction.

A quorum shall consist of a majority of the total membership of the Banking Commission. A majority vote of the members qualified with respect to a matter under review present at that meeting shall constitute valid action of the Banking Commission. The State Treasurer and all disqualified members who are present shall be counted to determine whether a quorum is present at a meeting.

The Commissioner of Banks shall act as the executive officer of the Banking Commission, but the Commission shall provide, by rules and regulations, for hearings before the Commission upon any matter or thing which may arise in connection with the banking laws of this State upon the request of any person interested therein, and review any action taken or done by the Commissioner of Banks.

(d) The Banking Commission is hereby vested with full power and authority to supervise, direct and review the exercise by the Commissioner of Banks of all powers, duties, and functions now vested in or exercised by the Commissioner of Banks under the banking laws of this State. Upon an appeal to the Banking Commission by any party from an order entered by the Commissioner of Banks following an administrative hearing pursuant to Article 3A of Chapter 150B of the General Statutes, the chairman of the Commission may appoint an appellate review panel of not less than five members to review the record on appeal, hear oral arguments, and make a recommended decision to the Commission. Unless another time period for appeals is provided by this Chapter, any party to an order by the Commissioner of Banks may, within 20 days after the order and upon written notice to the Commissioner, appeal the Commissioner's order to the Banking Commission for review. The notice of appeal shall state the grounds for the appeal and set forth in numbered order the assignments of error for review by the Banking Commission. Failure to state the grounds for the appeal and assignments of error shall constitute grounds to dismiss the appeal. Failure to comply with the briefing schedule provided by the Banking Commission shall also constitute grounds to dismiss the appeal. Upon receipt of a notice of appeal, the Commissioner of Banks shall, within 30 days of the notice, certify to the Commission the record on appeal. Any party to a proceeding before the Banking Commission may, within 20 days after final order of the Commission, petition the Superior Court of Wake County for judicial review of a final determination of any question of law which may be involved. The petition for judicial review shall be entitled "(insert name) Petitioner v. State of North Carolina on Relation of the Banking Commission." A copy of the petition for judicial review shall be served upon the Commissioner of Banks pursuant to G.S. 150B-46. The petition shall be placed on the civil issue docket of the court and shall have precedence over other civil actions. Within 15 days of service of the petition for judicial review, the Commissioner shall certify the record to the Clerk of Superior Court of Wake County. The standard of review of a petition for judicial review of a final order of the Banking Commission shall be as provided in G.S. 150B-51(b). (1931, c. 243, s. 1; 1935, c. 266; 1939, c. 91, s. 1; 1949, c. 372; 1953, c. 1209, ss. 4, 6; 1961, c. 547, s. 2; 1967, c. 789, s. 16; 1969, c. 844, s. 6; c. 920; 1979, c. 478, s. 1; 1981, c. 884, s. 1; 1983, c. 328, ss. 1, 3; 1985, c. 318; 1989, c. 781, s. 41.1; 1995, c. 490, s. 9; 2001-193, s. 14; 2003-63, s. 2; 2006-203, s. 16; 2009-57, s. 1.)

Editor's Note. — Session Laws 2001-193, s. 15, provides: "All (i) statutory authority, powers, duties, and functions, including rule making, budgeting, and purchasing, (ii) records, (iii) personnel, personnel positions, and salaries, (iv) property, and (v) unexpended balances of appropriations, allocations, reserves, support costs, and other funds of the Savings Institutions Division of the Department of Commerce are transferred to and vested in the Office of Commissioner of Banks authorized by Article 8 of Chapter 53 of the General Statutes. Though transferred to the Office of Commissioner of Banks pursuant to this section, the Savings Institutions Division shall continue to function under that name. All statutory authority, powers, duties, and functions of the Administrator of the Savings Institutions Division are transferred to and vested in the Commissioner of Banks. This transfer has all the elements of a Type I transfer, as defined in G.S. 143A-6."

Session Laws 2006-203, s. 126, provides in part: "Prosecutions for offenses committed before the effective date of this act [July 1, 2007] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 2009-57, s. 1, effective June 5, 2009, in subsection (d), in the second sentence, deleted "the Administrative Procedure Act," preceding "the chairman of the Commission," added the fourth through sixth and last sentences, and rewrote the remainder of the subsection.

CASE NOTES

Section 53-4 and this section are construed in pari materia. Young v. Roberts, 252 N.C. 9, 112 S.E.2d 758 (1960).

Finality of Commission Actions. — Had the Banking Commission been created as a purely administrative agency it might fairly be contended that the finality of its actions would be in an administrative sense only and appropriate legal proceedings could be had to test them. But the former Corporation Commission had judicial powers in dealing with banks. Its stock assessments were, for example, given the effect of superior court judgments. Corporation Comm'n v. Murphey, 197 N.C. 42, 147 S.E. 667 (1929), aff'd, 280 U.S. 534, 50 S. Ct. 161, 74 L. Ed. 598 (1930). See also Corporation Comm'n v. Bank of Vanceboro, 200 N.C. 422, 157 S.E. 59 (1931).

Compliance with Notice of Appeal Requirements. — Dismissal of a finance company's appeal from a decision of the North Carolina State Bank Commission was reversed because the company complied with the requirements under G.S. 53-92(d) for appeals from the Commission by submitting a notice of appeal to the North Carolina Commissioner of Banks within 20 days of the Commission's order. In re Advance Am., Cash Advance Ctrs. of N.C. Inc., 189 N.C. App. 115, 657 S.E.2d 405, 2008 N.C. App. LEXIS 426 (2008).

Cited in Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965); North Carolina Nat'l Bank v. Harwell, 38 N.C. App. 190, 247 S.E.2d 720 (1978).

§ 53-92.1. Commission bound by requirements imposed on Commissioner as to certification of new banks, establishment of branches, etc.

Notwithstanding any other provisions of this Chapter, the State Banking Commission, in the exercise of its authority to review the action of the Commissioner of Banks, shall be bound by the requirements, conditions and limitations imposed in this Chapter on the Commissioner as to the certification of new banks, establishment of branches or limited service facilities, or any other matters which may properly come before the Commissioner for review. Notwithstanding any other provision of law, members of the Commission may act on any matter before the Commission, provided however, a member may not vote on an application or other proceeding involving an institution in which the member has a financial interest or with which the member is affiliated. (1963, c. 793, s. 4; 1995, c. 129, s. 19; c. 267, ss. 1, 1.1.)

§ 53-93. Powers and duties of Commissioner.

The Commissioner of Banks shall have the powers, duties and functions herein given, and in addition thereto such other powers and rights as may be necessary or incident to the proper discharge of the Commissioner's duties. The Commissioner may appoint and assign a member of the staff of the Office of the Commissioner of Banks to preside at administrative hearings required by Article 3A of Chapter 150B of the General Statutes, the Administrative Procedure Act, and make a recommended decision to the Commissioner. (1931, c. 243, s. 2; 2003-63, s. 3.)

CASE NOTES

Source of Power to Liquidate Insolvent Banks. — The Commissioner of Banks, when engaged in the liquidation of the assets of an insolvent bank, as authorized by statute, does not derive his power or his authority from the court. His power and authority, both to take possession of an insolvent bank, and to liquidate its assets for distribution among its creditors according to their respective rights, are derived from the statute. In re Central Bank & Trust Co., 206 N.C. 251, 173 S.E. 340 (1934).

§ 53-93.1. Deputy commissioners.

(a) The Commissioner of Banks shall appoint, with approval of the Governor, and may remove at his discretion a chief deputy commissioner, who, in the event of the absence, death, resignation, disability or disqualification of the Commissioner of Banks, or in case the office of Commissioner shall for any reason become vacant, shall have and exercise all the powers and duties vested by law in the Commissioner of Banks.

Irrespective of the conditions under which the chief deputy commissioner may exercise the powers and perform the duties of the Commissioner of Banks, pursuant to the preceding paragraph, such chief deputy commissioner, in addition thereto, is hereby authorized and empowered at any and all times, at the discretion of the Commissioner of Banks, to perform such duties and exercise such powers of the Commissioner of Banks in the name of and on behalf of the Commissioner as the Commissioner, in his discretion, may direct.

(b) In addition to the chief deputy commissioner authorized by subsection (a) of this section, the Commissioner of Banks may appoint deputy commissioners to serve at the Commissioner's pleasure. The deputy commissioners authorized by this subsection shall perform any duties and exercise any powers directed by the Commissioner. (1959, c. 273; 1983, c. 717, s. 8; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1989, c. 752, s. 39(c); 1995, c. 129, s. 20; 2001-193, s. 1.)

§ 53-94. Right to sue and defend in actions involving banks; liability to suit.

As Commissioner of Banks he is empowered to sue and prosecute or defend in any action or proceeding in any courts of this State or any other state and in any court of the United States for the enforcement or protection of any right or pursuit of any remedy necessary or proper in connection with the subjects committed to him for administration or in connection with any bank or the rights, liabilities, property or assets thereof, under his supervision; but nothing herein shall be construed to render the Commissioner of Banks liable to be sued except as other departments and agencies of the State may be liable under the general law. (1931, c. 243, s. 3.)

§ 53-95. Commissioner to exercise powers under supervision of Banking Commission.

All the powers, duties, and functions granted to or imposed upon the Commissioner of Banks by law shall be exercised by him under the direction and supervision of the Banking Commission, and wherever provision is made in any law now in effect authorizing and permitting the Commissioner of Banks to make rules and regulations with respect to any actions or things required to be done under the banking laws of this State, such rules and regulations shall be made by the Banking Commission, and the words "the Commissioner of Banks," used in such statutes authorizing him to make rules and regulations, shall be construed to mean the Banking Commission, and the words "Banking Commission" substituted in such statutes for "Commissioner of Banks." (1931, c. 243, s. 4; 1939, c. 91, s. 2.)

§ 53-96. Salary of Commissioner; legal assistance.

The salary of the Commissioner of Banks shall be fixed by the General Assembly in the Current Operations Appropriations Act. The Attorney General shall assign an attorney on his staff to work full time with the Banking Commission. The attorney shall be subject to all provisions of Chapter 126 of the General Statutes relating to the State Personnel System. The Commission shall fully reimburse the Department of Justice for the compensation, secretarial support, equipment, supplies, records, and other property to support this attorney. (1931, c. 243, s. 6; 1957, c. 541, s. 3; 1979, 2nd Sess., c. 1137, s. 53; 1983, c. 717, s. 9; 1991 (Reg. Sess., 1992), c. 1039, s. 22; 1993, c. 321, s. 206(b); c. 561, s. 83.)

§ 53-96.1. Salaries, promotions, and leave of employees of the Office of the Commissioner of Banks.

(a) Repealed by Session Laws 2007-484, s. 9(a), effective August 30, 2007.

(b) The exemptions to Chapter 126 of the General Statutes authorized by G.S. 126-5(c11) for the Office of the Commissioner of Banks and its employees shall be used to develop organizational classification and compensation innovations that will result in the enhanced efficiency of operations. The Office of State Personnel shall assist the Commissioner of Banks in the development and implementation of an organizational structure and human resources programs that make the most appropriate use of the exemptions, including (i) a system of job categories or descriptions tailored to the agency's needs; (ii) policies regarding paid time off for agency personnel and the voluntary sharing of such time off; and (iii) a system of uniform performance assessments for agency personnel tailored to the agency's needs. The Commissioner of Banks may, under the supervision of the Office of State Personnel, develop and implement organizational classification and compensation innovations having the potential to benefit all State agencies. (2005-284, s. 1; 2007-484, s. 9(a).)

Editor's Note. — Session Laws 2005-284, s. 3, provides: "By April 1, 2007, the Commissioner of Banks and the Office of State Personnel shall report jointly to the General Assembly on the results of these efforts in meeting the agency's personnel needs and enhancing the efficiency and effectiveness of its operations."

Session Laws 2009-451, s. 26.14A, provides: "Notwithstanding G.S. 53-96.1, employees of the Office of the Commissioner of Banks shall not be awarded compensation bonuses during the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

§ 53-97: Repealed by Session Laws 1983, c. 328, s. 4.

Cross References. — As to the filling of vacancies in the office of the Commissioner of Banks, see now G.S. 53-92.

§ 53-98. Seal of office of Commissioner; certification of documents.

The Commissioner of Banks shall have a seal of office bearing the legend "State of North Carolina — Commissioner of Banks," with such other appropriate device as he may adopt. (1931, c. 243, s. 9.)

§ 53-99. Official records.

(a) The Commissioner of Banks shall keep a record in his office of his official acts, rulings, and transactions which, except as hereinafter provided, shall be open to inspection, examination and copying by any person.

(b) Notwithstanding any laws to the contrary, the following records of the Commissioner of Banks shall be confidential and shall not be disclosed or be subject to public inspection:

(1) Records compiled during or in connection with an examination, audit or investigation of any bank, banking office, bank holding company or its nonbank subsidiary, or trust department which operates or has applied to operate under the provisions of this Chapter;

(2) Records containing information compiled in preparation or anticipation of litigation, examination, audit or investigation;

(3) Records containing the names of any borrowers from a bank or revealing the collateral given by any such borrower: Provided, however, that every report of insider transactions made by a bank which report is required to be filed with the appropriate State or federal regulatory agency by either State or federal statute or regulation shall be filed with the Commissioner of Banks in a form prescribed by him and shall be open to inspection, examination and copying by any person;

(4) Records prepared during or as a result of an examination, audit or investigation of any bank, bank affiliate, bank holding company or its nonbank subsidiary, data service center or banking practice by an agency of the United States, or jointly by such agency and the Commissioner of Banks, if such records would be confidential under federal law or regulation;

(4a) Records prepared during or as a result of an examination, audit or investigation of any bank, bank affiliate, bank holding company or its nonbank subsidiary, data service center or banking practice by a regulatory agency of jurisdiction of the region defined in G.S. 53-210(11) if these records would be confidential under that jurisdiction's law or regulation;

(5) Records of information and reports submitted by banks to federal regulatory agencies, if such records would be confidential under federal law or regulation;

(6) Records of complaints from the public received by the banking department and concerning banks under its supervision if such complaints would or could result in an investigation;

(7) Records of examinations and investigations of consumer finance licensees;

(7a) Records of examinations and investigations of licensees under the Money Transmitters Act, Article 16A of this Chapter;

(7b) Records of applications, examinations, and investigations of applicants, licensees, and exempt persons under the Mortgage Lending Act, Article 19A of this Chapter;

(7c) Records of applications and investigations of registrants under the Refund Anticipation Loan Act, Article 20 of this Chapter;

(8) Records of pre-need burial contracts maintained pursuant to Article 13B of Chapter 90 of the General Statutes including investigations of such contracts and related credit inquiries;

(9) Any letters, reports, memoranda, recordings, charts, or other documents which would disclose any information set forth in any of the confidential records referred to in subdivisions (1) through (8).

(c) Notwithstanding the provisions of subsection (b), the Commissioner of Banks may, by written agreement with any state or federal regulatory agency, share with that agency any confidential information set out in subsection (b) on the condition that the information shared shall be treated as confidential under the applicable laws and regulations governing the recipient agency.

(d) Nothing in this section of the law shall prohibit a bank, upon approval of the Commissioner of Banks, from disclosing to an insurance carrier, for the purpose of obtaining insurance coverage required by Chapter 53 of the General Statutes, the bank's regulatory rating prepared by the Commissioner's office. Provided however, the insurance underwriter must agree in writing to maintain the confidentiality of such information and to not disclose the same in any manner whatsoever. (1931, c. 243, s. 10; 1977, 2nd Sess., c. 1181, s. 2; 1979, c. 255, s. 1; 1989, c. 9, s. 1; 1989 (Reg. Sess., 1990), c. 881, s. 3; 1995, c. 129, s. 21; 2001-393, s. 3; 2001-443, s. 3; 2004-171, s. 3.)

Editor's Note. — Session Laws 2004-171, s. 17, provides: "The Legislative Research Commission shall undertake a comprehensive study of those laws, including Chapters 53, 54B, and 54C of the General Statutes, which affect the establishment and operation of banks in North Carolina and shall make recommendations to the 2005 General Assembly, prior to the convening of the 2006 Regular Session as to which laws (i) are obsolete, unnecessary, or duplicative, (ii) are unnecessarily inconsistent in the treatment of banks, savings and loan associations, and savings banks, and (iii) unnecessarily restrict, impede, or prohibit activities of banks, savings and loan associations, and savings banks or the ability of the Commissioner of Banks to regulate banks and savings institutions in an effective, efficient, and equitable manner.

"In preparing its recommendations, the Commission shall actively solicit and consider information received from representatives of banks, savings and loan associations, savings banks, the State Banking Commission, the Commissioner of Banks and the Commissioner's staff, other interested parties, and the general public."

§ 53-99.1. Confidential records.

(a) As used in this section:

(1) "Compliance review committee" means:

a. An audit, loan review, or compliance committee appointed by the board of directors of a bank or any other person to the extent the person acts at the direction of or reports to a compliance review committee; and

b. Whose functions are to audit, evaluate, report, or determine compliance with any of the following:

1. Loan underwriting standards;
2. Asset quality;
3. Financial reporting to federal or State regulatory agencies;
4. Adherence to the bank's investment, lending, accounting, ethical, and financial standards; or
5. Compliance with federal or State statutory requirements.

(2) "Compliance review documents" means documents prepared for or created by a compliance review committee.

(3) "Bank" means a bank chartered under the laws of North Carolina or of the United States and any subsidiaries thereof.

(4) "Loan review committee" means a person or group of persons who, on behalf of a bank, reviews assets, including loans held by the bank, for

the purpose of assessing the credit quality of the loans or the loan application process, compliance with the bank's investment and loan policies and compliance with applicable laws and regulations.

(5) "Person" means an individual, group of individuals, board, committee, partnership, firm, association, corporation, or other entity.

(b) Banks chartered under the laws of North Carolina or of the United States shall maintain complete records of compliance review documents, and the documents shall be available for examination by any federal or State bank regulatory agency having supervisory jurisdiction. Notwithstanding Chapter 132 of the General Statutes, compliance review documents in the custody of a bank or regulatory agency are confidential, are not open for public inspection, and are not discoverable or admissible in evidence in a civil action against a bank, its directors, officers, or employees, unless the court finds that the interests of justice require that the documents be discoverable or admissible in evidence. (1995, c. 408, s. 1.)

§ 53-100. General or special investigations of insolvent banks.

Whenever it may appear to be to the public interest, the Governor may cause a general or special investigation to be made of the affairs of any insolvent bank or banks, singly or in related groups, with a view to discovering and establishing the causes of the failure of such bank or banks, and responsibility therefor; and of discovering the dealings with such banks of persons, officers, corporations or municipalities which may have led to such insolvency or which may have endangered or involved any public funds therein. The Governor may assign counsel who shall prosecute such inquiry before the Commissioner of Banks, or a deputy or commissioner appointed by the Commissioner of Banks for the purpose; and the Commissioner of Banks is hereby empowered to conduct such investigation either in person or through such commissioner or deputy appointed by him. The inquiry shall be held at the office of the Commissioner of Banks in the City of Raleigh or at any other place or places in the State designated by the Commissioner of Banks under such rules and regulations as the State Banking Commission may prescribe and may be adjourned from time to time as convenience may require. Attendance of witnesses and production of papers may be required by subpoena under the hand of the Commissioner or his deputy, and on failure of any witness to appear as subpoenaed or his or her failure to produce any books or papers, as called for by such Commissioner or deputy on subpoena or other order due notice shall be served, at the instance of such Commissioner or deputy, of not less than three days to appear before a judge of the superior court residing in or holding courts within the district wherein such witness is subpoenaed or notified to appear or produce such records or papers, on a day certain and a place named, when such judge shall hear the matter and is authorized to punish such witness as for contempt as he may find on such hearing.

A summary of such investigation shall be made with the findings and recommendations of the Commissioner thereon, and a copy thereof submitted to the Governor, and when the facts shall disclose that any person or persons are criminally responsible, a summary shall be sent to the district attorney of the prosecutorial district as defined in G.S. 7A-60 likely to have jurisdiction of the matter, whose duty it shall be to have the matter presented to the grand jury for its action. The Governor may employ counsel to assist in the prosecution of any person or persons criminally responsible and fix his compensation and the manner of its payment. (1931, c. 243, s. 11; 1973, c. 47, s. 2; 1987 (Reg. Sess., 1988), c. 1037, s. 90.)

§ 53-101. Clerical help.

The Commissioner of Banks is empowered to employ sufficient clerical and secretarial help, and other necessary labor to conduct the affairs of the Commissioner's office efficiently and effectively. (1931, c. 243, s. 12; 2005-284, s. 2.)

Editor's Note. — Session Laws 2005-284, s. 3, provides: "By April 1, 2007, the Commissioner of Banks and the Office of State Personnel shall report jointly to the General Assembly on the results of these efforts in meeting the agency's personnel needs and enhancing the efficiency and effectiveness of its operations."

§ 53-102. Offices.

Suitable offices shall be provided for the Commissioner of Banks in some state-owned public building in Raleigh. (1931, c. 243, s. 13.)

§ 53-103: Repealed by Session Laws 1945, c. 743, s. 1.

§ 53-104. Commissioner of Banks shall have supervision over, etc.

Every bank or corporation transacting the business of banking, or doing a banking business in connection with any other business, under the laws of and within this State, and any individual, partnership, association, or corporation which undertakes or attempts to transact the business of banking, or do a banking business in connection with any other business, shall be under the supervision of the Commissioner of Banks. It shall be his duty to execute and enforce through the State bank examiners and such other agents as are now or may hereafter be created or appointed, all laws which are now or may hereafter be enacted relating to banks as defined in this Chapter. For the more complete and thorough enforcement of the provisions of this Chapter, the State Banking Commission is hereby empowered to promulgate such rules not inconsistent with the provisions of this Chapter, as may, in its opinion, be necessary to carry out the provisions of the laws relating to banks and banking as herein defined, and as may be further necessary to insure safe and conservative management of the banks under its supervision taking into consideration the appropriate interest of the depositors, creditors, stockholders, and the public in their relations with such banks. All banks doing business under the provisions of this Chapter shall conduct their business in a manner consistent with all laws relating to banks and banking, and all rules, regulations, and instructions that may be promulgated or issued by the State Banking Commission. (1921, c. 4, s. 63; C.S., s. 222(a); 1931, c. 243, s. 5; 1939, c. 91, s. 2; 1945, c. 743, s. 1; 1979, c. 483, s. 10.)

Legal Periodicals. — For discussion of section, see 3 N.C.L. Rev. 81 (1925).

CASE NOTES

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961); Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 53-104.1. Examination of nonbanking affiliates.

The Commissioner of Banks, at his discretion, may examine the affiliates of a bank doing business under this Chapter to the extent it is necessary to safeguard the interest of depositors and creditors of the bank and of the general public, and to enforce the provisions of this Chapter. The Commissioner may conduct the examination in conjunction with any examination of the bank or affiliate conducted by any other state or federal regulatory authority. For the purpose of this section, the word "affiliate" means any bank holding company of which the bank is a subsidiary and any nonbanking subsidiary of that bank holding company, as "subsidiary" is defined by Section 2 of the Federal Bank Holding Company Act of 1956 (12 U.S.C. Sec. 1841(d), as amended). (1979, c. 483, s. 11.)

§ 53-105. Reports of condition.

Every bank shall make to the Commissioner of Banks not less than four reports during each year in the manner and form prescribed by the Commission by regulation. Each such report shall exhibit in detail and under appropriate heads the resources, assets, and liabilities of such bank at the close of business on any past day by the Commissioner of Banks specified, and shall be transmitted to the Commissioner of Banks within 10 days after the receipt of a request or requisition therefor from the Commissioner of Banks; provided, however, the Commissioner`of Banks may extend the time for a period not to exceed 30 days for any bank to transmit the reports heretofore required whenever in his judgment such extension is necessary; and in a form prescribed by the Commissioner of Banks; a summary of the report for the quarter ending December 31, shall if required by the Commissioner of Banks, be published in a newspaper published in the county where the bank is located, or if there is no newspaper in the county, then in a newspaper having a general circulation in the county in which such bank is established. Proof of such publication shall be furnished the Commissioner of Banks in such form as may be prescribed by him. (1921, c. 4, s. 64; 1923, c. 148, s. 2; C.S., s. 222(b); 1931, c. 243, s. 5; 1979, c. 483, s. 12; 1989, c. 187, s. 15; 1995, c. 129, s. 22.)

§ 53-106. Special reports.

The Commissioner of Banks may call for special reports whenever in his judgment it is necessary to inform him of the condition of any bank, or to obtain a full and complete knowledge of its affairs. Said reports shall be in and according to the form prescribed by the Commissioner of Banks and shall be published as provided in G.S. 53-105, if so required by the Commissioner of Banks. The Commissioner of Banks may extend the time for filing special reports for a period not to exceed 30 days. (1921, c. 4, s. 66; C.S., s. 222(d); 1931, c. 243, s. 5; 1981, c. 671, s. 12; 1995, c. 129, s. 23.)

§ 53-107. Penalty for failure to make report.

Every bank failing to make and transmit any report which the Commissioner of Banks is authorized to require by this Chapter, and in and according to the form prescribed by said Commissioner of Banks, within 10 days after the receipt of a request or requisition therefor, or within the extension of time granted by the Commissioner of Banks heretofore provided or failing to publish the reports as required, shall forthwith be notified by the Commissioner of Banks, and if such failure continue for five days after the receipt of such notice, such delinquent bank shall be subject to a penalty of two hundred dollars ($200.00). The penalty herein provided for shall be recovered in a civil action in any court of competent jurisdiction, and it shall be the duty of the Attorney General to prosecute all such actions. (1921, c. 4, s. 67; C.S., s. 222(e); 1931, c. 243, s. 5; 1979, c. 483, s. 13.)

§ 53-107.1. Administrative orders; penalties for violation.

(a) In addition to any other powers conferred by this Chapter, the Commissioner shall have the power to:

(1) Order any bank, trust company, or subsidiary thereof, or any director, officer, or employee to cease and desist violating any provision of this Chapter or any lawful regulation issued thereunder; and

(2) Order any bank, trust company, or subsidiary thereof, or any director, officer, or employee to cease and desist from a course of conduct that is unsafe or unsound and which is likely to cause insolvency or dissipation of assets or is likely to jeopardize or otherwise seriously prejudice the interests of a depositor.

(b) Consistent with Article 3A of Chapter 150B of the General Statutes, notice and opportunity for hearing shall be provided before any of the foregoing actions shall be undertaken by the Commissioner. Provided, however, in cases involving extraordinary circumstances requiring immediate action, the Commissioner may take such action, but shall promptly afford a subsequent hearing upon application to rescind the action taken.

(c) The Commissioner shall have the power to subpoena witnesses, compel their attendance, require the production of evidence, administer oaths, and examine any person under oath in connection with any subject related to a duty imposed or a power vested in the Commissioner.

(d) The Commissioner may impose a civil money penalty of not more than one thousand dollars ($1,000) for each violation by any bank, trust company, or subsidiary thereof, or any director, officer, or employee of an order issued under subdivision (1) of subsection (a) of this section. Provided further, the Commissioner may impose a civil money penalty of not more than five hundred dollars ($500.00) per day for each day that a bank, trust company, or subsidiary thereof, or any director, officer, or employee violates a cease and desist order issued under subdivision (2) of subsection (a) of this section.

The clear proceeds of civil money penalties imposed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1991, c. 677, s. 6; 1998-215, s. 29.)

§ 53-107.2. Review by the Banking Commission; additional penalties.

(a) Administrative orders issued by the Commissioner of Banks and civil money penalties imposed for violation of such orders shall be subject to review by the Banking Commission which shall have power to amend, modify, or disapprove the same at any regular or special meeting.

(b) Notwithstanding any penalty imposed by the Commissioner of Banks, the Banking Commission may after notice of and opportunity for hearing, impose, enter judgment for, and enforce by appropriate process, a penalty of not more than ten thousand dollars ($10,000) against any bank, trust company, or subsidiary thereof, or against any of its directors, officers, or employees for violating any lawful orders of the Commission or Commissioner of Banks.

The clear proceeds of civil money penalties imposed pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1991, c. 677, s. 6; 1998-215, s. 30.)

§ 53-108. List of shareholders of record to be kept.

Every bank doing business under this Chapter shall at all times keep a correct list of its shareholders of record and whenever called upon by the Commissioner of Banks or his duly authorized agent, make available for examination a correct list of all its shareholders of record, the address of each, and the number of shares held by each. Whenever the word "shareholders" is used in this section, the same shall be deemed to include, to the extent available, shareholders of any corporations which own ten percent (10%) or more of the capital stock of any bank doing business under this Chapter or a lesser amount when required by the Commissioner. (1921, c. 4, s. 68; C.S., s. 222(f); 1931, c. 243, s. 5; 1979, c. 483, s. 14; 1989, c. 187, s. 16.)

§ 53-109. Official communications of Commissioner of Banks.

Each official communication directed by the Commissioner of Banks, or any State bank examiner, to any bank, or to any officer thereof, relating to an examination or investigation conducted or made by the Commissioner of Banks, or containing suggestions or recommendations as to the conduct of the bank shall, if required by the authority submitting same, be submitted by the officer or director receiving it, to the executive committee or board of directors of such bank and duly noted in the minutes of such meeting. The receipt and submission of such notice to the executive committee or board of directors shall be certified to the Commissioner of Banks within such time as he may require, by three members of such committee or board. (1921, c. 4, s. 69; C.S., s. 222(g); 1931, c. 243, s. 5.)

§ 53-110. Banking Commission to prescribe books, records, etc.; retention, reproduction and disposition of records.

(a) Whenever in its judgment it may appear to be advisable, the State Banking Commission may issue such rules, instructions, and regulations prescribing the manner of keeping books, accounts, and records of banks as will tend to produce uniformity in the books, accounts, and records of banks of the same class.

(b) The following provisions shall be applicable to banks and trust companies operating under Chapter 53 of the General Statutes and amendments thereto, and to national banking associations insofar as this section does not contravene paramount federal law:

(1) Each bank shall retain permanently the minute books of meetings of its stockholders and directors, its capital stock ledger and capital stock certificate ledger or stubs, and all records which the Banking Commission shall in accordance with the terms of this section require to be retained permanently.

(2) All other bank records shall be retained for such periods as the Banking Commission shall in accordance with the terms of this section prescribe.

(3) The Banking Commission shall from time to time issue regulations classifying all records kept by banks and prescribing the period for which records of each class shall be retained. Such periods may be

permanent or for a lesser term of years. Such regulations may from time to time be amended or repealed, but any amendment or repeal shall not affect any action taken prior to such amendment or repeal. Prior to issuing any such regulations the Commission shall consider:

a. Actions at law and administrative proceedings in which the production of bank records might be necessary or desirable;

b. State and federal statutes of limitation applicable to such actions or proceedings;

c. The availability of information contained in bank records from other sources; and

d. Such other matters as the Banking Commission shall deem pertinent in order that its regulation will require banks to retain their records for as short a period as is commensurate with the interest of bank customers and stockholders and of the people of this State in having bank records available.

(4) Any bank may cause any or all records kept by it to be recorded, copied or reproduced by any photographic, photostatic or miniature photographic or reproduction process of any kind which is capable of conversion into written form within a reasonable time and which correctly, accurately, and permanently copies, reproduces or forms a medium for copying or reproducing the original record on a film or other durable material.

(5) Any such photographic, photostatic or miniature photographic copy or reproduction of any kind, including electronic or computer-generated data, which is capable of conversion into written form within a reasonable time, shall be deemed to be an original record for all purposes and shall be treated as an original record in all courts and administrative agencies for the purpose of its admissibility in evidence. A facsimile, exemplification or certified copy of any such photographic copy or reproduction shall, for all purposes, be deemed a facsimile, exemplification or certified copy of the original record.

(6) Any bank may dispose of any record which has been retained for the period prescribed by the Banking Commission or in accordance with the terms of this section for retention of records for its class. (1921, c. 4, s. 70; C.S., s. 222(h); 1931, c. 243, s. 5; 1939, c. 91, s. 2; 1951, c. 166, ss. 1, 2; 1991, c. 677, s. 7.)

§ 53-111. When reserve below legal requirement.

When the reserve of any bank falls below the amount required by law, it shall not make new loans or discounts, otherwise than by discounting or purchasing bills of exchange, payable at sight or on demand, nor make dividends of its profits until the reserve required by law is restored. The Commissioner of Banks shall require any bank whose reserve falls below the amount herein required immediately to make good such reserve. In case the bank fails for 30 days thereafter to make good its reserve the Commissioner of Banks may forthwith take possession of the property and business of such bank until its affairs be adjusted or finally liquidated as provided for in this Chapter. (1921, c. 4, s. 71; C.S., s. 222(i); 1931, c. 243, s. 5.)

Cross References. — As to amount of reserve, see G.S. 53-50. As to definition of "reserve," see G.S. 53-51.

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Purpose. — The wisdom of this section and G.S. 53-48 is manifest; banks, whose business is conducted in strict compliance therewith seldom become insolvent. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Criminal Liability of Bank's Officers. — A bank must act through its officers, and where they have violated the provisions of this section and G.S. 53-48, as to lending the bank's money, the offense is committed by the officers under the meaning of the statute, and they are individually indictable therefor. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Showing of Knowledge of Violation Is Sufficient for Conviction. — Where the official position of an officer of a bank is such as necessarily to acquaint him of the violation of the statute respecting the making of loans, and to fix him as a party thereto, it is sufficient evidence to sustain his conviction of the misdemeanor prescribed by G.S. 53-134. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Intent Not Element of Offense. — An intent to defraud the bank or others is not required to be either alleged in the indictment or proved upon the trial of the issue raised by a plea of not guilty. Neither the bank nor any of its officers or directors have any discretion as to the making of loans which are thus forbidden. Intent is, therefore, not an element of the crime. The willful doing of the unlawful act constitutes the crime declared by G.S. 53-134 to be a misdemeanor. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Consolidation of Indictments. — An indictment charging a bank officer of violating this section and also unlawfully making loans in violation of G.S. 53-48 alleges the commission of crimes of the same class. Where there are two indictments thereof against the same person they may be consolidated and tried together by the court. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

§ 53-112. Appraisal of assets of doubtful value.

If any assets of a bank are of a doubtful or disputed value, an appraisal of such assets may be had by the Commissioner of Banks, and for the purpose of making such appraisal the Commissioner of Banks shall designate one agent as an appraiser and the bank shall designate an agent as an appraiser and the two so chosen shall designate a third. The appraisers so selected shall make an appraisal of the assets so designated as doubtful or disputed and file a written report of their appraisal with the bank and with the Commissioner of Banks. In making such appraisal the appraisers shall determine the actual cash market value of such assets. Such appraisal, when made, shall be accepted as the value of such assets for the purpose of examination or for the purpose of determining the actual cash market value of such assets. The appraisers designated shall not be interested, in any way, either in the bank or as an employee of the Commissioner of Banks and all expenses of such appraisal shall be paid by the bank whose assets are appraised. If any bank required to appoint an appraiser hereunder shall fail for 10 days to appoint an appraiser, the Commissioner of Banks may apply to the clerk of the superior court of the county in which the bank is located for the appointment of such an appraiser, and the clerk shall thereupon make the appointment for the bank. (1927, c. 47, s. 13; 1931, c. 243, s. 5.)

§ 53-113. Certified copies of records as evidence.

In all civil actions in the courts of this State wherein are involved as evidence or otherwise any of the records of the Commissioner of Banks, a certified copy over the signature and under the seal of the Commissioner of Banks shall be admissible in evidence to the same effect as if produced in court at trial by the proper custodian of the records. (1927, c. 47, s. 14; 1931, c. 243, s. 5.)

§ 53-114. Other powers of State Banking Commission.

In addition to all other powers conferred upon and vested in the State Banking Commission, the said Commission, with the approval of the Governor, is hereby authorized, empowered and directed, whenever in its judgment the circumstances warrant it:

(1) To authorize, permit, and/or direct and require all banking corporations under its supervision, to extend for such period and upon such terms as it deems necessary and expedient, payment of any demand and/or time deposits.

(2) To direct, require or permit, upon such terms as it may deem advisable, the issuance of evidence of claims against assets of such banking institutions.

(3) To authorize and direct the creation, in such banking institutions, of special trust accounts for the receipt of new deposits, which deposits shall be subject to withdrawal on demand without any restriction or limitation and shall be kept separate in cash or on deposit in such banking institutions as it shall designate or invested in such obligations of the United States and/or the State of North Carolina as it shall designate.

(4) To adopt for such banking institutions such regulations as are necessary in its discretion to enable such banking institutions to comply fully with the federal regulations prescribed for national or state banks. (1933, c. 120, s. 3; 1939, c. 91, s. 2; 1995, c. 129, s. 24.)

§ 53-115. State Banking Commission to adopt rules.

(a) The State Banking Commission is hereby authorized, empowered and directed to make all necessary rules with respect to the establishment, operation, conduct, and termination of any and all activities and businesses that are subject to licensing, regulation, supervision, or examination by the Commissioner of Banks under this Chapter.

(b) The rule-making authority conferred on the State Banking Commission by this section shall be in addition to and not in derogation of any specific rule-making authority by any other provision of this Chapter. (1933, c. 120, s. 4; 1939, c. 91, s. 2; 1979, c. 483, s. 15; 2004-171, s. 4.)

Editor's Note. — Session Laws 2004-171, s. 17, provides: "The Legislative Research Commission shall undertake a comprehensive study of those laws, including Chapters 53, 54B, and 54C of the General Statutes, which affect the establishment and operation of banks in North Carolina and shall make recommendations to the 2005 General Assembly, prior to the convening of the 2006 Regular Session as to which laws (i) are obsolete, unnecessary, or duplicative, (ii) are unnecessarily inconsistent in the treatment of banks, savings and loan associations, and savings banks, and (iii) unnecessarily restrict, impede, or prohibit activities of banks, savings and loan associations, and savings banks or the ability of the Commissioner of Banks to regulate banks and savings institutions in an effective, efficient, and equitable manner.

"In preparing its recommendations, the Commission shall actively solicit and consider information received from representatives of banks, savings and loan associations, savings banks, the State Banking Commission, the Commissioner of Banks and the Commissioner's staff, other interested parties, and the general public."

§ 53-116. Commissioner need not take over banks failing to meet deposit demands.

The Commissioner of Banks is authorized and directed not to take possession of any banking corporation under his supervision for failure to meet its deposit liabilities during the period in which such banking corporation is operating under the terms of G.S. 53-114, subdivision (1); and he is hereby relieved from any and all liability for permitting such banking corporations to continue operations under the terms thereof. (1933, c. 120, s. 5.)

ARTICLE 9.

Bank Examiners.

§ 53-117. Appointment by Commissioner of Banks; examination of banks.

(a) The Commissioner of Banks, for the purpose of carrying out the provisions of this Chapter, shall appoint from time to time such State bank examiners, assistant State bank examiners, clerks and stenographers as may be necessary to examine the affairs of every bank doing business under this Chapter as often as the Commissioner of Banks shall deem necessary, and at least once every year; but the Commissioner may extend this period to 18 months when, in his opinion, an emergency condition exists that necessitates such action. The Commissioner of Banks may, at any time, remove any person appointed by him under this Chapter.

(b) The State Banking Commission shall adopt rules and regulations to implement the provisions of this Chapter, prescribing the nature and scope of examination of banks.

(c) The Commissioner of Banks is authorized to accept, in his discretion, as a part of a bank examination, reports on audits conducted in accordance with generally accepted auditing standards by independent accountants, when such reports contain an opinion by the independent accountant on the fairness of presentation of the financial statements and present information required by the rules and regulations of the State Banking Commission. No report of an audit of any bank shall be acceptable under this subsection if such audit was made by a person, firm or corporation who is a director, officer or employee of a bank or has a financial interest, other than as a depositor or obligor upon a fully collateralized loan, in the bank which is the subject of the audit.

(d) In the case of a bank which is a member of the Federal Reserve System or in the case of a bank whose deposits are insured by the Federal Deposit Insurance Corporation, the Commissioner of Banks is authorized to accept, in his discretion, as a part of the examinations prescribed in subsection (b) of this section, examinations and reports made pursuant to the Federal Reserve Act or the Federal Deposit Insurance Corporation Act. (1921, c. 4, s. 72; C.S., s. 223(a); 1931, c. 243, s. 5; 1967, c. 789, s. 17; 1977, c. 684, s. 1; 1977, 2nd Sess., c. 1181, s. 1.)

CASE NOTES

For manner in which former Corporation Commission took charge through examiner, see Taylor v. Everett, 188 N.C. 247, 124 S.E. 316 (1924).

§ 53-118. Duties and powers.

It shall be the duty of the examiners to verify all reports made to the Commissioner of Banks by the officers and directors, members, or individuals conducting any banking institution, as required by this Chapter or by the Commissioner of Banks. The officers of every bank shall submit and surrender its books, assets, papers, and concerns to the examiners appointed under this Chapter, who shall retain the custody and possession of such books, assets, papers, and concerns for such length of time as may be required for the purpose of making an examination as required by this Chapter. If any officer shall refuse to surrender the books, assets, papers, and concerns as herein provided, or shall refuse to be examined under oath touching the affairs of such bank, the Commissioner of Banks may forthwith take possession of the property and business of the bank and liquidate its affairs in accordance with the provisions of this Chapter. (1921, c. 4, s. 73; C.S., s. 223(b); 1931, c. 243, s. 5.)

§ 53-119. Removal of officers and employees.

The Commissioner of Banks shall have the right, and is hereby empowered, to require the immediate removal from office of any officer, director, or employee of any bank doing business under this Chapter, who shall be found to be dishonest, incompetent, or reckless in the management of the affairs of the bank, or who persistently violates the laws of this State or the lawful orders, instructions, and regulations issued by the State Banking Commission. (1921, c. 4, s. 74; C.S., s. 223(c); 1931, c. 243, s. 5; 1939, c. 91, s. 2.)

§ 53-120. Examiners may administer oaths; summoning witnesses.

For the purpose of making examinations as required by this Chapter, any duly appointed examiner may administer oaths to examine any officer, director, agent, employee, customer, depositor, shareholder of such bank, or any other person or persons, touching its affairs and business. Any examiner may summon in writing any officer, director, agent, employee, customer, depositor, shareholder, or any person or persons resident of this State to appear before him and testify in relation thereto. (1921, c. 4, s. 75; C.S., s. 223(d).)

§ 53-121. Examiners may make arrest.

When it shall appear to any examiner, by examination or otherwise, that any officer, agent, employee, director, stockholder, or owner of any bank has been guilty of a violation of the criminal laws of this State relating to banks, it shall be his duty, and he is hereby empowered to hold and detain such person or persons until a warrant can be procured for his arrest; and for such purposes such examiners shall have and possess all the powers of peace officers of such county, and may make arrest without warrant for past offenses. Upon report of his action to the Commissioner of Banks, said Commissioner may direct the release of the person or persons so held, or, if in his judgment such person or persons should be prosecuted, the Commissioner of Banks shall cause the district attorney of the prosecutorial district in which such detention is had to be promptly notified, and the action against such person or persons shall be continued a reasonable time to enable the district attorney to be present at the trial. (1921, c. 4, s. 76; C.S., s. 223(e); 1931, c. 243, s. 5; 1973, c. 47, s. 2; 1987 (Reg. Sess., 1988), c. 1037, s. 91.)

Legal Periodicals. — For discussion of section, see 15 N.C.L. Rev. 101 (1937).

CASE NOTES

Cited in Alexander v. Lindsey, 230 N.C. 663, 55 S.E.2d 470 (1949).

§ 53-122. Fees and assessments.

(a) For the purpose of operating and maintaining the office of the Commissioner of Banks, banks and consumer finance licensees doing business under the authority of Chapter 53 of the General Statutes shall pay the following fees and assessments into the office of the Commissioner of Banks within 10 days after the assessment:

(1) Banks. — Each bank shall pay a cumulative assessment based on its total assets, as shown on its report of condition made to the Commissioner of Banks as of December 31 each year or the date most nearly approximating the same, not to exceed the amount determined by applying the following schedule: (i) on the first fifty million dollars ($50,000,000) of assets, or fraction thereof, ten thousand dollars ($10,000); (ii) on assets over fifty million dollars ($50,000,000), but not more than two hundred fifty million dollars ($250,000,000), fourteen dollars ($14.00) per one hundred thousand dollars ($100,000), or fraction thereof; (iii) on assets over two hundred fifty million dollars ($250,000,000), but not more than five hundred million dollars ($500,000,000), eleven dollars ($11.00) per one hundred thousand dollars ($100,000), or fraction thereof; (iv) on assets over five hundred million dollars ($500,000,000), but not more than one billion dollars ($1,000,000,000), seven dollars ($7.00) per one hundred thousand dollars ($100,000), or fraction thereof; (v) on assets over one billion dollars ($1,000,000,000), but not more than ten billion dollars ($10,000,000,000), four dollars ($4.00) per one hundred thousand dollars ($100,000), or fraction thereof; and (vi) on assets over ten billion dollars ($10,000,000,000), two dollars ($2.00) per one hundred thousand dollars ($100,000), or fraction thereof. Additionally, each bank shall pay an assessment on trust assets held by it in the amount of one dollar ($1.00) per one hundred thousand dollars ($100,000) of the assets, or fraction thereof; except that banks are not required to pay assessments on real estate held as trust assets.

(2) Consumer Finance Licensees. — Each consumer finance licensee shall pay an assessment not to exceed eighteen dollars ($18.00) per one hundred thousand dollars ($100,000) of assets, or fraction thereof, plus a fee of three hundred dollars ($300.00) per office; provided, however, a consumer finance licensee shall pay a minimum annual assessment of not less than five hundred dollars ($500.00). The assessment shall be determined on a consumer finance licensee's total assets as shown on its report of condition made to the Commissioner of Banks as of December 31 each year, or the date most nearly approximating the same.

(3) Special Assessment. — If the Commissioner of Banks determines that the financial condition or manner of operation of a bank or consumer finance licensee warrants further examination or an increased level of supervision, or in the event of a merger or conversion of a savings institution organized under State or federal law into a bank, or conversion of a federally chartered bank into a State bank, the institutions may be subject to assessment not to exceed the amount determined in accordance with the schedule set forth in subdivision (1) of subsection (a) of this section for banks or subdivision (2) for consumer finance licensees.

(b) The State Banking Commission may by rule set the amount to be collected for processing any application or proceeding required by law to be filed with the Commissioner and for obtaining copies of any public record of the Banking Commission.

(c) In all civil and criminal cases tried in any of the courts of this State wherein any of the employees of the Commissioner of Banks are used as witnesses, a fee per day, to be determined by the presiding judge, and actual expenses incurred shall be allowed such witnesses and the same shall be paid to the Commissioner of Banks by the clerk of the court of the county in which the case is tried and thereafter charged in bill of costs as are other costs incurred in the matter.

(d) The total expenses of the office of the Commissioner of Banks shall not in any one year exceed the total fees collected under the provisions of this section, provided the expenses may exceed the total fees collected in any year when surplus funds are available.

(e) In the first half of each calendar year, the State Banking Commission shall review the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year. If the estimated fees and assessments provided for under this section shall exceed the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year, then the State Banking Commission may reduce by uniform percentage the fees and assessments provided for in this section. If the estimated fees and assessments provided for under this section shall be less than the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year, then the State Banking Commission may increase by uniform percentage the fees and assessments provided for in this section to an amount which will increase the amount of the fees and assessments to be collected to an amount at least equal to the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year. The State Banking Commission shall report to the Joint Legislative Commission on Governmental Operations its conclusion that the estimated fees and assessments should be reduced or increased. Any reduction or increase of estimated fees and assessments provided for under this section shall become effective July 1 of the next fiscal year.

(f) The Commissioner of Banks may collect the assessments provided for in subsection (a) of this section annually or in periodic installments as approved by the State Banking Commission. (1921, c. 4, s. 77; C.S., s. 223(f); 1927, c. 47, s. 15; 1931, c. 243, s. 5; 1943, c. 733; 1945, c. 467; 1955, c. 640, ss. 1, 2; 1957, c. 1443, s. 1; 1969, c. 229; 1979, c. 483, s. 1; 1981, c. 671, s. 13; 1989, c. 561, s. 1; 1997-285, s. 1; 2007-55, s. 1; 2009-451, s. 14.20.)

Editor's Note. — Subdivision (a)(1), as amended by Session Laws 2007-55, s. 1, effective May 23, 2007, is applicable to assessments made on or after that date.

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.5 is a severability clause.

Effect of Amendments. — Session Laws 2009-451, s. 14.20, effective July 1, 2009, in subsection (e), deleted the former last sentence, which read: "In no event shall any surplus at the end of any fiscal year resulting from the collection of fees and assessments pursuant to this section revert to the general fund," and added the present last sentence.

CASE NOTES

Cited in Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 53-123. Examiners shall make report.

Examiners shall make a full and detailed report in writing to the Commissioner of Banks of the condition of each bank within 10 days after each and every examination made by them. (1921, c. 4, s. 78; C.S., s. 223(g); 1931, c. 243, s. 5.)

Article 10.

Penalties.

§ 53-124. Examiner making false report.

If any bank examiner shall knowingly and willfully make any false or fraudulent report of the condition of any bank, which shall have been examined by him, with the intent to aid or abet the officers, owners, or agents of such bank in continuing to operate an insolvent bank, or if any such examiner shall keep or accept any bribe or gratuity given for the purpose of inducing him not to file any report of examination of any bank made by him, or shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be guilty of a Class H felony. (1921, c. 4, s. 79; C.S., s. 224(a); 1993, c. 539, s. 1265; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For similar section, see G.S. 14-233. As to malfeasance of corporation officers and agents, see G.S. 14-254.

§ 53-125. Examiners disclosing confidential information.

If any bank examiner or other employee of the Commissioner of Banks fails to keep secret the facts and information obtained in the course of an examination of a bank, except when the public duty of such examiner or employee requires him to report upon or take official action regarding the affairs of such bank, he shall be guilty of a Class 1 misdemeanor. Nothing in this section shall prevent the proper exchange of information with the representatives of the banking departments of other states, with the federal reserve bank or national bank examiners, or other authorities, with the creditors of such bank or others with whom a proper exchange of information is wise or necessary. (1921, c. 4, s. 80; C.S., s. 224(b); 1931, c. 243, s. 5; 1993, c. 539, s. 420; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 129, s. 25.)

§ 53-126. Loans or gratuities forbidden.

No State bank, or any officer, director or employee thereof shall hereafter make any loan or grant any gratuity to the Commissioner of Banks, any bank examiner or assistant bank examiner of the Commissioner of Banks of North Carolina. Any such officer, director or employee violating this provision shall be guilty of a Class 1 misdemeanor; and they may be fined a further sum equal to the money so loaned or gratuity given. If the Commissioner of Banks, or any bank examiner, or assistant bank examiner of the Commissioner of Banks of North Carolina shall accept a loan or gratuity from any State bank, or from any officer, director or employee thereof, he shall be guilty of a Class 1 misdemeanor, and may be fined a further sum equal to the money so loaned or gratuity given. (1927, c. 29, s. 1; 1931, c. 243, s. 5; 1993, c. 539, s. 421; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 53-127. Unlawful use of terms indicating that business is bank or trust company; unauthorized use of name of banking entity.

(a) Definitions. The following definitions apply in this section.
  (1) Banking. — The business of receiving or soliciting money on deposit.
  (2) Banking entity. — A person, partnership, corporation, or other entity that is engaged in the banking or trust business in North Carolina and is (i) subject to the supervision of the Commissioner of Banks under this Chapter, (ii) subject to supervision by the Commissioner of Banks under Chapter 54B or Chapter 54C, or (iii) a banking or savings institution authorized to transact a banking or trust business in this State under federal law. The term "banking entity" includes a credit union chartered under the laws of this State or under federal

law, but only with regard to subsections (c1), (d), (e), and (f) of this section.

(3) Nonbanking entity. — A person, partnership, corporation, or other entity that is not a banking entity.

(b) Restrictions. No nonbanking entity may use any sign or written or printed paper indicating that it is a bank, savings bank, trust company, or place of banking. No entity may use the word "bank", "savings bank", "banking", "banker", or "trust company", or the equivalent or plural of any of these words in connection with any business other than that of banking. This section does not prohibit an individual from acting in a trust capacity.

(c) Exceptions.

(1) A nonbanking entity may use any of the terms listed above in its name if the context or remaining words show clearly that the business is not a bank or trust company and is not engaged in the banking or trust business.

(2) A nonbanking entity may use any of the terms listed above where the term is the proper name of a principal or former principal in the entity and the use of the name is made in good faith and not in an effort to deceive the public.

(3) A corporation that is a bank holding company as defined in G.S. 53-226(2) or a savings and loan holding company as defined in G.S. 54B-261(d) may use the words "bank", "banker", and "trust company", and the equivalent and plural of these words in its name and may use a name similar to that of any of its subsidiary banks or stock associations.

(4) A corporation incorporated before January 1, 1905, may retain the word "trust" in its name, although it does not transact a business that requires examination by the Commissioner of Banks.

(c1) No person shall use the name or logo of any banking entity in connection with the sale, offering for sale, or advertising of any financial product or service without the express written consent of the banking entity.

(d) Penalty. Violation of subsections (a) through (c1) of this section is a Class 3 misdemeanor, punishable only by a fine of up to five hundred dollars ($500.00).

(e) Any banking entity may file an action to enjoin the use of the banking entity's name or logo in connection with the sale, offering for sale, distribution, or advertising of any financial product or service without the express written consent of the banking entity. Any court of competent jurisdiction may grant injunctions to restrain the use and may require the defendants to pay to the banking entity all profits derived from, and all damages suffered by, reason of the wrongful use of the name or logo.

(f) The provisions of this section are not exclusive remedies and do not preclude the use of any other remedy by law. (1921, c. 4, s. 81; C.S., s. 224(c); 1931, c. 243, s. 5; 1943, c. 543; 1985, c. 677, s. 6; 1989 (Reg. Sess., 1990), c. 805, s. 1; 1991, c. 680, s. 4; 1993, c. 539, s. 422; 1994, Ex. Sess., c. 24, s. 14(c); 2001-193, s. 16; 2005-162, s. 1.)

Editor's Note. — Session Laws 1985, c. 677, s. 422, which amended this section, provided in s. 7: "The provisions of this act shall not apply to any institution chartered as a savings bank prior to the effective date of this act and any such institution shall continue to be regulated and supervised in accordance with the laws of the State of North Carolina in effect prior to ratification of this act." The act was ratified July 10, 1985, and became effective on that date.

This section, as amended by Session Laws 2005-162, s. 1, effective December 1, 2005, is applicable to offenses committed on or after that date.

§ 53-128. Willfully and maliciously making derogatory reports.

Any person who shall willfully and maliciously make, circulate, or transmit to another or others any statement, rumor, or suggestion, written, printed, or by word of mouth, which is directly or by inference false and derogatory to the financial condition, or affects the solvency or financial standing of any bank, or who shall counsel, aid, procure, or induce another to state, transmit, or circulate any such statement or rumor shall be guilty of a Class 1 misdemeanor. (1921, c. 4, s. 82; C.S., s. 224(d); 1989, c. 187, s. 17; 1993, c. 539, s. 423; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 53-129. Misapplication, embezzlement of funds, etc.

Whoever being an officer, employee, agent or director of a bank, with intent to defraud or injure the bank, or any person or corporation, or to deceive an officer of the bank or an agent appointed to examine the affairs of such bank, embezzles, abstracts, or misapplies any of the money, funds, credit or property of such bank, whether owned by it or held in trust, or who, with such intent, willfully and fraudulently issues or puts forth a certificate of deposit, draws an order or bill of exchange, makes an acceptance, assigns a note, bond, draft, bill of exchange, mortgage, judgment, decree or fictitiously borrows or solicits, obtains or receives money for a bank not in good faith, intended to become the property of such bank; or whoever being an officer, employee, agent, or director of a bank, makes or permits the making of a false statement or certificate, as to a deposit, trust fund or contract, or makes or permits to be made a false entry in a book, report, statement or record of such bank, or conceals or permits to be concealed by any means or manner, the true and correct entries of said bank, or its true and correct transactions, who knowingly loans, or permits to be loaned, the funds or credit of any bank to any insolvent company or corporation, or corporation which has ceased to exist, or which never had any existence, or upon collateral consisting of stocks or bonds of such company or corporation, or who makes or publishes or knowingly permits to be made or published a false report, statement or certificate as to the true financial condition of such bank, shall be guilty of a felony. If an offense committed under this section involves money, funds, credit, or property with a value of one hundred thousand dollars ($100,000) or more, it is a Class C felony. If an offense committed under this section involves money, funds, credit, or property with a value of less than one hundred thousand dollars ($100,000), it is a Class H felony. Any other offense committed under this section is a Class H felony. (1921, c. 4, s. 83; C.S., s. 224(e); 1927, c. 47, s. 16; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, c. 14; 1993, c. 539, s. 1266; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 19.25(m).)

CASE NOTES

Intent and purpose of this section is to prevent the deception of the officers of a bank or the depletion of its assets or injury of its business by falsification of the bank's books by its officers or employees, and an indictment for the offense is not sufficient which merely charges such falsification without showing that the false entries were material or affected the interests of the bank or deceived its officers. State v. Cole, 202 N.C. 592, 163 S.E. 594 (1932).

Section 14-254 Not in Conflict. — Section 14-254, making it a criminal offense for the cashier or certain other officers, agents and employees of a bank to be guilty of malfeasance in the respects therein enumerated, making the intent necessary for a conviction, is not in conflict with this section as passed in 1921. State v. Switzer, 187 N.C. 88, 121 S.E. 43 (1924).

"Abstract" Construed. — The legal meaning of the word "abstract," as it appears in G.S. 14-254, with reference to the unlawful use of the funds of the bank, is correctly charged under an instruction to the jury defining it as the taking from or withdrawing from the bank, with the intent to injure or defraud. State v. Switzer, 187 N.C. 88, 121 S.E. 43 (1924).

"Embezzle" means to misappropriate as well as to convert to one's own use. State v. Maslin, 195 N.C. 537, 143 S.E. 3 (1928), overruled on other grounds, State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Specific intent to deceive or to defraud is not necessary to a conviction of a bank officer or employee of making false entries on the books of the bank under the provisions of this section, it being sufficient if the defendant willfully made such false entries, the performance of the act expressly forbidden by statute constituting an offense in itself without regard to the question of specific intent. State v. Lattimore, 201 N.C. 32, 158 S.E. 741 (1931).

Indictment Charging Conspiracy to Violate Section. — It is not necessary for an indictment, charging a conspiracy to violate the provisions of this section, to allege that all of the defendants were officers or employees of the bank, the indictment being sufficient if it alleges that some of the defendants were officers or employees of the bank and that the other defendants conspired with them to do the unlawful act. State v. Davis, 203 N.C. 13, 203 N.C. 35, 164 S.E. 737, 164 S.E. 737 (1932), cert. denied, 287 U.S. 649, 53 S. Ct. 95, 77 L. Ed. 561 (1932).

Alleging Corporation Is a Bank. — Where the indictment charges the employee with making false entries upon the books of the bank in which he was employed, and that it was a corporation existing under the laws of the State of North Carolina, it is not defective for failing to particularize that it was a bank, within the contemplation of the statute under which the indictment had been drawn. State v. Hedgecock, 185 N.C. 714, 117 S.E. 47 (1923).

Sufficiency of Indictment. — In a prosecution under this section and G.S. 14-254 it was not necessary to aver or to prove that the money or funds had been committed by the bank to the custody of the defendant or that there had been any breach of trust or confidence except that which arose out of the relation between the bank and the defendant. Nor was it necessary to charge in the very words that the defendant had converted the property to his own use. The words "did embezzle" sufficiently indicated the criminal act. The intent to defraud was sufficiently set out, under G.S. 15-151, without specifically naming any particular victim of the preconceived purpose. And the indictment was sufficient though there was nothing to indicate the number of abstractions, if more than one. State v. Maslin, 195 N.C. 537, 143 S.E. 3 (1928), overruled on other grounds, State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Variance as to Some Items. — In a prosecution of an officer of a bank for publishing a false report of the bank's condition in violation of this section, a variance between the allegations and proof as to some of the items of the report will not be fatal when there is no variance with respect to all the items, it being sufficient for conviction if the report as published was false in any particular as alleged in the indictment and was published with knowledge of such falsity and with a wrongful or unlawful intent. State v. Davis, 203 N.C. 47, 164 S.E. 732, cert. denied, 287 U.S. 645, 53 S. Ct. 91, 77 L. Ed. 558 (1932).

Expert Evidence as to Book Entries. — In a prosecution under this section and G.S. 14-254 expert parol evidence may be properly admitted to trace book entries, without contradicting them, so as to show that the officer of the bank had embezzled the bank's funds held in trust, as charged in the bill of indictment. In such case there was no invasion of the province of the jury by the expression of an opinion upon a fact in issue. State v. Maslin, 195 N.C. 537, 143 S.E. 3 (1928), overruled on other grounds, State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Instruction That Willfulness Must Be Shown Is Not Error. — In a prosecution under this section for willfully making false entries on the books of a bank, an instruction which was intended to stress and in effect did stress the necessity of proving that the false entries were willfully and not inadvertently made, will not be held for error. State v. Lattimore, 201 N.C. 32, 158 S.E. 741 (1931).

Conviction of Depositor. — In order to convict a depositor of a bank who has abstracted funds from the bank in collusion with its cashier, it is not required that he himself was an officer of the bank or that he was present at the time the money was feloniously "abstracted," under the provisions of G.S. 14-254, and he may be convicted thereunder when the bill of indictment substantially follows the language of the statute and the evidence is sufficient to sustain the charge therein. This is not applicable to the provisions of this section as passed in 1921. State v. Switzer, 187 N.C. 88, 121 S.E. 43 (1924).

Though the depositor was not present at the time the offense was committed, he may be convicted as a principal under the counts of the indictment so charging the offense. State v. Switzer, 187 N.C. 88, 121 S.E. 43 (1924).

§ 53-130. Making false entries in banking accounts; misrepresenting assets and liabilities of banks.

If any person shall willfully and knowingly subscribe to, or make, or cause to be made, any false statement or false entry in the books of any bank, or shall knowingly subscribe to or exhibit false papers, with intent to deceive any person authorized to examine into the affairs of such bank, or shall willfully and knowingly make, state or publish any false statement of the amount of the assets or liabilities of any bank, he shall be guilty of a Class H felony. (1903, c. 275, s. 27; Rev., s. 3326; C.S., s. 4402; 1993, c. 539, s. 1267; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 53-131. False certification of a check.

Whoever, being an officer, employee, agent, or director of a bank, certifies a check drawn on such bank, and willfully fails to forthwith charge the amount thereof against the account of the drawer thereof, or willfully certifies a check drawn on such bank unless the drawer of such check has on deposit with the bank an amount of money subject to the payment of such check and equivalent to the amount therein specified, shall be guilty of a Class I felony which may include a fine not more than five thousand dollars ($5,000). (1921, c. 4, s. 84; C.S., s. 224(f); 1993, c. 539, s. 1268; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 53-132. Receiving deposits in insolvent banks.

Any person, being an officer or employee of a bank, who receives, or being an officer thereof, permits an employee to receive money, checks, drafts, or other property as a deposit therein when he has knowledge that such bank is insolvent, shall be guilty of a Class I felony which may include a fine not more than five thousand dollars ($5,000). Provided, that in any indictment hereunder, insolvency shall not be deemed to include insolvency as defined under paragraph d of subdivision (3) in the definition of insolvency under G.S. 53-1. (1921, c. 4, s. 85; C.S., s. 224(g); 1927, c. 47, s. 17; 1993, c. 539, s. 1269; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

"Insolvent" Defined. — The word "insolvent," in this section, means when the bank cannot meet its depository liabilities in due course, and does not require that the condition of the bank should at the time be such as to enable it at any given time to pay all of its depositors in full at the time on demand. State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924).

A bank is insolvent, within the meaning of this section, when the actual cash market value of its assets is not sufficient to pay its liabilities to its depositors and other creditors. State v. Brewer, 202 N.C. 187, 162 S.E. 363 (1932).

"Knowledge" Defined. — The word "knowledge," as used in the statute, is to be taken in its ordinary sense and according to its usual significance or acceptation. It means an impression of the mind, the state of being aware; and this may be acquired in numerous ways and from many sources. It is usually obtained from a variety of facts and circumstances. Generally speaking, when it is said a person has knowledge of a given condition, it is meant that his relation to it, his association with it, his control over it, and his direction of it are such as to give him actual information concerning it. State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924).

Who May Bring Action for Civil Liability. — A violation of this section by an employee, or by officers and directors of a bank, resulting in damages to a depositor, is a wrong to the depositor; he and not the bank or its receiver is entitled to maintain an action to recover the damages resulting from such wrong. See Townsend v. Williams, 117 N.C. 330, 23 S.E. 461 (1895); Tate v. Bates, 118 N.C. 287, 24 S.E. 482 (1896); Solomon v. Bates, 118 N.C. 311, 24 S.E. 478, motion to modify opinion dismissed, 118 N.C. 321, 24 S.E. 746 (1896); Houston v. Thornton, 122 N.C. 365, 29 S.E. 827 (1898); State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924); Russell v. Boone, 188 N.C. 830, 125 S.E. 926 (1924); Bane v. Powell, 192 N.C. 387, 135 S.E. 118 (1926).

A depositor in a bank, who has sustained damages, peculiar to himself, by the wrongful act of the officers and directors of the bank, has a right to recover damages in an action brought by him against the officers and directors. Douglass v. Dawson, 190 N.C. 458, 130 S.E. 195 (1925); Bane v. Powell, 192 N.C. 387, 135 S.E. 118 (1926).

Liability Not Bank Asset. — Sums for which bank officers and directors are liable for receiving or permitting receipt of deposit with knowledge of bank's insolvency, contrary to this section, are not assets of the bank. The wrong being only to the depositor, he need not allege, to maintain an action, that bank's receiver refused to sue on demand. Bane v. Powell, 192 N.C. 387, 135 S.E. 118 (1926).

Elements of Offense. — In order for a conviction under the provisions of this section, the State must prove beyond a reasonable doubt the actual receipt of the deposits by defendant officer of the bank at the time when the bank was insolvent to his own knowledge, or that such officer permitted an employee of the bank to receive the deposits with knowledge of these facts. State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924).

Necessary Allegations. — In order for a depositor to maintain an action against the individual officers of an insolvent bank for permitting the deposits to be received it is necessary, among other things, to allege and prove the insolvency of the bank at the time the deposits were made, and the allegation that is was either insolvent then or the misconduct of the officials afterwards caused its insolvency, is insufficient, the alternative of the allegation being a wrong to the bank itself which may be sued upon by its receiver afterwards. Wall v. Howard, 194 N.C. 310, 139 S.E. 449 (1927).

Evidence of Value of Assets and Property. — For the purpose of ascertaining the solvency or insolvency of a bank, it is permissible to go into an investigation of its assets and property as of the date when the deposit was made, and, of course, their value after that, or at the time of the trial, is competent as illustrating or bearing upon their worth at the time the deposit was charged to have been received. State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924).

Evidence of Admissions of Knowledge of Insolvency. — Upon the trial of an officer of an insolvent bank under this section, the officer's admissions that he knew of the insolvency of the bank at the time in question with his explanation thereof is competent testimony. State v. Brewer, 202 N.C. 187, 162 S.E. 363 (1932).

Bank Examiner as Expert Witness. — In an action to convict an officer of a bank under this section, the testimony of the State bank examiner is to be received as that of an expert upon the question of the bank's insolvency. State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924).

Certified Accountant as Witness. — Upon the trial of a bank official under the provisions of this section, testimony of a certified public accountant who had had experience in such matters and who had examined the books of the bank and had obtained from the directors, collectively and individually, information as to the value of its assets including lands and collateral, that the bank was insolvent at the time in question is not objectionable. State v. Brewer, 202 N.C. 187, 162 S.E. 363 (1932).

Sufficiency of Expert Opinion Evidence as to Insolvency. — Where the State bank examiner and another expert have been permitted to give their testimony as to the bank's insolvency at the time of the crime, upon their investigation, without stating the basis of their opinions thereon, it may not be decided as a matter of law, upon conflicting evidence, that the defendant must have known of the insolvent condition testified to by the experts. State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924).

§ 53-133. Advertising larger amount than that paid in capital stock.

It shall be unlawful for any bank to advertise in a newspaper, letterhead, or any other way, a larger capital stock than has been actually paid in in cash. Any bank violating this section shall be subject to a penalty of five hundred dollars ($500.00) for each and every offense. The penalty herein provided for shall be recovered by the State in a civil action in any court of competent jurisdiction, and it shall be the duty of the Attorney General to prosecute all such actions.

The clear proceeds of penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1921, c. 4, s. 86; C.S., s. 224(h); 1998-215, s. 31.)

§ 53-134. Offenses declared misdemeanors; prosecution; employment of counsel; punishment.

Any offense against the banking laws of the State of North Carolina which is not elsewhere specifically declared to be a crime, or for which elsewhere a penalty is not specifically provided, is a Class 1 misdemeanor. The Commissioner of Banks is authorized and directed to prosecute all offenses against the banking laws of the State, and to that end is expressly authorized to employ counsel to prosecute in the inferior courts and to aid the district attorney in the superior courts. The Commissioner of Banks shall compensate the counsel so employed, and the State Treasurer shall pay the same out of the funds in the treasury and not otherwise appropriated. (Ex. Sess. 1921, c. 56, s. 4; C.S., s. 224(i); 1927, c. 47, s. 18; 1931, c. 243, s. 5; 1973, c. 47, s. 2; 1993, c. 257, s. 2; 1993, c. 539, s. 424; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Loans in Violation of § 53-48 or § 53-111. — Under this section as it read prior to amendment by Session Laws 1993, c. 539, s. 424, the unlawful act of making loans in violation of G.S. 53-48 or G.S. 53-111 was made a misdemeanor punishable as such at the discretion of the court. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925). See notes to §§ 53-48 and 53-111.

§ 53-135. General corporation law to apply.

All provisions of the law relating to private corporations, and particularly those enumerated in the Chapter entitled "North Carolina Business Corporation Act," not inconsistent with this Chapter or with the business of banking, shall be applicable to banks. (1921, c. 4, s. 87; C.S., s. 224(j); 1989 (Reg. Sess., 1990), c. 1024, s. 3.)

CASE NOTES

Cited in Cole v. Farmers Bank & Trust Co., 221 N.C. 249, 20 S.E.2d 54 (1942); Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

Article 11.

Industrial Banks.

§ 53-136. Industrial bank defined.

The term "industrial bank," as used in this Article shall be construed to mean any corporation organized or authorized under this Article which is engaged in receiving, soliciting or accepting money or its equivalent on deposit and in lending money to be repaid in weekly, monthly, or other periodical installments or principal sums as a business: Provided, however, this definition shall not be construed to include building and loan associations, commercial banks, or credit unions. (1923, c. 225, s. 1; C.S., s. 225(a); 1945, c. 743, s. 1.)

§ 53-137. Manner of organization.

Any number of persons, not less than five, may organize an industrial bank by setting forth in a certificate of incorporation, under their hands and seals, the following:

(1) The name of the industrial bank.
(2) The location of its principal office in this State.
(3) The nature of its business.
(4) The amount of its authorized capital stock which shall be divided into shares of ten ($10.00), twenty ($20.00), twenty-five ($25.00), fifty ($50.00) or one hundred dollars ($100.00) each: Provided, fractional shares may be issued for the purpose of complying with the requirements of G.S. 53-88.
(5) The names and post-office addresses of subscribers for stock, and the number of shares subscribed by each. The aggregate of such subscription shall be the amount of the capital with which the industrial bank will begin business.
(6) Period, if any, limited for the duration of the industrial bank.

This section shall not apply to banks organized and doing business prior to the adoption of this section. (1923, c. 225, s. 2; C.S., s. 225(b); 1945, c. 743, s. 1.)

CASE NOTES

Denial of Charter Upheld Absent Capricious Acts, Bad Faith or Disregard of Law. — Where plaintiffs applied for an industrial bank charter, and their application was not passed upon by the Secretary of State on the advice and recommendation of the Commissioner of Banks, acting in accordance with G.S. 53-4, and plaintiffs sued to compel the issuance of a charter, alleging no capricious acts, bad faith or disregard of law by the State officers, the complaint did not state a cause of action and was not sufficient as a petition for certiorari or as an application for mandamus. Pue v. Hood, 222 N.C. 310, 22 S.E.2d 896 (1942).

§ 53-138. Corporate title.

Every corporation incorporated or reorganized pursuant to the provisions of this Article shall be known as an industrial bank, and may use the word "bank" as part of its corporate title. (1923, c. 225, s. 3; C.S., s. 225(c).)

§ 53-139. Capital stock.

The amount of capital stock with which any industrial bank shall commence business shall not be less than fifty percent (50%) of that which would be required of a commercial bank under the provisions of G.S. 53-2. (1923, c. 225, s. 4; C.S., s. 225(d); 1967, c. 789, s. 18.)

§ 53-140. Sales of capital stock; accounting; fees.

The capital stock sold by any industrial bank in process of organization, or for an increase of the capital stock, shall be accounted for to the bank in the full amount paid for the same. No commission or fee shall be paid to any person, association, or corporation for selling such stock. The Commissioner of Banks shall refuse authority to commence business to any industrial bank where commissions or fees have been paid, or have been contracted to be paid by it, or by anyone in its behalf to any person, association, or corporation for securing subscriptions for or selling stock in such bank. (1923, c. 225, s. 5; C.S., s. 225(e); 1931, c. 243, s. 5.)

§ 53-141. Powers.

Industrial banks shall have perpetual duration and succession in their corporate name unless a limited period of duration is stated in their certificate of incorporation. They shall have the powers conferred by subdivisions (1), (2), and (3) of subsection (a) of G.S. 55-3-02, and subdivision (3) of G.S. 53-43, such additional powers as may be necessary or incidental for the carrying out of their corporate purposes, and in addition thereto the following powers:

(1) To discount and negotiate promissory notes, drafts, bills of exchange and other evidences of indebtedness, and to loan money on real or personal security, and to purchase notes, bills of exchange, acceptances or other choses in action, and to take and receive interest or discounts subject to G.S. 53-43(1).

(2) To make loans and charge and receive interest at rates not exceeding the rates of interest provided in G.S. 24-1.1 and G.S. 24-1.2.

(3) To establish branch offices or places of business within the county in which its principal office is located, and elsewhere in the State, after having first obtained the written approval of the Commissioner of Banks, which approval may be given or withheld by the Commissioner of Banks in his discretion. The Commissioner of Banks, in exercising such discretion, shall take into account, but not by way of limitation, such factors as the financial history and condition of the applicant bank, the adequacy of its capital structure, its future earnings prospects, and the general character of its management. Such approval shall not be given until he shall find

a. That the establishment of such branch or limited service facility will meet the needs and promote the convenience of the community to be served by the bank, and

b. That the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch or limited service facility and of the existing bank or banks in said community.

Provided, that the Commissioner of Banks shall not authorize the establishment of any branch the paid-in capital of whose parent bank is not sufficient in amount to provide for capital in an amount equal to that required with respect to the establishment of branches of commercial banks under the provisions of G.S. 53-62. For the purposes of this paragraph, the provisions of G.S. 53-62 as to the meaning of the word "capital" shall be applicable.

A bank may discontinue a branch office upon resolution of its board of directors. Upon the adoption of such a resolution, the bank shall follow the procedures for closing a branch as set forth at G.S. 53-62(e). No branch shall be closed until approved by the Commissioner of Banks.

(4) Subject to the approval of the Commissioner of Banks and on the authority of its board of directors, or a majority thereof, to enter into such contract, incur such obligations and generally to do and perform any and all such acts and things whatsoever as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights or privileges, which may at any time be available or inure to banking institutions, or to their depositors, creditors, stockholders, conservators, receivers or liquidators, by virtue of those provisions of section eight of the Federal Banking Act of 1933 (section twelve B of the Federal Reserve Act as amended) which establish the Federal Deposit Insurance Corporation and provide for the insurance of deposits, or of any other provisions of that or any other act or resolution of Congress to aid, regulate or safeguard banking institutions and their depositors, including any amendments of the same or any substitutions therefor; also, to subscribe for and acquire any stock, debentures, bonds or other types of securities of the Federal Deposit Insurance Corporation and to

comply with the lawful regulations and requirements from time to time issued or made by such corporations.

(5) To solicit, receive and accept money or its equivalent on deposit both in savings accounts and upon certificates of deposit.

(6) Subject to the approval of the State Banking Commission, to solicit, receive and accept money or its equivalent on deposit subject to check; provided, however, no such approval shall be given unless and until such industrial bank meets the capital requirements of a commercial bank as set forth in G.S. 53-2.

(7) To transact any lawful business in aid of the United States in time of war or engagement of the nation's armed forces in hostile military operations. (1923, c. 225, s. 6; C.S., s. 225(f); 1925, c. 199, s. 1; 1931, c. 243, s. 5; 1935, c. 81, s. 2; 1939, c. 244, ss. 1, 2; 1943, c. 233; 1945, c. 283; 1949, c. 952, ss. 1, 2; 1959, c. 365; 1967, c. 789, s. 19; 1969, c. 1303, ss. 10-12; 1995, c. 129, s. 26; 1995 (Reg. Sess., 1996), c. 742, s. 20.)

Editor's Note. — Section 24-1.2, referred to in subdivision (2) above, has been repealed.

Legal Periodicals. — For comment on the 1949 amendment to this section, see 27 N.C.L. Rev. 425 (1949).

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

§ 53-142. Restriction on powers.

No industrial bank shall deposit any of its funds in any banking corporation unless such corporation has been designated as such depositary by a vote of a majority of the directors, or of the executive committee, exclusive of any director who is an officer, director, or trustee of the depositary so designated, present at any meeting duly called at which a quorum is in attendance, and approved by the Commissioner of Banks. (1923, c. 225, s. 7; C.S., s. 225(g); 1931, c. 243, s. 5; 1937, c. 220.)

§ 53-143. Investments; securities; loans; limitations.

The provisions of G.S. 53-46, 53-48 and 53-49, with reference to the limitations of investments in securities, limitations of loans and suspensions of investment and loan limitations, shall be applicable to industrial banks. (1923, c. 225, s. 8; C.S., s. 225(h); 1945, c. 127, s. 2.)

§ 53-144. Supervision and examination.

Every industrial bank now or hereafter transacting the business of an industrial bank as defined by this Article, whether as a separate business or in connection with any other business under the laws of and within this State, shall be subject to the provisions of this Article, and shall be under the supervision of the Commissioner of Banks. The Commissioner of Banks shall exercise control of and supervision over the industrial banks doing business under this Article, and it shall be his duty to execute and enforce, through the State bank examiners and such other agents as are now or may hereafter be created or appointed, all laws which are now or may hereafter be enacted relating to industrial banks as defined in this Article. For the more complete and thorough enforcement of the provisions of this Article, the State Banking Commission is hereby empowered to promulgate such rules, regulations, and instructions, not inconsistent with the provisions of this Article, as may, in its opinion, be necessary to carry out the provisions of the laws relating to industrial banks as in this Article defined, and as may be further necessary to insure such safe and conservative management of industrial banks under the supervision of the Commissioner of Banks as may provide adequate protection for the interest of creditors, stockholders, and the public, in their relations with such institutions. All industrial banks doing business under the provisions of this Article shall conduct their business in a manner consistent with all laws relating to industrial banks, and all rules, regulations and instructions that may be promulgated or issued by the State Banking Commission. (1923, c. 225, s. 11; C.S., s. 225(k); 1931, c. 243, s. 5; 1939, c. 91, s. 2.)

§ 53-145. Sections of general law applicable.

Sections 53-1, 53-3, 53-4, 53-5, 53-6, 53-7, 53-8, 53-9, 53-10, 53-11, 53-12, 53-13, 53-18, 53-20, 53-22, 53-23, 53-42, 53-42.1, 53-47, 53-50, 53-51, 53-54, 53-63, 53-64, 53-67, 53-68, 53-70, 53-71, 53-73, 53-78, 53-79, 53-80, 53-81, 53-82, 53-83, 53-85, 53-87, 53-88, 53-90, 53-91.2, 53-91.3, 53-105, 53-106, 53-107, 53-108, 53-109, 53-110, 53-111, 53-112, 53-117, 53-118, 53-119, 53-120, 53-121, 53-122, 53-123, 53-124, 53-125, 53-126, 53-128, 53-129, 53-132, 53-133, 53-134, relating to the supervision and examination of commercial banks, shall be construed to be applicable to industrial banks, insofar as they are not inconsistent with the provisions of this Article. Sections 53-19, 53-24, 53-37, 53-39, 53-40, 53-41, 53-44, 53-45, 53-61, 53-75, 53-76, 53-77, 53-86, 53-113, 53-114, 53-115, 53-116, 53-135, 53-146, and 53-148 through 53-158, relating to commercial banks, shall be construed to be applicable to industrial banks. (1923, c. 225, s. 13; C.S., s. 225(m); 1927, c. 141; 1939, c. 244, s. 3; 1945, c. 743, s. 1; 1981, c. 671, s. 14; 1995, c. 129, s. 27.)

ARTICLE 12.

Joint Deposits.

§ 53-146. Deposits in two names.

When a deposit has been or is hereafter made in any bank, trust company, banking and trust company, or any other institution transacting business in this State, in the names of two persons, payable to either, or payable to either or the survivor, all or any part of the deposit, or any interest or dividend thereon, may be paid to either of said persons, whether the other is living or not; and the receipt or acquittance of the person so paid is a valid and sufficient discharge to the bank for payment so made. (1917, c. 243, s. 1; C.S., s. 230.)

Legal Periodicals. — For discussion of section, see 9 N.C.L. Rev. 14 (1931).

For note on rights of a survivor to a joint bank account, see 31 N.C.L. Rev. 95 (1952); 35 N.C.L. Rev. 75 (1956).

For note on joint bank accounts without survivorship provision in joint account agreement, see 35 N.C.L. Rev. 352 (1957).

For note on joint bank accounts with the right of survivorship in North Carolina, see 46 N.C.L. Rev. 669 (1968).

CASE NOTES

Section is for protection of bank only. O'Brien v. Reece, 45 N.C. App. 610, 263 S.E.2d 817 (1980).

Ownership of Funds. — Absent any other evidence, this section is not dispositive as to the ownership of funds. O'Brien v. Reece, 45 N.C. App. 610, 263 S.E.2d 817 (1980).

Instrument in Husband's Name and Payable to Himself "or" Wife. — The certificate of deposit by a bank in the name of the husband, payable to himself "or" his wife does not fall within the provisions of this section. It applies only where the deposit is made in the names of two persons and payable to either; nor can construing the word "or" as meaning "and" have the effect of creating a tenancy in common. Jones v. Fullbright, 197 N.C. 274, 148 S.E. 229 (1929).

Cited in Redmond v. Farthing, 217 N.C. 678, 9 S.E.2d 405 (1940).

§ 53-146.1. Joint accounts.

(a) Any two or more persons may establish a deposit account or accounts by written contract. The deposit account and any balance thereof shall be held for them as joint tenants, with or without right of survivorship, as the contract shall provide; the account may also be held pursuant to G.S. 41-2.1 and have the incidents set forth in that section, provided, however, if the account is held pursuant to G.S. 41-2.1 the contract shall set forth that fact as well. Unless the persons establishing the account have agreed with the bank that withdrawals require more than one signature, payment by the bank to, or on the order of, any persons designated in the contract authorized by this section shall be a total discharge of the bank's obligation as to the amount so paid. Funds in a joint account established with right of survivorship shall belong to the surviving joint tenant or tenants upon the death of a joint tenant, and the funds shall be subject only to the personal representative's right of collection as set forth in G.S. 28A-15-10(a)(3), or as provided in G.S. 41-2.1 if the account is established pursuant to the provisions of that section. Payment by the bank of funds in the joint account to a surviving joint tenant or tenants shall terminate the personal representative's authority under G.S. 28A-15-10(a)(3) to collect against the bank for the funds so paid, but the personal representative's authority to collect such funds from the surviving joint tenant or tenants is not terminated. A pledge of such account by any owner or owners, unless otherwise specifically agreed upon, shall be a valid pledge and transfer of such account, or of the amount so pledged, and shall not operate to sever or terminate the joint ownership of all or any part of the account. Persons establishing an account under this section shall sign a statement showing their election of the right of survivorship in the account, and containing language set forth in a conspicuous manner and substantially similar to the following:

"BANK (or name of institution)

JOINT ACCOUNT WITH RIGHT OF SURVIVORSHIP

G.S. 53-146.1

We understand that by establishing a joint account under the provisions of North Carolina General Statute 53-146.1 that:

1. The bank (or name of institution) may pay the money in the account to, or on the order of, any person named in the account unless we have agreed with the bank that withdrawals require more than one signature; and
2. Upon the death of one joint owner the money remaining in the account will belong to the surviving joint owners and will not pass by inheritance to the heirs of the deceased joint owner or be controlled by the deceased joint owner's will.

We DO elect to create the right of survivorship in this account.

____

______________________________"

(a1) This section shall not be deemed exclusive. Deposit accounts not conforming to this section shall be governed by other common law provisions of the General Statutes or the common law as appropriate.

(b) This section does not repeal or modify any provisions of laws relating to estate taxes. This section regulates and protects the bank in its relationship with joint owners of deposit accounts.

(c) No addition to such deposit account, nor any withdrawal or payment shall affect the nature of the account as a joint account, or affect the right of any tenant to terminate the account. (1987 (Reg. Sess., 1988), c. 1078, s. 1; 1989, c. 164, s. 2; 1989 (Reg. Sess., 1990), c. 866, s. 4; 1998-69, s. 13.)

Editor's Note. — Session Laws 1987 (Reg. Sess., 1988), c. 1078, s. 9 provided that all accounts opened pursuant to any statute amended by c. 1078 before July 1, 1989 would continue to be governed by the provisions of those statutes as they read prior to July 1, 1989.

CASE NOTES

Signed Statement Still Required to Create Survivorship. — This section retains requirement that parties execute signed statement of their intent to create right of survivorship. In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990).

Executor Holding Joint Tenancy with Decedent Could Not Be Liable for Converting Funds Contained in Joint Account. — Beneficiary could not legally establish a claim of conversion against an executor, as the executor was a true and rightful owner of the funds held with the decedent as a joint tenant and no evidence was presented that the decedent and the executor agreed with or required the bank to demand that withdrawals contain both owners' signatures. Horry v. Woodbury, 189 N.C. App. 669, 659 S.E.2d 88, 2008 N.C. App. LEXIS 706 (2008), rev'd, 363 N.C. 7, 673 S.E.2d 127 (2009).

Cited in Napier v. High Point Bank & Trust Co., 100 N.C. App. 390, 396 S.E.2d 620 (1990); Davis v. Wrenn, 121 N.C. App. 156, 464 S.E.2d 708 (1995); Mutual Community Savs. Bank v. Boyd, 125 N.C. App. 118, 479 S.E.2d 491 (1996).

§ 53-146.2. Payable on Death (POD) accounts.

(a) If any person or persons establishing a deposit account shall execute a written agreement with the bank containing a statement that it is executed pursuant to the provisions of this section and providing for the account to be held in the name of the person or persons as owner or owners for one or more persons designated as beneficiaries, the account and any balance thereof shall be held as a Payable on Death account, with the following incidents:

(1) Any owner during the owner's lifetime may change any designated beneficiary by a written direction to the bank.

(1a) If there are two or more owners of a Payable on Death account, the owners shall own the account as joint tenants with right of survivorship and, except as otherwise provided in this section, the account shall have the incidents set forth in G.S. 53-146.1.

(2) Any owner may withdraw funds by writing checks or otherwise, as set forth in the account contract, and receive payment in cash or check payable to the owner's personal order.

(3) If only one beneficiary is living and of legal age at the death of the last surviving owner, the beneficiary shall be the owner of the account, and payment by the bank to such owner shall be a total discharge of the bank's obligation as to the amount paid. If two or more beneficiaries are living at the death of the last surviving owner, they shall be owners of the account as joint tenants with right of survivorship as provided in G.S. 53-146.1, and payment by the bank to the owners or any of the owners shall be a total discharge of the bank's obligation as to the amount paid.

(4) If one or more owners survive the last surviving beneficiary, the account shall become an individual account of the owner, or a joint account with right of survivorship of the owners, and shall have the

legal incidents of an individual account in the case of a single owner or a joint account with right of survivorship, as provided in G.S. 53-146.1, in the case of multiple owners.

(5) If only one beneficiary is living and that beneficiary is not of legal age at the death of the last surviving owner, the bank shall transfer the funds in the account to the general guardian or guardian of the estate, if any, of the minor beneficiary. If no guardian of the minor beneficiary has been appointed, the bank shall hold the funds in a similar interest bearing account in the name of the minor until the minor reaches the age of majority or until a duly appointed guardian withdraws the funds.

(6) Prior to the death of the last surviving owner, no beneficiary shall have any ownership interest in a Payable on Death account. Funds in a Payable on Death account established pursuant to this subsection shall belong to the beneficiary or beneficiaries upon the death of the last surviving owner and the funds shall be subject only to the personal representative's right of collection as set forth in G.S. 28A-15-10(a)(1). Payment by the bank of funds in the Payable on Death account to the beneficiary or beneficiaries shall terminate the personal representative's authority under G.S. 28A-15-10(a)(1) to collect against the bank for the funds so paid, but the personal representative's authority to collect such funds from the beneficiary or beneficiaries is not terminated.

The person or persons establishing an account under this subsection shall sign a statement containing language set forth in a conspicuous manner and substantially similar to the following:

BANK (or name of institution)
PAYABLE ON DEATH ACCOUNT
G.S. 53-146.2

I (or we) understand that by establishing a Payable on Death account under the provisions of North Carolina General Statute 53-146.2 that:

1. During my (or our) lifetime I (or we), individually or jointly, may withdraw the money in the account; and
2. By written direction to the bank (or name of institution) I (or we), individually or jointly, may change the beneficiary or beneficiaries; and
3. Upon my (or our) death the money remaining in the account will belong to the beneficiary or beneficiaries and the money will not be inherited by my (or our) heirs or be controlled by will.

____ ”

(a1) This section shall not be deemed exclusive. Deposit accounts not conforming to this section shall be governed by other applicable provisions of the General Statutes or the common law, as appropriate.

(b) Repealed by Session Laws 2001-267, s. 1, effective October 1, 2001.

(c) No addition to such accounts, nor any withdrawal, payment, or change of beneficiary shall affect the nature of such accounts as Payable on Death accounts, or affect the right of any owner to terminate the account.

(d) This section does not repeal or modify any provisions of laws relating to estate taxes. (1987 (Reg. Sess., 1988), c. 1078, s. 1; 1989, c. 164, s. 5; 1989 (Reg. Sess., 1990), c. 866, s. 5; 1998-69, s. 14; 2001-267, s. 1.)

Editor's Note. — Session Laws 1987 (Reg. Sess., 1988), c. 1078, s. 9 provided that all accounts opened pursuant to any statute amended by c. 1078 before the effective date thereof (July 1, 1989) would continue to be governed by the provisions of those statutes as they read prior to the effective date of this act.

CASE NOTES

Attachment of Funds in Trust for Minor. — Funds deposited in a trust established under this section by a judgment debtor for the benefit of his minor son were subject to attachment by judgment creditors, since the trust was revocable and the debtor could freely withdraw funds from it. Jimenez v. Brown, 131 N.C. App. 818, 509 S.E.2d 241 (1998).

Order for Widow to Repay Funds Proper. — Since a transfer of funds from a decedent's payable on death account by his widow took place while the deceased was still alive, the widow had no ownership interest in the funds in the account at the time that she transferred the funds, and partial summary judgment that the widow repay the money was proper. Estate of Redden v. Redden, 179 N.C. App. 113, 632 S.E.2d 794, 2006 N.C. App. LEXIS 1638 (2006).

Applied in Holloway v. Wachovia Bank & Trust Co., 104 N.C. App. 631, 410 S.E.2d 915 (1991).

§ 53-146.3. Personal agency accounts.

(a) Any person may establish a personal agency account by written contract containing a statement that it is executed pursuant to the provisions of this section. A personal agency account may be a checking account, savings account, time deposit, or any other type of withdrawable account or certificate. The written contract shall name an agent who shall have authority to act on behalf of the depositor in regard to the account in the actions set out in this subsection. The agent shall have the authority to:

(1) Make, sign or execute checks drawn on the account or otherwise make withdrawals from the account;

(2) Endorse checks made payable to the principal for deposit only into the account; and

(3) Deposit cash or negotiable instruments, including instruments endorsed by the principal, into the account.

A person establishing an account under this section shall sign a statement containing language substantially similar to the following in a conspicuous manner:

"BANK (or name of institution)
PERSONAL AGENCY ACCOUNT
G.S. 53-146.3

I understand that by establishing a personal agency account under the provisions of North Carolina General Statute 53-146.3 that the agent named in the account may:

1. Sign checks drawn on the account; and
2. Make deposits into the account.

I also understand that upon my death the money remaining in the account will be controlled by my will or inherited by my heirs.

____"

(b) An account created under the provisions of this section grants no ownership right or interest in the agent. Upon the death of the principal there is no right of survivorship to the account and the authority set out in subsection (a) terminates.

(c) The written contract referred to in subsection (a) shall provide that the principal may elect to extend the authority of the agent set out in subsection (a) to act on behalf of the principal in regard to the account notwithstanding the subsequent incapacity or mental incompetence of the principal. If the principal so elects to extend such authority of the agent, then upon the subsequent incapacity or mental incompetence of the principal, the agent may continue to exercise such authority, without the requirement of bond or of accounting to any court, until such time as the agent shall receive actual knowledge that such authority has been terminated by a duly qualified guardian of the estate of the incapacitated or incompetent principal or by the duly appointed attorney-in-fact for the incapacitated or incompetent principal, acting pursuant to a durable power of attorney (as defined in G.S. 32A-8) which grants to the attorney-in-fact that authority in regard to the account which is granted to the agent by the written contract executed pursuant to the provisions of this section, at which time the agent shall account to such guardian or attorney-in-fact for all actions of the agent in regard to the account during the incapacity or incompetence of the principal. If the principal does not so elect to extend the authority of the agent, then upon the subsequent incapacity or mental incompetence of the principal, the authority of the agent set out in subsection (a) terminates.

(d) When an account under this section has been established all or part of the account or any interest or dividend thereon may be paid on a check made, signed or executed by the agent. In the absence of actual knowledge that the principal has died or that the agency created by the account has been terminated, such payment shall be a valid and sufficient discharge to the bank for payment so made. (1987 (Reg. Sess., 1988), c. 1078, s. 1; 1989, c. 164, s. 8; 1989 (Reg. Sess., 1990), c. 866, s. 6.)

Editor's Note. — Session Laws 1987 (Reg. Sess., 1988), c. 1078, which amended this section, in s. 9 provided that all accounts opened pursuant to any statute amended by c. 1078 before July 1, 1989 would continue to be governed by the provisions of those statutes as they read prior to July 1, 1989.

CASE NOTES

Applied in Holloway v. Wachovia Bank & Trust Co., 104 N.C. App. 631, 410 S.E.2d 915 (1991).

§ **53-147:** Repealed by Session Laws 1943, c. 543.

ARTICLE 13.

Conservation of Bank Assets and Issuance of Preferred Stock.

§ 53-148. Provision for bank conservators; duties and powers.

Whenever he shall deem it necessary, in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, the Commissioner of Banks may (with the approval of the Governor), appoint a conservator for such bank and require of such conservator such bond with such security as he may deem necessary and proper. The conservator, under the direction of the Commissioner of Banks, shall take possession of the books, records and assets of every description of such bank, and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law. Such conservator shall have all such rights, powers and privileges, subject to the Commissioner of Banks, now possessed by or hereafter given to the Commissioner of Banks under G.S. 53-20, as amended, as are necessary to conserve the assets of said bank. During the time that such conservator remains in possession of such bank, the rights of all parties with respect thereto, shall be the same as those provided in G.S. 53-20, as amended. All expenses of any such conservator shall be paid out of the assets of such bank and shall be a lien thereon which shall be prior to any other lien provided by this Article or otherwise. The conservator shall receive as salary an amount no greater than that paid at the present time to employees of departments of the State government for similar services. (1933, c. 155, s. 1.)

Legal Periodicals. — As to similarity to federal act, see 11 N.C.L. Rev. 196 (1933).

§ 53-149. Examination of bank.

The Commissioner of Banks shall cause to be made such examination of the affairs of such bank as shall be necessary to inform him as to the financial condition of such bank. (1933, c. 155, s. 2.)

§ 53-150. Termination of conservatorship.

If the Commissioner of Banks shall become satisfied that it may safely be done, he may, in his discretion, terminate the conservatorship and permit such bank to resume the transaction of its business, subject to such terms, conditions, restrictions and limitations as he may prescribe. (1933, c. 155, s. 3.)

§ 53-151. Special funds for paying depositors and creditors ratably; new deposits.

While such bank is in the hands of the conservator appointed by the Commissioner of Banks, the Commissioner of Banks may require the conservator to set aside from unpledged assets and make available for withdrawal by depositors and payment to other creditors on a ratable basis, such amounts as, in the opinion of the Commissioner of Banks, may safely be used for this purpose; and the Commissioner of Banks, may, in his discretion, permit the conservator to receive deposits, but deposits received while the bank is in the hands of the conservator (as well as special or trust deposits received by any bank, under the orders of the Commissioner of Banks, since March 2, 1933), shall not be subject to any limitation as to payment or withdrawal, and such deposits shall be segregated and shall not be used to liquidate any indebtedness of such bank existing at the time that a conservator was appointed for it, or any subsequent indebtedness incurred for the purpose of liquidating any indebtedness of said bank existing at the time such conservator was appointed. Such deposits received while the bank is in the hands of the conservator, as well as the special or trust deposits received since March 2, 1933, shall be kept on hand in cash or on deposit with a federal reserve bank. In being transmitted to the federal reserve bank, said deposits shall be so marked and designated as to indicate to such federal reserve bank that they are special deposits. (1933, c. 155, s. 4.)

§ 53-152. Reorganization on agreement of depositors and stockholders.

By the agreement of (i) depositors and other creditors of any bank representing at least seventy-five percent (75%) in amount of its total deposits and other liabilities as shown by the books of the banks, or (ii) stockholders owning at least two thirds of each class of its outstanding capital stock as shown by the books of the bank, or (iii) both depositors and other creditors representing at least seventy-five percent (75%) in amount of the total deposits and other liabilities, and stockholders owning at least two thirds of its outstanding capital stock as shown by the books of the bank, any bank may effect such reorganization with the consent and approval of the Commissioner of Banks as by such agreement may be determined: Provided, however, that claims of depositors or other creditors which will be satisfied in full under the provisions of the plan of reorganization shall not be included among the total deposits and other liabilities of the bank in determining the percent thereof as above provided.

When such reorganization becomes effective, all books, records and assets of such bank shall be disposed of in accordance with the provisions of the plan, and the affairs of the bank shall be conducted by its board of directors in the manner provided by the plan and under the conditions, restrictions and limitations which may have been prescribed by the Commissioner of Banks. In any reorganization which shall have been approved, and shall have become effective as provided herein, all depositors and other creditors and stockholders of such bank, whether or not they shall have consented to such plan of organization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan of reorganization: Provided, however, that no reorganization shall affect the lien of secured creditors. (1933, c. 155, s. 5.)

Legal Periodicals. — As to similarity to federal act, see 11 N.C.L. Rev. 196 (1933).

§ 53-153. Segregation of recent deposits not effective after bank turned back to officers; notice of turning bank back to officers.

After 15 days after the affairs of a bank shall have been turned back to its board of directors by the conservator, either with or without a reorganization as provided in G.S. 53-152 hereof, the provisions of G.S. 53-151 with respect to the segregation of deposits received while it is in the hands of the conservator, and with respect to the use of such deposits to liquidate the indebtedness of such bank, shall no longer be effective: Provided, that before the conservator shall turn back the affairs of the bank to its board of directors, he shall cause to be published in a newspaper published in the county in which such bank is located, and if no newspaper is published in such county, in a newspaper having a general circulation in such county, a notice in form approved by the Commissioner of Banks, stating the date on which the affairs of the bank will be returned to its board of directors, and that the said provisions of G.S. 53-151 will not be effective after 15 days after such date; and on the date of publication of such notice, the conservator shall immediately send to every person who is a depositor in such bank under G.S. 53-151, a copy of such notice by registered mail, addressing it to the last known address of such persons shown by the records of the bank; and the conservator shall send similar notice in like manner to every person making deposit in such bank under G.S. 53-151, after the date of such newspaper publication and before the time when the affairs of the bank are returned to its directors. (1933, c. 155, s. 6; 1995, c. 129, s. 28.)

§ 53-154. Issuance of preferred stock.

Notwithstanding any other provision of this Article or any other law, and notwithstanding any of the provisions of its articles of incorporation or bylaws, any bank may, with the approval of the Commissioner of Banks, and by vote of stockholders owning a majority of the stock of such bank, upon not less than two days' notice given by registered mail pursuant to action taken at a meeting of its board of directors (which may be held upon not less than one day's notice) issue preferred stock in such amount and with such par value and at such annual dividend rate as shall be approved by said Commissioner of Banks. A copy of the minutes of such directors' and stockholders' meetings, certified by the proper officer and under the corporate seal of the bank, and accompanied by the written approval of the Commissioner of Banks shall be immediately filed in the office of the Secretary of State, and when so filed, shall be deemed and treated as an amendment to the articles of incorporation of such bank.

No issue of preferred stock shall be valid until the par value of all stock so issued shall have been paid for in full in cash or in such manner as may be specifically approved by the Commissioner of Banks. (1933, c. 155, s. 7; 1979, c. 483, s. 16.)

§ 53-155. Rights and liabilities of preferred stockholders.

The holders of such preferred stock shall be entitled to cumulative dividends payable at an annual rate approved by the Commissioner of Banks, but shall not be held individually responsible as such holders for any debts, contracts or engagements of such bank, and shall not be liable for assessments to restore impairments in the capital of such banks as now provided by law with reference to holders of common stock in banks. Notwithstanding any other provisions of law, the holders of such preferred stock shall have such voting rights and such stock shall be subject to retirement in such manner and on such terms and conditions as may be provided in the articles of incorporation or any amendment thereto, with the approval of the Commissioner of Banks.

No dividends shall be declared or paid on common stock until the cumulative dividends on the preferred stock shall have been paid in full; and if the bank is placed in liquidation, no payments shall be made to the holders of the common stock until the holders of the preferred stock shall have been paid in full the par value of such stock and all accumulated dividends. (1933, c. 155, s. 8; 1979, c. 483, s. 17.)

§ 53-156. Term "stock" to include preferred stock.

Whenever in existing banking law, the words "stock," "stockholders," "capital," or "capital stock" are used, the same shall be deemed to include preferred stock: Provided, that no bank issuing preferred stock under the provisions hereof, shall be permitted at any time to make loans secured by such preferred stock; provided further that such words shall not be deemed to include preferred stock where they are used in G.S. 53-2, 53-10, 53-80, 53-87, 53-88 and 53-139. (1933, c. 155, s. 9; 1935, c. 80; 1953, c. 675, s. 5; 1979, c. 483, s. 18.)

§ 53-157. Rights and liabilities of conservator.

The conservator appointed pursuant to the provisions of this Article shall be subject to the provisions of and to the penalties prescribed by G.S. 53-43, 53-129, and 53-131. (1933, c. 155, s. 10.)

§ 53-158. Naming of conservator not liquidation.

No power conferred in this Article upon the Commissioner of Banks, when exercised, shall be deemed an act of possession for the purposes of liquidation; and whenever the Commissioner of Banks shall, with reference to any bank for which a conservator is appointed, deem that liquidation is necessary, he shall exercise the powers for the purposes of liquidation as provided in G.S. 53-20 as amended. (1933, c. 155, s. 11.)

§ 53-158.1. Scope of preferred stock provisions.

All provisions of this Article relating to preferred stock apply only to the emergency issuance of preferred stock, pursuant to the provisions of G.S. 53-154, by a bank in conservatorship. The provisions of this Article do not affect the issuance or treatment of preferred stock, or other shares authorized by Chapter 55 of the General Statutes in accordance with G.S. 53-10(a) and G.S. 53-135, provided the issuance of preferred stock or any shares other than common capital stock shall have been approved by the Commissioner of Banks. (2005-269, s. 19.)

ARTICLE 14.

Banks Acting in a Fiduciary Capacity.

Part 1. General Provisions.

§ 53-159. Bank may act as fiduciary.

Any bank licensed by the Commissioner of Banks, where such powers or privileges are granted it in its charter, may be guardian, trustee, assignee, receiver, executor or administrator or act in another fiduciary capacity in this State without giving any bond; and the clerks of the superior courts, or other officers charged with the duty or clothed with the power of making such appointments, are authorized to appoint such bank to any such office. (1945, c. 743, s. 1; 2001-263, s. 3.)

Legal Periodicals. — For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

CASE NOTES

Cited in Wiggins v. Finch, 232 N.C. 391, 61 S.E.2d 72 (1950).

§ 53-159.1. Power of fiduciary or custodian to deposit securities in a clearing corporation.

Notwithstanding any other provision of law, any fiduciary holding securities in its fiduciary capacity, any bank or trust company holding securities in a fiduciary capacity or as a custodian or agent is authorized to deposit or arrange for the deposit of such securities in a clearing corporation as defined in G.S. 25-8-102. When such securities are so deposited, certificates representing securities of the same class of the same issuer may be merged and held in bulk in the name of the nominee of such clearing corporation with any other such securities deposited in such clearing corporation by any person regardless of the ownership of such securities, and certificates of small denomination may be merged into one or more certificates of larger denomination. The records of such fiduciary and the records of such bank or trust company acting as a fiduciary or as a custodian or managing agent shall at all times show the name of the party for whose account the securities are so deposited. Title to such securities may be transferred by bookkeeping entry on the books of such clearing corporation without physical delivery of certificates representing such securities. A bank or trust company so depositing securities pursuant to this section shall be subject to such rules as, in the case of State-chartered institutions, the State Banking Commission and, in the case of national banking associations, the Comptroller of the Currency may from time to time issue. A bank or trust company acting as custodian or agent for a fiduciary shall, on demand by the fiduciary, certify in writing to the fiduciary the securities so deposited by such bank or trust company in such clearing corporation for the account of such fiduciary. A fiduciary shall, on demand by any party to a judicial proceeding for the settlement of such fiduciary's account or on demand by the attorney for such party, certify in writing to such party the securities deposited by such fiduciary in such clearing corporation for its account as such fiduciary. This section shall apply to any fiduciary holding securities in its fiduciary capacity, and to any bank or trust company holding securities as a fiduciary or as a custodian or managing agent acting on May 15, 1973, or who thereafter may act regardless of the date of the agreement, instrument or court order by which it is appointed and regardless of whether or not such fiduciary, custodian or agent owns capital stock of such clearing corporation. The fiduciary shall personally be liable for any loss to the trust resulting from an act of such nominee in connection with such securities so deposited. (1973, c. 497, s. 4; 1997-181, s. 26; 2001-263, s. 3.)

§ 53-160. License to do business.

Before any such bank or trust company is authorized to act in any fiduciary capacity without bond, it must be licensed by the Commissioner of Banks of the State. For such license the licensee, for the purpose of defraying necessary expenses of the Commissioner of Banks and the Commissioner's agents in supervising and examining the licensee, shall pay to the Commissioner of Banks an annual license fee not to exceed five hundred dollars ($500.00) as required by rule of the State Banking Commission. A national bank which has been granted trust powers by the Comptroller of the Currency or his duly authorized agent shall be annually licensed as required in this section and shall be granted a certificate of solvency which will meet the provisions of G.S. 53-162 without examination by the Commissioner of Banks as required in G.S. 53-161. (1945, c. 743, s. 1; 1967, c. 789, s. 20; 2001-263, s. 3; 2004-171, s. 5.)

Editor's Note. — Session Laws 2004-171, s. 17, provides: "The Legislative Research Commission shall undertake a comprehensive study of those laws, including Chapters 53, 54B, and 54C of the General Statutes, which affect the establishment and operation of banks in North Carolina and shall make recommendations to the 2005 General Assembly, prior to the convening of the 2006 Regular Session as to which laws (i) are obsolete, unnecessary, or duplicative, (ii) are unnecessarily inconsistent in the treatment of banks, savings and loan associations, and savings banks, and (iii) unnecessarily restrict, impede, or prohibit activities of banks, savings and loan associations, and savings banks or the ability of the Commissioner of Banks to regulate banks and savings institutions in an effective, efficient, and equitable manner.

"In preparing its recommendations, the Commission shall actively solicit and consider information received from representatives of banks, savings and loan associations, savings banks, the State Banking Commission, the Commissioner of Banks and the Commissioner's staff, other interested parties, and the general public."

§ 53-161. Examination as to solvency.

The Commissioner of Banks shall examine into the solvency of such bank, and shall, if he deem it necessary, at the expense of the bank, make or cause to be made an examination at its home office of its assets and liabilities.

Examinations of trust institutions other than banks shall be as provided in Article 24 of this Chapter. (1945, c. 743, s. 1; 2001-263, s. 3.)

§ 53-162. Certificate of solvency.

After any bank has been licensed by the Commissioner of Banks, a certificate issued by the Commissioner of Banks, showing the bank to be solvent to an amount not less than one hundred thousand dollars ($100,000), shall authorize such bank to act in a fiduciary capacity without bond. There shall be no charge for the seal of this certificate. (1945, c. 743, s. 1; 2001-263, s. 3.)

§ 53-163. Clerk of superior court notified of license and revocation.

The Commissioner of Banks, upon granting license to any such bank or trust company, shall immediately notify the clerk of the superior court of each county in the State that the bank or trust company has been licensed under this Part, and, whenever the Commissioner of Banks is satisfied that any bank or trust company licensed by the Commissioner has become insolvent, or is in imminent danger of insolvency, the Commissioner shall revoke the license granted to that bank and notify the clerk of the superior court of each county in the State of the revocation. After such notification, the right of any such bank or trust company to act in a fiduciary capacity shall cease. (1945, c. 743, s. 1; 2001-263, s. 3.)

§ 53-163.1. Funds held by a corporation exercising fiduciary powers awaiting investment or distribution.

(a) Funds held in a fiduciary capacity by a bank, trust company, savings and loan association, or other corporation authorized to exercise the powers of a fiduciary, awaiting investment or distribution shall not be held uninvested or undistributed any longer than is reasonable for the proper management of the account. A corporation acting in a fiduciary capacity has complied with this requirement if such funds awaiting investment or distribution in excess of one thousand dollars ($1,000) are invested or distributed within 30 days of receipt or accumulation thereof.

(b) Funds held in a fiduciary capacity by a bank, awaiting investment or distribution may, unless prohibited by the instrument creating the fiduciary relationship, be deposited in the commercial or savings or other department of the bank, provided that it shall first set aside under control of the trust department as collateral security, such securities as may be found listed in G.S. 142-34 as being eligible for the investment of the sinking funds of the State of North Carolina equal in market value of such deposited funds, or readily marketable commercial bonds having not less than a recognized "A" rating equal to one hundred and twenty-five percent (125%) of the funds so deposited.

The securities so deposited or securities substituted therefor as collateral in the trust department by the commercial or savings or other department (as well as the deposit of cash in the commercial or savings or other department by the trust department) shall be held pursuant to the provisions of G.S. 53-43(6).

If such funds are deposited in a bank insured under the provisions of the Federal Deposit Insurance Corporation, the above collateral security will be required only for that portion of uninvested balances of each trust which are not fully insured under the provisions of that corporation.

(c) Funds held in a fiduciary capacity by a corporate fiduciary awaiting investment or distribution may, unless prohibited by the instrument creating the fiduciary relationship, be invested in short-term, trust-quality investment vehicles, through the medium of a collective investment fund or otherwise.

(d) In addition to any other compensation to which it may be entitled under G.S. 28A-23-3, 34-12, 35A-1269, or under any other authority, a corporation acting in a fiduciary capacity shall be allowed to charge a fee for the temporary investment of funds held awaiting investment or distribution, which fee may be calculated upon the amount of such funds actually invested and upon the income produced thereby. The fee authorized by this subsection shall not exceed twelve percent (12%) of the income produced by such investment. A corporation acting in a fiduciary capacity has complied with its duty to disclose fees and practices in connection with the investment of fiduciary funds awaiting investment or distribution if the corporation's periodic statements set forth the method of computing such fees. (1939, c. 197, s. 4; 1963, c. 243, ss. 1, 2; 1977, c. 502, s. 2; 1989, c. 443; 2004-139, s. 5; 2005-192, s. 1.)

Editor's Note. — This section was formerly codified as G.S. 36A-63. It was recodified as G.S. 53-163.1 by Session Laws 2005-192, s. 1, effective January 1, 2006.

Section 142-34, referred to in this section, was repealed by Session Laws 1983, c. 913, s. 30.

Subsection (d), as amended by Session Laws 2004-139, s. 5, effective January 1, 2005, is applicable to payments made to a fiduciary on or after that date.

§ 53-163.2. Investments in securities by banks or trust companies.

Unless the governing instrument, court order, or a statute specifically directs otherwise, a bank or trust company serving as trustee, guardian, agent, or in any other fiduciary capacity may invest in any security authorized by this Chapter even if such fiduciary or an affiliate thereof participates or has participated as a member of a syndicate underwriting such security, if:

(1) The fiduciary does not purchase the security from itself or its affiliate; and

(2) The fiduciary does not purchase the security from another syndicate member or an affiliate, pursuant to an implied or express agreement between the fiduciary or its affiliate and a selling member or its affiliate, to purchase all or part of each other's underwriting commitments. (1985, c. 549, s.1; 2005-192, s. 1; 2007-106, s. 51.)

Editor's Note. — This section was formerly codified as G.S. 36A-66.1. It was recodified as G.S. 53-163.2 by Session Laws 2005-192, s. 1, effective January 1, 2006.

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Part 2. Uniform Common Trust Fund Act.

§ 53-163.5. Establishment of common trust funds.

(a) Any bank or trust company duly authorized to act as a fiduciary in this State may establish and maintain one or more common trust funds for the collective investment of funds held in a fiduciary capacity by such bank or trust company hereafter referred to as the "maintaining bank". The maintaining bank may include for the purposes of collective investment in such common trust fund or funds established and maintained by it, funds held in a fiduciary capacity by any other bank or trust company duly authorized to act as a fiduciary, wherever located, which other bank or trust company is hereinafter referred to as the "participating bank".

Provided, however, that the relationship between the maintaining bank and the participating bank is (i) the maintaining bank owns, controls or is affiliated with the participating bank or (ii) a bank holding company owns, controls or is affiliated with both the maintaining bank and the participating bank.

(b) For the purposes of this section, a bank or trust company shall be considered to be owned, controlled or affiliated if twenty-five percent (25%) or more of any class of its voting stock is owned by a bank or bank holding company or if twenty-five percent (25%) or more of any class of its voting stock is owned by one person or no more than 10 persons who are the same person or persons who own twenty-five percent (25%) or more of any class of the voting stock of the maintaining bank.

(c) Such common trust funds may include a fund composed solely of funds held under an agency agreement in which the bank or trust company assumes investment discretion and assumes fiduciary responsibility.

(d) Such bank or trust company may invest the funds held by it in any fiduciary capacity in one or more common trust funds, provided that (i) such investment is not prohibited by the instrument, judgment, decree or order creating such fiduciary relationship or amendment thereof, and (ii) the bank has no interest in the assets of the common trust fund other than as a fiduciary. (1939, c. 200, s. 1; 1973, c. 1276; 1977, c. 502, s. 2; 2005-192, s. 1; 2006-259, s. 13(q).)

Editor's Note. — This section was formerly codified as G.S. 36A-90. It was recodified as G.S. 53-163.3 by Session Laws 2005-192, s. 1, effective January 1, 2006 and redesignated as G.S. 53-163.5 by the Revisor of Statutes.

Session Laws 2006-259, s. 13(s) provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

Legal Periodicals. — For comment on this Part, see 17 N.C.L. Rev. 394 (1939).

§ 53-163.6. Court accountings.

Unless ordered by a court of competent jurisdiction the bank or trust company operating such common trust fund or funds shall not be required to render a court accounting with regard to such fund or funds; but it may, by application to the superior court, secure approval of such an accounting on such conditions as the court may establish. This section shall not affect the duties of the trustees of the participating trusts under the common trust fund to render accounts of their several trusts. (1939, c. 200, s. 2; 1977, c. 502, s. 2; 2005-192, s. 1.)

Editor's Note. — This section was formerly codified as G.S. 36A-91. It was recodified as G.S. 53-163.4 by Session Laws 2005-192, s. 1, effective January 1, 2006 and redesignated as G.S. 53-163.6 by the Revisor of Statutes.

§ 53-163.7. Supervision by State Banking Commission.

All common trust funds established under the provisions of this Part shall be subject to the rules and regulations of the State Banking Commission. (1939, c. 200, s. 3; 1977, c. 502, s. 2; 2005-192, s. 1.)

Editor's Note. — This section was formerly codified as G.S. 36A-92. It was recodified as G.S. 53-163.5 by Session Laws 2005-192, s. 1, effective January 1, 2006 and was redesignated as G.S. 53-163.7 by the Revisor of Statutes.

§ 53-163.8. Uniformity of interpretation.

This Part shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1939, c. 200, s. 4; 1977, c. 502, s. 2; 2005-192, s. 1.)

Editor's Note. — This section was formerly codified as G.S. 36A-93. It was recodified as G.S. 53-163.6 by Session Laws 2005-192, s. 1, effective January 1, 2006 and was redesignated as G.S. 53-163.8 by the Revisor of Statutes.

§ 53-163.9. Short title.

This Part may be cited as the Uniform Common Trust Fund Act. (1939, c. 200, s. 5; 1977, c. 502, s. 2; 2005-192, s. 1.)

Editor's Note. — This section was formerly codified as G.S. 36A-94. It was recodified as G.S. 53-163.7 by Session Laws 2005-192, s. 1, effective January 1, 2006 and was redesignated as G.S. 53-163.9 by the Revisor of Statutes.

ARTICLE 15.

North Carolina Consumer Finance Act.

§ 53-164. Title.

This Article shall be known and may be cited as the North Carolina Consumer Finance Act. (1961, c. 1053, s. 1.)

Cross References. — As to effect of secured transaction provisions of Uniform Commercial Code, see G.S. 25-9-201.

Editor's Note. — Session Laws 1961, c. 1053, s. 3, provided that all laws and clauses of laws in conflict with this Article would be repealed; provided, however, G.S. 105-88 would not be repealed; provided G.S. 14-391 would not be applicable to persons licensed under this Article; and, provided, further, all other laws and provisions of laws repealed by this Article would, notwithstanding, continue in force and effect with respect to all acts prohibited or required to be performed pursuant thereto prior to August 18, 1961.

Session Laws 2009-574, ss. 48.1 through 48.8, provide: "SECTION 48.1. There is created the Joint Legislative Study Commission on the Modernization of North Carolina Banking Laws and the Consumer Finance Act. The purpose of the Commission is to determine whether and to what extent the North Carolina Banking Laws and the Consumer Finance Act (Article 15 of Chapter 53 of the General Statutes) need to be updated.

"SECTION 48.2. The Commission shall consist of 16 members as follows:

"(1) Five members of the House of Representatives, appointed by the Speaker of the House of Representatives.

"(2) Five members of the Senate, appointed by the President Pro Tempore of the Senate.

"(3) One member of the consumer finance industry, one member representing a State-chartered bank, and one member of a consumer advocacy organization, each appointed by the Speaker of the House of Representatives.

"(4) One member of the consumer finance industry, one member representing a State-chartered bank, and one member of a consumer advocacy organization, each appointed by the President Pro Tempore of the Senate.

"SECTION 48.3. The Commission shall have two cochairs, one designated by the Speaker of the House of Representatives and one designated by the President Pro Tempore of the Senate from among their respective appointees. The Commission shall meet upon the call of the cochairs. Any vacancy on the Commission shall be filled by the original appointing authority. A quorum of the Commission shall be a majority of its members.

"SECTION 48.4. The Commission shall study the following issues related to the modernization of the North Carolina Consumer Finance Act:

"(1) The increase in costs of operations for the consumer finance industry and its impact on the delivery of products to the public.

"(2) The maximum dollar amount that can be lent to an individual consumer.

"(3) The appropriate rate of interest and fees to be charged for each level of consumer transaction.

"(4) Strategies for increasing consumer protection and disclosure.

"SECTION 48.5. The Commission also shall study any issue related to the Banking Laws of North Carolina that the Commission deems appropriate.

"SECTION 48.6. Members of the Commission shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate. The Commission, while in the discharge of its official duties, may exercise all powers provided for under G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4. The Commission may meet in the Legislative Building or the Legislative Office Building.

"With approval of the Legislative Services Commission, the Legislative Services Officer shall assign professional staff to assist the Commission in its work. The House of Representatives' and the Senate's Directors of Legislative Assistants shall assign clerical staff to the Commission, and the expenses relating to the clerical employees shall be borne by the Commission. The Commission may contract for professional, clerical, or consultant services as provided by G.S. 120-32.02. If the Commission hires a consultant, the consultant shall not be a State employee or a person currently under contract with the State to provide services.

"All State departments and agencies and local governments and their subdivisions shall furnish the Commission with any information in their possession or available to them.

"SECTION 48.7. The Commissioner of Banks shall use up to twenty-five thousand dollars ($25,000) of the funds available to the State Banking Commission for the 2009-2010 fiscal year to fund the study authorized by this act.

"SECTION 48.8. The Commission shall report the results of its study and its recommendations, including any proposed legislative changes, to the 2010 Regular Session of the 2009 General Assembly. The Commission shall terminate on May 1, 2010, or upon the filing of its final report, whichever occurs first."

Session Laws 2009-574, s. 52.1, provides: "For legislative studies authorized by this act, out-of-state travel must be authorized by the President Pro Tempore of the Senate or the Speaker of the House of Representatives, as appropriate."

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

CASE NOTES

Cited in Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967); Ken-Mar Fin. v. Harvey, 90 N.C. App. 362, 368 S.E.2d 646 (1988); State ex rel. Cooper v. NCCS Loans, Inc., — N.C. App. —, 620 S.E.2d 697, 2005 N.C. App. LEXIS 2392 (2005); State ex rel. Cooper v. NCCS Loans, Inc., 174 N.C. App. 630, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005); In re Advance Am., Cash Advance Ctrs. of N.C. Inc., 189 N.C. App. 115, 657 S.E.2d 405, 2008 N.C. App. LEXIS 426 (2008).

§ 53-165. Definitions.

(a) "Amount of the loan" shall mean the aggregate of the cash advance and the charges authorized by G.S. 53-173 and G.S. 53-176.

(b) "Borrower" shall mean any person who borrows money from any licensee or who pays or obligates himself to pay any money or otherwise furnishes any valuable consideration to any licensee for any act of the licensee as a licensee.

(c) "Cash advance" shall mean the amount of cash or its equivalent that the borrower actually receives or is paid out at his discretion or on his behalf.

(d) "Commission" shall mean the State Banking Commission.

(e) "Commissioner" shall mean the Commissioner of Banks.

(f) "Deputy commissioner" shall mean the deputy commissioner of banks.

(g) "License" shall mean the certificate issued by the Commissioner under the authority of this Article to conduct a consumer finance business.

(h) "Licensee" shall mean a person to whom one or more licenses have been issued.

(i) "Loanable assets" shall mean cash or bank deposits or installment loans made as a licensee pursuant to this Article or installment loans made as a licensee pursuant to the Article which this Article supersedes or such other loans payable on an installment basis as the Commissioner of Banks may approve, or any combination of two or more thereof.

(j) "Person" shall include any person, firm, partnership, association or corporation. (1957, c. 1429, s. 1; 1961, c. 1053, s. 1; 2001-519, s. 1.)

§ 53-166. Scope of Article; evasions; penalties; loans in violation of Article void.

(a) Scope. — No person shall engage in the business of lending in amounts of ten thousand dollars ($10,000) or less and contract for, exact, or receive, directly or indirectly, on or in connection with any such loan, any charges whether for interest, compensation, consideration, or expense, or any other purpose whatsoever, which in the aggregate are greater than permitted by Chapter 24 of the General Statutes, except as provided in and authorized by this Article, and without first having obtained a license from the Commissioner. The word "lending" as used in this section, shall include, but shall not be limited to, endorsing or otherwise securing loans or contracts for the repayment of loans.

(b) Evasions. — The provisions of subsection (a) of this section apply to any person who seeks to avoid its application by any device, subterfuge, or pretense whatsoever. Devices, subterfuges, and pretenses include any transaction in which a cash rebate or other advance of funds is offered and all of the following apply:

(1) The cash advance is made contemporaneously with the transaction or soon thereafter.
(2) The amount of the cash advance is required to be repaid at a later date.
(3) The selling or providing of any item, service, or commodity with the transaction is incidental to, or a pretext for, the advance of funds.

(c) Penalties; Commissioner to Provide and Testify as to Facts in His Possession. — Any person not exempt from this Article, or any officer, agent, employee, or representative thereof, who fails to comply with or who otherwise violates any of the provisions of this Article, or any regulation of the Banking Commission adopted pursuant to this Article, shall be guilty of a Class 1 misdemeanor. Each violation shall be considered a separate offense. It is the duty of the Commissioner of Banks to provide the district attorney of the court having jurisdiction of any offense under this subsection with all facts and evidence in the Commissioner's actual or constructive possession, and to testify as to these facts upon the trial of any person for the offense.

(d) Additional Penalties. — Any contract of loan, the making or collecting of which violates any provision of this Article, or regulation thereunder, except as a result of accidental or bona fide error of computation is void, and the licensee or any other party in violation shall not collect, receive, or retain any principal or charges whatsoever with respect to the loan. If an affiliate operating in the same office or subsidiary operating in the same office of a licensee makes a loan in violation of G.S. 53-180(i), the affiliate or subsidiary may recover only its principal on the loan. (1955, c. 1279; 1957, c. 1429, s. 8; 1961, c. 1053, s. 1; 1969, c. 1303, ss. 13, 14; 1973, c. 47, s. 2; c. 1042, s. 1; 1979, c. 33, s. 1; 1985, c. 154, ss. 6, 13; 1987, c. 444, s. 3; 1989, c. 17, ss. 1, 13; 1989 (Reg. Sess., 1990), c. 881, s. 1; 1993, c. 539, s. 425; 1994, Ex. Sess., c. 24, s. 14(c); 2006-243, s. 2.)

Editor's Note. — Session Laws 2006-243, s. 1, provides "The General Assembly makes the following findings:

"(1) Consumer loans in North Carolina are regulated by the North Carolina Consumer Finance Act, Article 15 of Chapter 53 of the General Statutes. The North Carolina Consumer Finance Act requires consumer finance lenders to be licensed and, under G.S. 53-173, authorizes interest rates of up to thirty-six percent (36%) on loans of three thousand dollars ($3,000) or less.

"(2) Some lenders have attempted to evade the restrictions of the North Carolina Consumer Finance Act by offering cash advances in the form of instant cash rebates or other guises. These cash advance transactions are typically offered in conjunction with the sale of Internet access, telephone time units, catalog certificates, or the use of office equipment, when in fact the sale of the goods or services is a pretext for the making of a loan.

"(3) North Carolina courts have declared some of these transactions to be unlawful, but new schemes continue to be devised in order to circumvent the lending laws of North Carolina and to avoid regulation by the Commissioner of Banks.

"(4) It is the intent of the General Assembly that G.S. 53-166(a) should be construed broadly to prohibit illicit lending schemes and to clarify the devices, subterfuges, and pretenses that are prohibited under G.S. 53-166(b), as amended by Section 2 of this act."

This section, as amended by Session Laws 2006-243, s. 2, effective October 1, 2006, is applicable to transactions that are investigated on or after that date under the North Carolina Consumer Finance Act, Article 15 of Chapter 53 of the General Statutes, and to transactions that are subject to enforcement actions under the North Carolina Consumer Finance Act that are filed on or after that date.

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

CASE NOTES

Applicability of § 105-88. — Contention of plaintiff insurance premium finance company that under the Consumer Finance Act (G.S. 53-164 et seq.), Article 35 of Chapter 58 (G.S. 58-35-1 et seq.) and G.S. 105-88, when considered together, it was exempt from payment of license tax under G.S. 105-88, was without merit. Not all loan agencies subject to the provisions of G.S. 105-88 are subject to the provisions of this Article. Moreover, G.S. 105-88 applies to all the loan agencies specified therein, irrespective of the amounts which they loan or the interest they charge. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

Applicability of This Article to Insurance Premium Finance Companies. — Had the legislature intended to subject to the provisions of this Article those who make loans solely to finance insurance premiums, surely it would not have enacted Article 35 of Chapter 58 in the first instance, since it exempts from its provisions those subject to this Article. The legislature did not deem it necessary for both the Commissioner of Banks and the Commissioner of Insurance to supervise an insurance premium financing company. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

Applicability To Check Cashing Business That Charged Usurious Interest Rates. — Where evidence against a check cashing business established that it executed contracts for usurious loans, it used its alternative business purpose of providing Internet access to consumers as a guise to cover this illegal activity, and no evidentiary basis existed upon which a reasonable fact-finder could reach a contrary conclusion, the State's claims of usury and violations of the Consumer Finance Act were established as a matter of law; moreover, the contracts which customers had with the business were cancelled pursuant to G.S. 75-15.1, requiring all funds collected by the business pursuant to such contracts to be refunded to the customers. State ex rel. Cooper v. NCCS Loans, Inc., 174 N.C. App. 630, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005).

Check Cashing Companies. — Reorganized check cashing companies' policy of extending an immediate cash rebate and Internet usage to its customers in exchange for a one-year commitment to make bi-weekly payments in an amount equal to five times the amount of the rebate, violated G.S. § 24-2.1, was usurious, and constituted an unfair and deceptive trade practice in violation of G.S. 75-1.1. The fact that the reorganized companies characterized the transactions as rebates or Internet service agreements was subterfuge to conceal the usurious rate of interest. State ex rel. Cooper v. NCCS Loans, Inc., — N.C. App. —, 620 S.E.2d 697, 2005 N.C. App. LEXIS 2392 (2005).

Litigation Lending Agreement Violated Section. — Litigation lender violated G.S. 53-166(a) since it was undisputed that it did not have the requisite license and it had contracted with an injured driver for a payment of interest that exceeded the amount permitted under G.S. 24-1.1. Odell v. Legal Bucks, LLC, — N.C. App. —, 665 S.E.2d 767, 2008 N.C. App. LEXIS 1619 (2008).

Applied in In re Dickson, 432 F. Supp. 752 (W.D.N.C. 1977).

Cited in Barclays American/Credit Co. v. Riddle, 57 N.C. App. 662, 292 S.E.2d 177 (1982); Provident Finance Co. v. Rowe, 101 N.C. App. 367, 399 S.E.2d 368 (1991); Kucan v. Advance Am., 190 N.C. App. 396, 660 S.E.2d 98, 2008 N.C. App. LEXIS 902 (2008).

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Deterring Presentment of a Check. — The Consumer Finance Act applies to a check cashing company which cashes a check, and for a fee, agrees to defer presentment of the check until sufficient funds are deposited into the customer's bank account to cover the amount of the check, if the amount of the loan is $10,000 or less and if the fee charged by the company exceeds the charges permitted under Chapter 24. In this event, the company will be subject to all provisions of the Act, including the penal provisions of subsection (c) of this section. It also appears that these transactions violate G.S. 14-107, and may violate Truth-in-Lending requirements regarding disclosure. See opinion of the Attorney General to Mr. George J. Franks, Attorney at Law, Cumberland County Sheriff's Office, Fayetteville, 60 N.C.A.G. 86 (1992).

§ 53-167. Expenses of supervision.

Each licensee, for the purpose of defraying necessary expenses of the Commissioner of Banks and his agents in supervising them, shall pay to the Commissioner of Banks the fees prescribed in G.S. 53-122 at the times therein specified. (1955, c. 1279; 1957, c. 1429, s. 1; 1961, c. 1053, s. 1.)

CASE NOTES

Fee Is in Addition to Privilege Tax. — In addition to the fee required by this section, each licensee under this Article also pays the privilege tax exacted by G.S. 105-88. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

And Is Intended to Pay Expenses of Supervision. — The fees exacted of insurance premium financiers by G.S. 58-35-5 and of persons engaged in business under this Article by this section are intended to pay the necessary expenses of licensing, regulating, and supervising the business. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 53-168. License required; showing of convenience, advantage and financial responsibility; investigation of applicants; hearings; existing businesses; contents of license; transfer; posting.

(a) Necessity for License; Prerequisites to Issuance. — No person shall engage in or offer to engage in the business regulated by this Article unless and until a license has been issued by the Commissioner of Banks, and the Commissioner shall not issue any such license unless and until the Commissioner finds:

(1) That authorizing the applicant to engage in such business will promote the convenience and advantage of the community in which the applicant proposes to engage in business; and

(2) That the financial responsibility, experience, character and general fitness of the applicant are such as to command the confidence of the public and to warrant the belief that the business will be operated lawfully and fairly, within the purposes of this Article; and

(3) That the applicant has available for the operation of such business at the specified location loanable assets of at least fifty thousand dollars ($50,000).

(b) Investigation of Applicants. — Upon the receipt of an application, the Commissioner shall investigate the facts. If the Commissioner determines from such preliminary investigation that the applicant does not satisfy the conditions set forth in subsection (a), the Commissioner shall so notify the applicant who shall then be entitled to an informal hearing thereon provided he so requests in writing within 30 days after the Commissioner has caused the above-referred to notification to be mailed to the applicant. In the event of a hearing, to be held in the offices of the Commissioner of Banks in Raleigh, the Commissioner shall reconsider the application and, after the hearing, issue a written order granting or denying such application. At the time of making such application, the applicant shall pay the Banking Department the sum of two hundred fifty dollars ($250.00) as a fee for investigating the application, which shall be retained irrespective of whether or not a license is granted the applicant.

(c) Repealed by Session Laws 2001-519, s. 2, effective January 1, 2002.

(d) Required Assets Available. — Each licensee shall continue at all times to have available for the operation of the business at the specified location loanable assets of at least fifty thousand dollars ($50,000). The requirements and standards of this subsection and subsection (a)(2) of this section shall be maintained throughout the period of the license and failure to maintain such requirements or standards shall be grounds for the revocation of a license under the provisions of G.S. 53-171 of this Article.

(e) License, Posting, Continuing. — Each license shall state the address at which the business is to be conducted and shall state fully the name of the licensee, and if the licensee is a copartnership, or association, the names of the members thereof, and if a corporation, the date and place of its incorporation. Transfer or assignment of a license by one person to another by sale or otherwise is prohibited without the prior approval of the Commissioner. Each license shall be kept posted in the licensed place of business. Each license shall remain in full force and effect until surrendered, revoked, or suspended as hereinafter provided. (1961, c. 1053, s. 1; 1969, c. 1303, s. 15; 1973, c. 1042, s. 2; 1981, c. 671, s. 15; 1987, c. 827, s. 12; 2001-519, s. 2.)

Legal Periodicals. — For survey of 1982 law on commercial law, see 61 N.C.L. Rev. 1018 (1983).

CASE NOTES

Legislative History. — For consideration of the legislative history of subsection (c) of this section and G.S. 53-173, 53-191 and former 53-176.1 with regard to lenders making loans secured by motor vehicles, see Barclays American/Credit Co. v. Riddle, 57 N.C. App. 662, 292 S.E.2d 177, cert. denied, 306 N.C. 555, 294 S.E.2d 369 (1982).

Unlicensed Check Cashing Companies. — Reorganized check cashing companies' policy of extending an immediate cash rebate and Internet usage to its customers in exchange for a one-year commitment to make bi-weekly payments in an amount equal to five times the amount of the rebate, violated G.S. 24-2.1, was usurious, and constituted an unfair and deceptive trade practice in violation of G.S. 75-1.1. The fact that the reorganized companies characterized the transactions as rebates or Internet service agreements was subterfuge to conceal the usurious rate of interest. State ex rel. Cooper v. NCCS Loans, Inc., — N.C. App. —, 620 S.E.2d 697, 2005 N.C. App. LEXIS 2392 (2005).

§ 53-169. Application for license.

The application for license shall be made on a form prepared and furnished by the Commissioner of Banks and shall state:

(1) The fact that the applicant desires to engage in business under this Article; and
(2) Whether the applicant is an individual, partnership, association or corporation; and
(3) The name and address of the person who will manage and be in immediate control of the business; and
(4) The name and address of the owners and their percentage of equity in the company, except when the Commissioner does not deem it feasible

to furnish such information because of the number of stockholders involved; and

(5) When the applicant proposes to commence doing business; and

(6) Such other information as the Commissioner of Banks deems necessary.

The statements made in such application shall be sworn to by the applicant or persons making application on the applicant's behalf. (1961, c. 1053, s. 1.)

§ 53-170. Locations; change of ownership or management.

(a) Business Location. — A licensee may conduct and carry on his business only at such location or locations as may be approved by the Commissioner of Banks, and no changes shall be made from one location to another without the approval of the Commissioner.

(b) Additional Places of Business. — Not more than one place of business shall be maintained under the same license, but the Commissioner may issue more than one license to the same licensee upon compliance with all the provisions of this Article governing issuance of a single license.

(c) Change of Location, Ownership or Management. — If any change occurs in the name and address of the licensee or of the president, secretary or agent of a corporation, or in the membership of any partnership under said sections, a true and full statement of such change, sworn to in the manner required by this Article in the case of the original application, shall forthwith be filed with the Commissioner. (1961, c. 1053, s. 1.)

§ 53-171. Revocation, suspension or surrender of license.

(a) If the Commissioner shall find, after due notice and hearing, or opportunity for hearing, that any such licensee, or an officer, agent, employee, or representative thereof has violated any of the provisions of this Article, or has failed to comply with the rules, regulations, instructions or orders promulgated by the Commission pursuant to the powers and duties prescribed therein, or has failed or refused to make its reports to the Commissioner, or has failed to pay the fees for its examination and supervision, or has furnished false information to the Commissioner or the Commission, the Commissioner may issue an order revoking or suspending the right of such licensee and such officer, agent, employee or representative to do business in North Carolina as a licensee, and upon receipt of such an order from the Commissioner, the licensee shall immediately surrender his license to the Commissioner. Within five days after the entry of such an order the Commissioner shall place on file his findings of fact and mail or otherwise deliver a copy to the licensee. Any licensee who fails to make any loans during any period of 90 consecutive days after being licensed shall surrender his license to the Commissioner.

(b) Any licensee may surrender any license by delivering it to the Commissioner with written notice of its surrender, but such surrender shall not affect his civil or criminal liability for acts committed prior thereto.

(c) No revocation, suspension or surrender of any license shall impair or affect the obligation of any preexisting lawful contract between the licensee and any obligor.

(d) The Commissioner, in his discretion, may reinstate suspended licenses or issue new licenses to a person whose license or licenses have been revoked, or surrendered if and when he determines no fact or condition exists which clearly would have justified the Commissioner in refusing originally to issue such license under this Article. (1955, c. 1279; 1961, c. 1053, s. 1.)

§ 53-172. Conduct of other business in same office.

(a) No licensee shall conduct the business of making loans under this Article within any office, suite, room, or place of business in which any other business is solicited or transacted.

Installment paper dealers as defined in G.S. 105-83, and the collection by a licensee of loans legally made in North Carolina, or another state by another government regulated lender or lending agency, shall not be considered as being any other business within the meaning of this section.

(b) Notwithstanding subsection (a) of this section, the Commissioner may authorize in writing the solicitation and transaction of other business in any office, suite, room, or place of business in which a licensee is conducting the business of making loans if the Commissioner determines that the other business would not be contrary to the best interests of the borrowing public.

(c) The Commissioner may require, consistent with the provisions of 12 C.F.R. Part 226 (Regulation Z) of the federal Truth-In-Lending Act, the other business authorized under subsection (b) of this section to:

(1) Disclose the cost of consumer credit of goods and services sold; and

(2) Provide the purchaser with a reasonable cancellation period for goods and services purchased.

(d) No licensee shall:

(1) Make the purchase of goods and services sold under the authorization of subsection (b) of this section a condition of making a loan; or

(2) Consider the borrower's decision to purchase, or not purchase, goods and services sold under the authorization of subsection (b) of this section a factor in its approval or denial of credit, or in its determination of the amount of or terms of credit for the borrower.

(e) The licensee shall notify the borrower in writing that the purchase of the goods and services offered under the authorization under subsection (b) of this section is voluntary and that the borrower's decision whether or not to purchase the goods and services will not affect the licensee's decision to grant credit or the amount of or terms of the credit granted.

(f) If, at any time, the Commissioner has reason to believe that the conduct of any other business authorized under this section is contrary to the best interests of the borrowing public, the Commissioner shall hold a hearing pursuant to Chapter 150B of the General Statutes to determine whether or not to revoke the authority to conduct that business. The Commissioner shall revoke the authority to conduct any other business if he or she finds that the conduct of any other business authorized under this section is contrary to the best interests of the borrowing public.

(g) This section shall not be construed as authorizing the collection of any loans or charges in violation of the prohibitions contained in G.S. 53-190.

(h) The books, records, and accounts relating to loans shall be kept in such manner as the Commissioner of Banks prescribes as to delineate clearly the loan business from any other business authorized by the Commissioner. (1961, c. 1053, s. 1; 1967, c. 769, s. 1; 1971, c. 1212; 1981, c. 464, s. 2; 1985, c. 154, ss. 7, 8, 9; 1987, c. 444, ss. 2, 3; 1989, c. 17, ss. 2, 13; 1991 (Reg. Sess., 1992), c. 765, s. 1.)

CASE NOTES

The structure and language of this section indicate that the authorization for other business is an exception to the general prohibition of conduct of other business by Consumer Finance Act licensees in the same location as their loan business. Beneficial N.C., Inc. v. State ex rel. N.C. State Banking Comm'n, 126 N.C. App. 117, 484 S.E.2d 808 (1997).

The statutory use of the word "may" indicates that the Commissioner of Banks has the discretion to determine whether such other business should be permitted. Beneficial N.C., Inc. v. State ex rel. N.C. State Banking Comm'n, 126 N.C. App. 117, 484 S.E.2d 808 (1997).

Finance company was not deprived of a right to sell non-credit disability insurance in conjunction with its loan business as there is no such right; such other business is prohibited unless the Banking Commissioner decides to authorize it. Beneficial N.C., Inc. v. State ex rel. N.C. State Banking Comm'n, 126 N.C. App. 117, 484 S.E.2d 808 (1997).

Cited in Beneficial N.C., Inc. v. State ex rel. N.C. State Banking Comm'n, 126 N.C. App. 117, 484 S.E.2d 808 (1997).

OPINIONS OF ATTORNEY GENERAL

The "other business" authorized by this section permits the Commissioner to allow a consumer finance licensee to engage in another business on the same premises as its consumer finance operations. See opinion of Attorney General to William T. Graham, Commissioner of Banks, Department of Economic and Community Development (now Department of Commerce), 60 N.C.A.G. 58 (1991).

§ 53-173. Maximum rate of interest and fee; computation of interest; limitation on interest after judgment; limitation on interest after maturity of the loan.

(a) Maximum Rate of Interest. — Every licensee under this section may make loans in installments not exceeding three thousand dollars ($3,000) in amount, at interest rates not exceeding thirty-six percent (36%) per annum on the outstanding principal balance of any loan not in excess of six hundred dollars ($600.00) and fifteen percent (15%) per annum on any remainder of such unpaid principal balance. Interest shall be contracted for and collected at the single simple interest rate applied to the outstanding balance that would earn the same amount of interest as the above rates for payment according to schedule.

(a1) Maximum Fee. — In addition to the interest authorized in subsection (a) of this section, a licensee making loans under this section may collect from the borrower a fee for processing the loan equal to five percent (5%) of the loan amount not to exceed twenty-five dollars ($25.00), provided that such charges may not be assessed more than twice in any 12-month period.

(b) Computation of Interest. — Interest on loans made pursuant to this section shall not be paid, deducted, or received in advance. Such interest shall not be compounded but interest on loans shall (i) be computed and paid only as a percentage of the unpaid principal balance or portion thereof and (ii) computed on the basis of the number of days actually elapsed; provided, however, if part or all of the consideration for a loan contract is the unpaid principal balance of a prior loan, then the principal amount payable under the loan contract may include any unpaid interest on the prior loan which have accrued within 90 days before the making of the new loan contract. For the purpose of computing interest, a day shall equal 1/365th of a year. Any payment made on a loan shall be applied first to any accrued interest and then to principal, and any portion or all of the principal balance may be prepaid at any time without penalty.

(c) Limitation on Interest after Judgment. — If a money judgment is obtained against any party on any loan made under the provisions of this section neither the judgment nor the loan shall carry, from the date of the judgment, any interest in excess of eight percent (8%) per annum.

(d) Limitation of Interest after Maturity of Loan. — After the maturity date of any loan contract made under the provisions of this section and until the loan contract is paid in full by cash, new loan, refinancing or otherwise, no charges other than interest at eight percent (8%) per annum shall be computed or collected from any party to the loan upon the unpaid principal balance of the loan.

(e) Repealed by Session Laws 1989, c. 17, s. 3.

(f) Repealed by Session Laws 2001-519, s. 3, effective January 1, 2002. (1961, c. 1053, s. 1; 1969, c. 1303, ss. 13, 17-22; 1973, c. 1042, s. 3; 1975, c. 110, s. 1; 1979, c. 33, s. 2; 1981, c. 561, ss. 1-3; 1983, c. 68, s. 1; c. 126, s. 13; 1989, c. 17, s. 3; 2001-519, s. 3.)

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 76 (1969).

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 343 (1970).

For note discussing the appropriate disclosure of inconsistent federal and state requirements with regard to credit terms, see 15 Wake Forest L. Rev. 793 (1979).

CASE NOTES

Legislative History. — For consideration of the legislative history of this section and G.S. 53-168(c) and 53-191, and former G.S. 53-176.1 with regard to lenders making loans secured by motor vehicles, see Barclays American/Credit Co. v. Riddle, 57 N.C. App. 662, 292 S.E.2d 177, cert. denied, 306 N.C. 555, 294 S.E.2d 369 (1982).

This section does not limit type of security that lender may take. Barclays American/Credit Co. v. Riddle, 57 N.C. App. 662, 292 S.E.2d 177, cert. denied, 306 N.C. 555, 294 S.E.2d 369 (1982).

Former section 53-176.1 was not an implied limitation on this section. Barclays American/Credit Co. v. Riddle, 57 N.C. App. 662, 292 S.E.2d 177, cert. denied, 306 N.C. 555, 294 S.E.2d 369 (1982).

Limitation imposed by § 53-180(f) only proscribes the use of interests in real property as security. Barclays American/Credit Co. v. Riddle, 57 N.C. App. 662, 292 S.E.2d 177, cert. denied, 306 N.C. 555, 294 S.E.2d 369 (1982).

Only Collateral Not Available Is Real Property. — The only section of this Article which expressly limits the type of collateral available to a general lender operating under this section is G.S. 53-180(f). Barclays American/Credit Co. v. Riddle, 57 N.C. App. 662, 292 S.E.2d 177, cert. denied, 306 N.C. 555, 294 S.E.2d 369 (1982).

No Legislative Intent to Exclude Motor Vehicles as Security. — Subsection (f) of G.S. 53-180 refers specifically to this section, and it may be reasonably inferred that had the Legislature intended to prohibit the use of motor vehicles as security for loans made under this section, it would have so stated. Barclays American/Credit Co. v. Riddle, 57 N.C. App. 662, 292 S.E.2d 177, cert. denied, 306 N.C. 555, 294 S.E.2d 369 (1982), decided prior to subsequent amendment.

General Lender May Take Interest in Motor Vehicle. — Under the pertinent statutes, and particularly G.S. 53-180(f), a general lender operating under this section is entitled to secure any loan by taking a security interest in a motor vehicle. Barclays American/Credit Co. v. Riddle, 57 N.C. App. 662, 292 S.E.2d 177, cert. denied, 306 N.C. 555, 294 S.E.2d 369 (1982), decided prior to subsequent amendment.

Small loan operations are subject to state regulation, and enjoy the higher interest rates allowed by this section. Generally speaking, their loans under $900.00 (now $3,000) are allowed to be made at interest rates substantially higher than rates allowed to other lenders. United States v. Wachovia Corp., 313 F. Supp. 632 (W.D.N.C. 1970).

Cited in Ken-Mar Fin. v. Harvey, 90 N.C. App. 362, 368 S.E.2d 646 (1988); Herndon v. ITT Consumer Fin. Corp., 789 F. Supp. 720 (W.D.N.C. 1992).

§ 53-173.1: Repealed by Session Laws 1989, c. 17, s. 4.

§ 53-173.2: Repealed by Session Laws 1975, c. 110, s. 2.

§ 53-174: Repealed by Session Laws 1989, c. 17, s. 4.

§ 53-175. Fee for returned checks.

A licensee may collect the fee for returned checks to the extent permitted by G.S. 25-3-506. This section shall apply to any loan made by any licensee under this Article. (1961, c. 1053, s. 1; 1969, c. 1303, s. 23; 1981, c. 561, s. 4; 1983, c. 68, s. 1; c. 126, s. 12; 1989, c. 17, s. 5; 1995 (Reg. Sess., 1996), c. 742, s. 21.)

CASE NOTES

Cited in Herndon v. ITT Consumer Fin. Corp., 789 F. Supp. 720 (W.D.N.C. 1992).

§ 53-176. Optional rates, maturities and amounts.

(a) In lieu of making loans in the amount and at the interest stated in G.S. 53-173 and for the terms stated in G.S. 53-180, a licensee may at any time elect to make loans in installments not exceeding ten thousand dollars ($10,000) and which shall not be repayable in less than six months or more than 84 months and which shall not be secured by deeds of trust or mortgages on real estate and which are repayable in substantially equal consecutive monthly payments and to charge and collect interest in connection therewith which shall not exceed the following actuarial rates:

(1) With respect to a loan not exceeding seven thousand five hundred dollars ($7,500), thirty percent (30%) per annum on that part of the unpaid principal balance not exceeding one thousand dollars ($1,000) and eighteen percent (18%) per annum on the remainder of the unpaid principal balance. Interest shall be contracted for and collected at the single simple interest rate applied to the outstanding balance that would earn the same amount of interest as the above rates for payment according to schedule.

(2) With respect to a loan exceeding seven thousand five hundred dollars ($7,500), eighteen percent (18%) per annum on the outstanding principal balance.

(b) In addition to the interest permitted in this section, a licensee may assess at closing a fee for processing the loan as agreed upon by the parties, not to exceed twenty-five dollars ($25.00) for loans up to two thousand five hundred dollars ($2,500) and one percent (1%) of the cash advance for loans above two thousand five hundred dollars ($2,500), not to exceed a total fee of forty dollars ($40.00), provided that such charges may not be assessed more than twice in any 12-month period.

(c) The provisions of G.S. 53-173(b), (c) and (d) and G.S. 53-180(b), (c), (d), (e), (f), (g), (h) and (i) shall apply to loans made pursuant to this section.

(d) Any licensee under this Article shall have the right to elect to make loans in accordance with this section by the filing of a written statement to that effect with the Commissioner and no sooner than 30 days from the date of such notification begin making loans regulated by this section. After such election a licensee may continue to make loans in accordance with this section unless the licensee notifies the Commissioner in writing of its intention to terminate such election on a date not sooner than 30 days from the notification.

(e) The due date of the first monthly payment shall not be more than 45 days following the disbursement of funds under any such installment loan. A borrower under this section may prepay all or any part of a loan made under this section without penalty. Except as otherwise provided for pursuant to G.S. 75-20(a), no more than twice in a 12-month period, a borrower may cancel a loan with the same licensee within three business days after disbursement of the loan proceeds without incurring or paying interest so long as the amount financed, minus any fees or charges, is returned to and received by the licensee within that time.

(f) No individual, partnership, or corporate licensee and no corporation which is the parent, subsidiary or affiliate of a corporate licensee that is making loans under this Article except as authorized in this section, shall be permitted to make loans under the provisions of this section. Any corporate licensee or individual or partnership licensee that elects to make loans in accordance with the provisions of this section shall be bound by that election with respect to all of its offices and locations in this State and all offices and locations in this State of its parent, subsidiary or affiliated corporate licensee, or with respect to all of his or their offices and locations in this State. (1961, c. 1053, s. 1; 1969, c. 1303, s. 12.1; 1981, c. 561, s. 7; 1983, c. 68, s. 1; c. 126, ss. 14, 15; 1989, c. 17, s. 6; 1995, c. 155, s. 1; 2001-519, s. 4.)

CASE NOTES

Applied in In re Ivey, 131 Bankr. 43 (Bankr. M.D.N.C. 1991).

Cited in Herndon v. ITT Consumer Fin. Corp., 789 F. Supp. 720 (W.D.N.C. 1992).

§ 53-176.1: Repealed by Session Laws 1989, c. 17, s. 4.

§ 53-177. Recording fees.

The licensee may collect from the borrower the amount of any fees necessary to file or record its security interest with any public official or agency of a county or the State as may be required pursuant to Article 9 of Chapter 25 of the General Statutes or G.S. 20-58 et seq. Upon full disclosure to the borrower on how the fees will be applied, such fees may either (i) be paid by the licensee to such public official or agency of the county or State, or (ii) in lieu of recording or filing, applied by the licensee to purchase nonfiling or nonrecording insurance on the instrument securing the loan, or (iii) be retained by a licensee that elects to self insure against the loss of a security interest by reason of not filing or recording its security instrument: Provided, however, the amount collected by the licensee from the borrower for the purchase of a nonfiling or nonrecording insurance policy, or for self insurance, shall be the premium amount for such insurance as fixed by the Commissioner of Insurance. Such premium shall be at least one dollar ($1.00) less than the cost of recording or filing a security interest. Provided further, a licensee shall not collect or permit to be collected any notary fee in connection with any loan made under this Article, nor may a licensee collect any fee from the borrower for the cost of releasing a security interest except such fee as actually paid to any public official or agency of the county or State for such purpose. (1961, c. 1053, s. 1; 1989, c. 17, s. 7; 2000-169, s. 36.)

CASE NOTES

Purpose of charge for nonfiling. — The purpose of the charge for nonfiling insurance is to protect the lender, not the borrower. Mosley v. National Fin. Co., 36 N.C. App. 109, 243 S.E.2d 145, cert. denied, 295 N.C. 467, 246 S.E.2d 9 (1978), overruled on other grounds, 319 N.C. 274, 354 S.E.2d 459 (1987).

Cited in Herndon v. ITT Consumer Fin. Corp., 789 F. Supp. 720 (W.D.N.C. 1992).

§ 53-178. No further charges; no splitting contracts; certain contracts void.

No further or other charges or insurance commissions shall be directly or indirectly contracted for or received by any licensee except those specifically authorized by this Article or by the Commissioner under G.S. 53-172. No licensee shall divide into separate parts any contract made for the purpose of or with the effect of obtaining charges in excess of those authorized by this

Article. All balances due to a licensee from any person as a borrower or as an endorser, guarantor or surety for any borrower or otherwise, or due from any husband or wife, jointly or severally, shall be considered a part of any loan being made by a licensee to such person for the purpose of computing interest or charges. (1961, c. 1053, s. 1; 1991 (Reg. Sess., 1992), c. 765, s. 2.)

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

CASE NOTES

Sale of Noncredit Insurance. — Both the language of the North Carolina Consumer Finance Act and its interpretation by the North Carolina Commissioner of Banks supported defendants' sale of noncredit insurance. As such, plaintiffs' Motion for a Judgment finding such sales to be per se illegal was without merit. Herndon v. ITT Consumer Fin. Corp., 789 F. Supp. 720 (W.D.N.C. 1992), aff'd, 16 F.3d 409 (4th Cir. 1994).

OPINIONS OF ATTORNEY GENERAL

A licensee under the Consumer Finance Act may not benefit either directly or indirectly from charges or commissions realized on noncredit insurance, services, or products sold as a part of, or in connection with, a loan transaction under the Consumer Finance Act other than those charges and commissions specified by this section. See opinion of Attorney General to William T. Graham, Commissioner of Banks, Department of Economic and Community Development (now Department of Commerce), — N.C.A.G. — (Jan. 22, 1991).

§ 53-179. Multiple-office loan limitations.

A licensee shall not grant a loan in one office to any borrower who already has a loan in another office operated by the same entity or by an affiliate, parent, subsidiary or under the same ownership, management or control, whether partial or complete. This section shall apply to intrastate and interstate operations. A licensee shall take every reasonable precaution to prevent granting loans in violation of this section. Such loans granted inadvertently resulting in a total liability of three thousand dollars ($3,000) or less, shall be adjusted to the rates applicable under the Article to a single loan of equivalent amount, and when the total liability on such loans is in excess of three thousand dollars ($3,000), interest shall be adjusted to simple interest at eight percent (8%) per annum on the entire obligation. (1961, c. 1053, s. 1; 1969, c. 1303, s. 13; 1973, c. 1042, s. 6; 1981, c. 561, ss. 5, 6; 1983, c. 68, s. 1.)

§ 53-180. Limitations and prohibitions on practices and agreements.

(a) Time and Payment Limitation. — Except as otherwise provided in this Article, no licensee making a loan pursuant to G.S. 53-173 shall enter into any contract of loan under this Article providing for any scheduled repayment of principal more than 25 months from the date of making the contract if the cash advance is six hundred dollars ($600.00) or less; more than 37 months from the date of making the contract if the cash advance is in excess of six hundred dollars ($600.00) but not in excess of fifteen hundred dollars ($1,500); more than 49 months from the date of making the contract if the cash advance is in excess of fifteen hundred dollars ($1,500) but not in excess of two thousand five hundred dollars ($2,500); or more than 61 months if the cash advance is in excess of two thousand five hundred dollars ($2,500). Every loan contract shall provide for repayment of the amount loaned in substantially equal installments, either of principal or of principal and charges in the aggregate, at approximately equal periodic intervals of time. Nothing contained herein shall prevent a loan being considered a new loan because the proceeds of the loan are used to pay an existing contract.

(b) No Assignment of Earnings. — A licensee may not take an assignment of earnings of the borrower for payment or as security for payment of a loan. An assignment of earnings in violation of this section is unenforceable by the assignee of the earnings and is revocable by the borrower. A sale of unpaid earnings made in consideration of the payment of money to or for the account of the seller of the earnings is deemed to be a loan to the seller by an assignment of earnings.

(c) Limitation on Default Provisions. — An agreement between a licensee and a borrower pursuant to a loan under this Article with respect to default by the borrower is enforceable only to the extent that (i) the borrower fails to make a payment as required by the agreement, or (ii) the prospect of payment, performance, or realization of collateral is significantly endangered or impaired, the burden of establishing the prospect of a significant endangerment or impairment being on the licensee.

(d) Prohibitions on Discrimination. — No licensee shall deny any extension of credit or discriminate in the fixing of the amount, duration, application procedures or other terms or conditions of such extension of credit because of the race, color, religion, national origin, sex or marital status of the applicant or any other person connected with the transaction.

(e) Limitation on Attorney's Fees. — With respect to a loan made pursuant to the provisions of G.S. 53-173, the agreement may not provide for payment by the borrower of attorney fees.

(f) No Real Property as Security. — No licensee shall make any loan within this State which shall in any way be secured by real property.

(g) Deceptive Acts or Practices. — No licensee shall engage in any unfair method of competition or unfair or deceptive trade practices in the conduct of making loans to borrowers pursuant to this Article or in collecting or attempting to collect any money alleged to be due and owing by a borrower.

(h) Limitations on Home Loans. — No affiliate operating in the same office or subsidiary operating in the same office of a licensee shall make any home loan as defined in G.S. 24-1.1A(e) in a principal amount of less than three thousand dollars ($3,000).

(i) Limitation on Conditions to Making Loans. — A licensee or an affiliate operating in the same office or subsidiary operating in the same office of a licensee shall not make as a condition of any loan the refinancing of a borrower's home loan as defined in G.S. 24-1.1A(e) which is not currently in default.

(j) No Solicitation of Deposits. — No licensee may directly or indirectly solicit from any borrower funds to be held on deposit in any bank; provided, however, a borrower may at his option, by way of a military allotment or other such program, designate a depository to receive and disburse funds for a designated purpose.

(k) Loans made pursuant to this Article solicited using a facsimile or negotiable check shall be subject to the provisions of G.S. 75-20(a). (1961, c. 1053, s. 1; 1969, c. 1303, s. 24; 1973, c. 1042, s. 7; 1979, c. 33, s. 3; 1981, c. 464, s. 3; 1985, c. 154, ss. 10-12; 1987, c. 444, s. 3; 1989, c. 17, ss. 8, 13; 2001-519, s. 5.)

CASE NOTES

Deceptive Acts or Practices. — Selling credit insurance at inflated premiums, receiving a 25% commission, and failing to disclose these facts, while in a fiduciary relationship with the borrower, constitutes an unfair and deceptive trade practice within the meaning of this section. In re Dickson, 432 F. Supp. 752 (W.D.N.C. 1977).

Section 53-173 does not limit the type of security that a lender may take. Barclays American/Credit Co. v. Riddle, 57 N.C. App. 662, 292 S.E.2d 177, cert. denied, 306 N.C. 555, 294 S.E.2d 369 (1982).

No Legislative Intent to Exclude Motor Vehicles as Security. — Subsection (f) of this section, which formerly stated "[n]o loan made pursuant to the provisions of G.S. 53-173 shall be secured in any way by an interest in real property" referred specifically to G.S. 53-173, and it could be reasonably inferred that had the Legislature intended to prohibit the use of motor vehicles as security for loans made under G.S. 53-173, it would have so stated. Barclays American/Credit Co. v. Riddle, 57 N.C. App. 662, 292 S.E.2d 177, cert. denied, 306 N.C. 555, 294 S.E.2d 369 (1982).

Cited in Ken-Mar Fin. v. Harvey, 90 N.C. App. 362, 368 S.E.2d 646 (1988); Provident Finance Co. v. Rowe, 101 N.C. App. 367, 399 S.E.2d 368 (1991).

§ 53-181. Statements and information to be furnished to borrowers; power of attorney or confession of judgment prohibited.

(a) Contents of Statement Furnished to Borrower. — At the time a loan is made, the licensee shall deliver to the borrower, or if there be two or more borrowers, to one of them a copy of the loan contract, or a written statement, showing in clear and distinct terms:

(1) The name and address of the licensee and one of the primary obligors on the loan;
(2) The date of the loan contract;
(3) Schedule of installments or descriptions thereof;
(4) The cash advance;
(5) The face amount of the note evidencing the loan;
(6) The amount collected or paid for insurance, if any;
(7) The amount collected or paid for filing or other fees allowed by this Article;
(8) The collateral or security for the loan;
(9) If the loan refinances a previous loan, the following relating to the refinanced loan: (i) the principal balance due; (ii) interest charged that is included in the new loan; and (iii) rebates on any credit insurance, listed separately.
(10) In addition to any disclosures otherwise provided by law, a licensee soliciting loans using a facsimile or negotiable check shall provide the disclosures required by G.S. 75-20(a).

(b) Schedule of Charges, etc., to Be Made Available; Copy Filed with Commissioner. — Each licensee doing business in North Carolina shall make readily available to the borrower at each place of business such full and accurate schedule of charges and insurance premiums, including refunds and rebates, on all classes of loans currently being made by such licensee, as the Commissioner shall prescribe, and a copy thereof shall be filed in the office of the Commissioner of Banks.

(c) Power of Attorney or Confession of Judgment Prohibited. — No licensee shall take any confession of judgment or permit any borrower to execute a power of attorney in favor of any licensee or in favor of any third person to confess judgment or to appear for the borrower in any judicial proceeding and any such confession of judgment or power of attorney to confess judgment shall be absolutely void. (1955, c. 1279; 1961, c. 1053, s. 1; 1989, c. 17, s. 9; 2001-519, s. 6.)

§ 53-182. Payment of loans; receipts.

(a) After each payment made on account of any loan, the licensee shall give to the person making such payment a signed, dated receipt showing the amount paid and the balance due on the loan. No receipt shall be required in the case of payments made by the borrower's check or money order, where the entire proceeds of the check or money order are applied to the loan. The use of a coupon book system shall be deemed in compliance with this section.

(b) Upon payment of any loan in full, a licensee shall cancel and return to the borrower, within a reasonable length of time, originals or copies of any note, assignment, mortgage, deed of trust, or other instrument securing such loan, which no longer secures any indebtedness of the borrower to the licensee. (1955, c. 1279; 1961, c. 1053, s. 1; 2001-519, s. 7.)

§ 53-183. Advertising, broadcasting, etc., false or misleading statements.

No licensee subject to this Article shall advertise, display, distribute, telecast, or broadcast or cause or permit to be advertised, displayed, distributed, telecasted, or broadcasted, in any manner whatsoever, any false, misleading, or deceptive statement or representation with regard to the rates, terms, or conditions of loans. The Commissioner may require that charges or rates of charge, if stated by a licensee, be stated fully and clearly in such manner as he may deem necessary to prevent misunderstanding thereof by prospective borrowers. The Commissioner may permit or require licensees to refer in their advertising to the fact that their business is under State supervision, subject to conditions imposed by him to prevent an erroneous impression as to the scope or degree of protection provided by this Article. (1957, c. 1429, s. 3; 1961, c. 1053, s. 1.)

§ 53-184. Securing of information; records and reports; allocations of expense.

(a) Each licensee shall maintain all books and records relating to loans made under this Article required by the Commissioner of Banks to be kept, and the Commissioner, his deputy, or duly authorized examiner or agent or employee is authorized and empowered to examine such records at any reasonable time. Such books and records may be maintained in the form of magnetic tape, magnetic disk, optical disk, or other form of computer, electronic or microfilm media available for examination on the basis of computer printed reproduction, video display or other medium acceptable to the Commissioner of Banks; provided, however, that such books and records so kept must be convertible into clearly legible tangible documents within a reasonable time. Any licensee having more than one licensed office may maintain such books and records at a location other than the licensed office location if such location is approved by the Commissioner; provided that, upon such requirements as may be imposed by the Commissioner of Banks, there shall be available to the borrower at each licensed location or such other location convenient to the borrower, as designated by the licensee, complete loan information; and provided further that such books and records of each licensed office shall be clearly segregated. When a licensee maintains its books and records outside of North Carolina, the licensee shall make them available for examination at the place where they are maintained and shall pay for all reasonable and necessary expenses incurred by the Commissioner in conducting such examination. Where the data processing for any licensee is performed by a person other than the licensee, the licensee shall provide to the Commissioner of Banks a copy of a binding agreement between the licensee and the data processor which allows the Commissioner of Banks, his deputy, or duly authorized examiner or agent or employee to examine that particular data processor's activities pertaining to the licensee to the same extent as if such services were being performed by the licensee on its own premises; and, notwithstanding the provisions of G.S. 53-167 and 53-122, when billed by the Commissioner of Banks, the licensee shall reimburse the Commissioner of Banks for all costs and expenses incurred by the Commissioner in such examination.

(b) Each licensee shall file annually with the Commissioner of Banks on or before the thirty-first day of March for the 12 months' period ending the preceding December 31, reports on forms prescribed by the Commissioner. Reports shall disclose in detail and under appropriate headings the assets and liabilities of the licensee, the income, expense, gain, loss, and any other information as the Commissioner may require. Reports shall be verified by the oath or affirmation of the owner, manager, president, vice-president, cashier, secretary or treasurer of the licensee.

(c) If a licensee conducts another business or is affiliated with other licensees under this Article, or if any other situation exists under which allocations of expense are necessary, the licensee or licensees shall make such allocation according to appropriate and reasonable accounting principles.

(d) Repealed by Session Laws 1997-285, s. 3, effective January 1, 1998. (1955, c. 1279; 1957, c. 1429, s. 4; 1961, c. 1053, s. 1; 1981, c. 561, s. 8; 1983, c. 68, s. 1; 1989, c. 17, s. 10; 1997-285, ss. 2, 3; 2001-519, s. 8.)

§ 53-185. Rules and regulations by Banking Commission and Commissioner.

The State Banking Commission is hereby authorized, empowered and directed to make all rules and regulations deemed by the Commission to be necessary in implementing this Article and in providing for the protection of the borrowing public and the efficient management of such licensees and to give all necessary instructions to such licensees for the purpose of interpreting this Article; provided, the Commissioner is hereby authorized to make such rules and regulations and issue such orders as he deems necessary and desirable in implementing and carrying out the provisions of G.S. 53-184. And it shall be the duty of all such licensees, their officers, agents and employees, to comply fully with all such rules, regulations and instructions. When promulgated, any rule or regulation shall be forwarded by mail to each licensee at its licensed place of business at least 20 days prior to its effective date. (1955, c. 1279; 1961, c. 1053, s. 1.)

§ 53-186. Commissioner to issue subpoenas, conduct hearings, give publicity to investigations, etc.

The Commissioner of Banks shall have the power and duty to issue subpoenas including subpoenas duces tecum, and compel attendance of witnesses, administer oaths, conduct hearings and transcribe testimony in making the investigations and conducting the hearings provided for herein or in the other discharge of his duties, and to give such publicity to his investigations and findings as he may deem best for the public interest. (1957, c. 1429, s. 5; 1961, c. 1053, s. 1.)

§ 53-187. Injunctive powers; receivers.

Whenever the Commissioner has reasonable cause to believe that any person is violating or is threatening to violate any provision of this Article, he may in addition to all actions provided for in this Article, and without prejudice thereto, enter an order requiring such person to desist or to refrain from such violation; and an action may be brought in the name of the Commissioner on the relation of the State of North Carolina to enjoin such person from engaging in or continuing such violation or from doing any act or acts in furtherance thereof. In any such action an order or judgment may be entered awarding such preliminary or final injunction as may be deemed proper. In addition to all other means provided by law for the enforcement of a restraining order or injunction, the court in which such action is brought shall have power and jurisdiction to impound, and to appoint a receiver for the property and business of the defendant, including books, papers, documents and records pertaining thereto or so much thereof as the court may deem reasonably necessary to prevent violations of this Article through or by means of the use of said property and business. Such receiver, when appointed and qualified, shall have such powers and duties as to custody, collection, administration, winding up, and liquidation of such property and business as shall from time to time be conferred upon him by the court. (1957, c. 1429, s. 6; 1961, c. 1053, s. 1.)

§ 53-188. Review of regulations, order or act of Commission or Commissioner.

The Commission may review any rule, regulation, order or act of the Commissioner done pursuant to or with respect to the provisions of this Article. Any person aggrieved by any such rule, regulation, order or act may appeal, pursuant to G.S. 53-92(d), to the Commission for review upon giving notice in writing within 20 days after such rule, regulation, order or act complained of is adopted, issued or done. Notwithstanding any other provision of law to the contrary, any aggrieved party to a decision of the Commission shall be entitled to petition for judicial review pursuant to G.S. 53-92(d). (1957, c. 1429, s. 6; 1961, c. 1053, s. 1; 1973, c. 1331, s. 3; 1987, c. 827, s. 13; 1995, c. 129, s. 29; 2009-57, s. 2.)

Effect of Amendments. — Session Laws 2009-57, s. 2, effective June 5, 2009, in the first sentence, substituted "may review" for "shall have full authority to review" near the beginning, and substituted "Article. Any" for "Article and any" at the end; in the second sentence, inserted "pursuant to G.S. 53-92(d)"; and in the third sentence, substituted "petition for judicial review pursuant to G.S. 53-92(d)" for "an appeal pursuant to G.S. 53-92" at the end.

CASE NOTES

Cited in State ex rel. N.C. Utils. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965).

§ 53-189. Insurance.

(a) Credit life, credit accident and health, credit unemployment, and credit property insurance may be written in accordance with the provisions of Article 57 of Chapter 58 of the General Statutes.

(b) The premium or cost of credit life, credit accident and health, credit unemployment, or credit property insurance, when written by or through any lender or other creditor, its affiliate, associate or subsidiary shall not be deemed as interest or charges or consideration or an amount in excess of permitted charges in connection with the loan or credit transaction and any gain or advantage to any lender or other creditor, its affiliate, associate or subsidiary, arising out of the premium or commission or dividend from the sale or provision of such insurance shall not be deemed a violation of any other law, general or special, civil or criminal, of this State, or of any rule, regulation or order issued by any regulatory authority of this State. (1961, c. 1053, s. 1; 1969,

c. 1303, s. 25; 1975, c. 660, s. 2; 1981, c. 759, s. 10; c. 876; 1987, c. 826, s. 10; 1993, c. 226, s. 14.)

CASE NOTES

Cited in Herndon v. ITT Consumer Fin. Corp., 789 F. Supp. 720 (W.D.N.C. 1992).

§ 53-190. Loans made elsewhere.

(a) No loan contract made outside this State in the amount or of the value of ten thousand dollars ($10,000) or less, for which greater consideration or charges than are authorized by G.S. 53-173 and G.S. 53-176 of this Article have been charged, contracted for, or received, shall be enforced in this State. Provided, the foregoing shall not apply to loan contracts in which all contractual activities, including solicitation, discussion, negotiation, offer, acceptance, signing of documents, and delivery and receipt of funds, occur entirely outside North Carolina.

(b) If any lender or agent of a lender who makes loan contracts outside this State in the amount or of the value of ten thousand dollars ($10,000) or less, comes into this State to solicit or otherwise conduct activities in regard to such loan contracts, then such lender shall be subject to the requirements of this Article.

(c) No lender licensed to do business under this Article may collect, or cause to be collected, any loan made by a lender in another state to a borrower, who was a legal resident of North Carolina at the time the loan was made. The purchase of a loan account shall not alter this prohibition. (1961, c. 1053, s. 1; 1967, c. 769, s. 2; 1969, c. 1303, s. 13; 1973, c. 1042, s. 8; 1979, c. 706, s. 2; 1989, c. 17, s. 11.)

Legal Periodicals. — For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

§ 53-191. Businesses exempted.

Nothing in this Article shall be construed to apply to any person, firm or corporation doing business under the authority of any law of this State or of the United States relating to banks, trust companies, savings and loan associations, cooperative credit unions, agricultural credit corporations or associations organized under the laws of North Carolina, production credit associations organized under the act of Congress known as the Farm Credit Act of 1933, pawnbrokers lending or advancing money on specific articles of personal property, industrial banks, the business of negotiating loans on real estate as defined in G.S. 105-41, nor to installment paper dealers as defined in G.S. 105-83 other than persons, firms and corporations engaged in the business of accepting fees for endorsing or otherwise securing loans or contracts for repayment of loans. (1955, c. 1279; 1957, c. 1429, s. 8; 1961, c. 1053, s. 1; 1969, c. 1303, s. 26.)

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

CASE NOTES

Legislative History. — For consideration of the legislative history of this section and G.S. 53-168(c), G.S. 53-173, and former G.S. 53-176.1 with regard to lenders making loans secured by motor vehicles, see Barclays American/Credit Co. v. Riddle, 57 N.C. App. 662, 292 S.E.2d 177, cert. denied, 306 N.C. 555, 294 S.E.2d 369 (1982).

Cited in Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

ARTICLE 16.

Money Transmitters Act.

§§ 53-192 through 53-208: Repealed by Session Laws 2001-443, s. 1, effective November 1, 2001, and applicable to contracts entered into on or after that date.

Cross References. — For the Money Transmitters Act, see now G.S. 53-208.1 et seq.

ARTICLE 16A.

Money Transmitters Act.

§ 53-208.1. Citation of Article.

This Article shall be known and cited as the "Money Transmitters Act". (2001-443, s. 2.)

CASE NOTES

Federal Preemption. — Bankruptcy court held that the disputed issues of fact regarding tracing were immaterial, and that summary judgment was appropriate because the North Carolina Money Transmitters Act (NCMTA), G.S. 53-208.1 et seq., eliminated the need for a tracing analysis by creating a floating trust; however, the North Carolina legislature could not alter a federal tracing requirement. Even if the NCMTA established a floating trust as the bankruptcy court held, the floating nature of the trust conflicted with federal law and was preempted. Callaway v. Memo Money Order Co., 381 B.R. 650, 2008 U.S. Dist. LEXIS 8478 (E.D.N.C. 2008).

§ 53-208.2. Definitions.

(a) Unless otherwise provided in this Article, or when the context clearly indicates that a different meaning is intended, the following definitions apply in this Article:

(1) Applicant. — A person filing an application for a license under this Article.

(2) Authorized delegate. — An entity designated by the licensee under the provisions of this Article to sell or issue payment instruments or stored value or engage in the business of transmitting money on behalf of a licensee.

(3) Commissioner. — The Commissioner of Banks of the State of North Carolina.

(4) Control. — Ownership of, or the power to vote, ten percent (10%) or more of the outstanding voting securities of a licensee or controlling person. For purposes of determining the percentage of a licensee

controlled by any person, there shall be aggregated with the person's interest the interest of any other person controlled by the person or by any spouse, parent, or child of the person.

(5) Controlling person. — Any person in control of a licensee.

(6) Electronic instrument. — A card or other tangible object for the transmission or payment of money or monetary value which contains a microprocessor chip, magnetic strip, or other means for the storage of information that is prefunded and for which the value is decremented upon each use. The term does not include a card or other tangible object that is redeemable by the issuer in goods or services.

(7) Executive officer. — The licensee's president, chair of the executive committee, senior officer responsible for the licensee's business, chief financial officer, and any other person who performs similar functions.

(8) Key shareholder. — Any person, or group of persons acting in concert, who is the owner of ten percent (10%) or more of any voting class of an applicant's stock.

(9) Licensee. — A person licensed under this Article.

(10) Material litigation. — Any litigation that, according to generally accepted accounting principles, is deemed significant to an applicant's or licensee's financial health and would be required to be referenced in that entity's annual audited financial statements, report to shareholders, or similar documents.

(11) Monetary transmission. — The term means either of the following:
  a. The sale or issuance of payment instruments or stored value.
  b. The act of engaging in the business of receiving money or monetary value for transmission within the United States or to locations abroad by any and all means, including payment instrument, wire, facsimile, or electronic transfer.

(12) Monetary value. — A medium of exchange, whether or not redeemable in money.

(13) Outstanding payment instrument. — Any payment instrument issued by the licensee which has been sold in the United States directly by the licensee or any payment instrument issued by the licensee which has been sold by an authorized delegate of the licensee in the United States, which has been reported to the licensee as having been sold and which has not yet been paid by or for the licensee.

(14) Payment instrument. — Any electronic or written check, draft, money order, traveler's check, or other electronic or written instrument or order for the transmission or payment of money or monetary value, whether or not the instrument is negotiable. The term does not include a credit card voucher, letter of credit, or any other instrument that is redeemable by the issuer in goods or services.

(15) Permissible investments. — One or more of the following:
  a. Cash.
  b. Certificates of deposit or other debt obligations of a financial institution, either domestic or foreign.
  c. Bills of exchange or time drafts drawn on and accepted by a commercial bank, otherwise known as bankers' acceptances, which are eligible for purchase by member banks of the Federal Reserve System.
  d. Any investment bearing a rating of one of the three highest grades as defined by a nationally recognized organization that rates securities.
  e. Investment securities that are obligations of the United States, its agencies, or instrumentalities or obligations that are guaranteed fully as to principal and interest of the United States or any

obligations of any state, municipality, or any political subdivision thereof.

f. Shares in a money market mutual fund, interest-bearing bills or notes or bonds, debentures, or preferred stock traded on any national securities exchange or on a national over-the-counter market, or mutual funds primarily composed of such securities or a fund composed of one or more permissible investments as set forth herein.

g. Any demand borrowing agreement or agreements made to a corporation or a subsidiary of a corporation whose capital stock is listed on a national exchange.

h. Receivables due to a licensee from its authorized delegates pursuant to a contract described in G.S. 53-208.19, which are not past due or doubtful of collection.

i. Any other investments or security device approved by the Commissioner.

(16) Person. — Any individual, partnership, association, joint-stock association, trust, or corporation.

(17) Remit. — To do one or more of the following:

a. Make direct payment of the funds to the licensee or its representatives authorized to receive those funds.

b. Deposit the funds in a bank, credit union, or savings and loan association or other similar financial institution in an account specified by the licensee.

(18) Stored value. — Monetary value that is evidenced by an electronic record. (2001-443, s. 2.)

Editor's Note. — Some of the definitions above were renumbered in alphabetical order at the direction of the Revisor of Statutes.

§ 53-208.3. License required.

(a) On or after October 1, 2001, no person except those exempt pursuant to G.S. 53-208.4 shall engage in the business of money transmission in this State without a license as provided in this Article.

(b) A licensee may conduct its business in this State at one or more locations, directly or indirectly owned, or through one or more authorized delegates, or both, pursuant to the single license granted to the licensee.

(c) For the purposes of this Article, a person is considered to be engaged in the business of money transmission in this State if that person makes available, from a location inside or outside of this State, an Internet website North Carolina citizens may access in order to enter into those transactions by electronic means. (2001-443, s. 2.)

§ 53-208.4. Exemptions.

(a) This Article shall not apply to any of the following:

(1) The United States or any department, agency, or instrumentality thereof.

(2) The United States Postal Service.

(3) The State or any political subdivisions thereof.

(4) Banks, credit unions, savings and loan associations, savings banks, or mutual banks organized under the laws of any state or the United States.

(5) A person registered as a securities broker-dealer under federal or state securities laws to the extent of its operation as a broker-dealer.

(6) The provision of electronic transfer of government benefits for any federal, state, or county governmental agency as defined in Federal Reserve Board Regulation E, by a contractor for and on behalf of the United States or any department, agency, or instrumentality thereof, or any state or any political subdivisions thereof.

(b) Authorized delegates of a licensee, acting within the scope of authority conferred by a written contract as described in G.S. 53-208.19 shall not be required to obtain a license pursuant to this Article. (2001-443, s. 2.)

§ 53-208.5. License qualifications.

(a) Each licensee shall have at all times a net worth of not less than one hundred thousand dollars ($100,000) calculated in accordance with generally accepted accounting principles. Licensees engaging in money transmission at more than one location or through authorized delegates shall have an additional net worth of ten thousand dollars ($10,000) per location in this State, as applicable, to a maximum of five hundred thousand dollars ($500,000). Licensees with neither locations nor authorized delegates in this State shall have an additional net worth as established by the Commissioner in an amount not to exceed a maximum of five hundred thousand dollars ($500,000).

(b) Every corporate applicant, at the time of filing of an application for license under this Article and at all times after a license is issued, shall be in good standing in the state of its incorporation and, if required by the North Carolina Business Corporations Act, Chapter 55 of the General Statutes, shall be registered or qualified to do business in this State. All noncorporate applicants shall, at the time of the filing of an application for a license under this Article and at all times after a license is issued, be registered or qualified to do business in the State as required by law. (2001-443, s. 2.)

§ 53-208.6. Permissible investments and statutory trust.

(a) Each licensee under this Article shall possess at all times unencumbered permissible investments having an aggregate market value, calculated in accordance with generally accepted accounting principles, of not less than the aggregate face amount of all outstanding payment instruments and stored value obligations issued or sold. This requirement may be waived by the Commissioner if the dollar volume of a licensee's outstanding payment instruments and stored value do not exceed the bond or other security devices posted by the licensee pursuant to G.S. 53-208.8.

(b) Permissible investments, even if commingled with other assets of the licensee, shall be deemed by operation of law to be held in trust for the benefit of the purchasers and holders of the licensee's outstanding payment instruments and stored value obligations in the event of the bankruptcy of the licensee. (2001-443, s. 2.)

§ 53-208.7. License application.

(a) Each application for a license under this Article shall be made in writing, under oath, and in a form prescribed by the Commissioner. For all applicants, each application shall contain:

(1) The exact name of the applicant, the applicant's principal address, any assumed or trade name used by the applicant in the conduct of its business, and the location of the applicant's business records.

(2) The history of the applicant's material civil litigation for a 10-year period prior to the date of the application and a record of any criminal convictions.

(3) A description of the activities conducted by the applicant and a history of operations.

(4) A description of the business activities in which the applicant seeks to be engaged in the State.

(5) A list identifying the applicant's proposed authorized delegates in the State, if any, at the time of the filing of the license application.

(6) A sample authorized delegate contract, if applicable.

(7) A sample form of payment instrument, if applicable, which bears the name and address or telephone number of the issuer clearly printed on the payment instrument.

(8) The location or locations at which the applicant and its authorized delegates, if any, propose to conduct the licensed activities in the State.

(9) The name and address of the clearing bank or banks on which the applicant's payment instruments will be drawn or through which the payment instruments will be payable.

(b) If the applicant is a corporation, the applicant shall also provide:

(1) The date of the applicant's incorporation and state of incorporation.

(2) A certificate of good standing from the state in which the applicant was incorporated.

(3) A certificate of authority from the Secretary of State to conduct business in this State, if required by the North Carolina Business Corporations Act, Chapter 55 of the General Statutes.

(4) A description of the corporate structure of the applicant, including the identity of any parent or subsidiary of the applicant and the disclosure of whether any parent or subsidiary is publicly traded on any stock exchange.

(5) The name, business and residence address, and employment history for the past five years of the applicant's executive officers and the officers or managers who will be in charge of the applicant's activities to be licensed pursuant to this Article.

(6) The name, business and residence address, and employment history for the period five years prior to the date of the application of any key shareholder of the applicant.

(7) The history of material civil litigation for a 10-year period prior to the date of the application and a record of any criminal conviction for every executive officer or key shareholder.

(8) A copy of the applicant's most recent audited financial statement, including the balance sheet, statement of income or loss, statement of changes in shareholder equity, and statement of changes in financial position and, if available, the applicant's audited financial statements for the immediately preceding two-year period. However, if the applicant is a wholly owned subsidiary of another corporation, the applicant may submit either the parent corporation's consolidated audited financial statements for the current year and for the immediately preceding two-year period or the parent corporation's Form 10K reports filed with the United States Securities and Exchange Commission for the prior three years in lieu of the applicant's financial statements. If the applicant is a wholly owned subsidiary of a corporation having its principal place of business outside the United States, similar documentation filed with the parent corporation's non-United States regulator may be submitted to satisfy this provision.

(9) Copies of all filings, if any, made by the applicant with the United States Securities and Exchange Commission, or with a similar regulator in a country other than the United States, within the year preceding the date of filing of the application.

(c) If the applicant is not a corporation, the applicant shall also provide:

(1) The name, business and residence address, personal financial statement, and employment history, for the past five years, of each principal of the applicant and the name, business and residence address, and employment history for the past five years of any other person or persons who will be in charge of the applicant's activities to be licensed pursuant to this Article.

(2) The place and date of the applicant's registration or qualification to do business in this State.

(3) The history of material civil litigation for a 10-year period prior to the date of the application and a record of any criminal conviction for each individual having an ownership interest in the applicant and each individual who exercises supervisory responsibility with respect to the applicant's activities.

(4) Copies of the applicant's audited financial statements, including the balance sheet, statement of income or loss, and statement of changes in financial position, for the current year and, if available, for the immediately preceding two-year period.

The Commissioner is authorized, for good cause shown, to waive any requirements of this section with respect to any license application or to permit a license applicant to submit substituted information in its license application in lieu of the information required by this section. (2001-443, s. 2.)

§ 53-208.8. Surety bond.

(a) Each application shall be accompanied by a surety bond acceptable to the Commissioner in the amount of one hundred fifty thousand dollars ($150,000). If the applicant proposes to engage in business under this Article at more than one location, through authorized delegates or otherwise, then the amount of the security bond will be increased by five thousand dollars ($5,000) per location, up to a maximum of two hundred fifty thousand dollars ($250,000). In the case of an applicant which engages in business under this Article, but has no locations or authorized delegates in this State, the amount of the security bond may be increased at the Commissioner's discretion to a maximum of two hundred fifty thousand dollars ($250,000). The surety bond shall be in a form satisfactory to the Commissioner and shall run to the State for the benefit of any claimants against the licensee to secure the faithful performance of the obligations of the licensee with respect to the receipt, handling, transmission, and payment of money or monetary value in connection with the sale and issuance of payment instruments, stored value, or transmission of money. The aggregate liability of the surety in no event shall exceed the principal sum of the bond. Claimants against the licensee may themselves bring suit directly on the security bond, or the Commissioner may bring suit on behalf of claimants, either in one action or in successive actions.

(b) In lieu of a surety bond, the licensee may deposit with the Commissioner, or with any bank in this State designated by the licensee and approved by the Commissioner, to an aggregate amount, based upon principal amount or market value, whichever is lower, of not less than the amount of the surety bond or portion thereof, the following:

(1) Unencumbered cash.

(2) Unencumbered interest-bearing bonds.

(3) Unencumbered notes.

(4) Unencumbered debentures.

(5) Unencumbered obligations of the United States or any agency or instrumentality thereof, or guaranteed by the United States.

(6) Unencumbered obligations of this State or of any political subdivision of the State, or guaranteed by this State.

The securities or cash shall be deposited as aforesaid and held to secure the same obligations as would the surety bond, but the depositor shall be entitled to receive all interest and dividends thereon, shall have the right, with the approval of the Commissioner, to substitute other securities for those deposited, and shall be required to do so on written order of the Commissioner made for good cause shown.

(c) The surety bond shall remain in effect until cancellation, which may occur only after 90 days' written notice to the Commissioner. Cancellation shall not affect any liability incurred or accrued during that period.

(d) The surety bond shall remain in place for no longer than five years after the licensee ceases money transmission operations in the State. However, notwithstanding this provision, the Commissioner may permit the surety bond to be reduced or eliminated prior to that time to the extent that the amount of the licensee's outstanding payment instruments, stored value obligations, and money transmitted in this State is reduced.

(e) The surety bond proceeds and any cash or other collateral posted as security by a licensee shall be deemed by operation of law to be held in trust for the benefit of the purchasers and holders of the licensee's outstanding payment instruments, stored value obligations, and money transmissions in the event of the bankruptcy of the licensee. (2001-443, s. 2.)

§ 53-208.9. Fees.

(a) Investigation and License Fees. — Each application for a license shall be accompanied by a nonrefundable investigation fee of five hundred dollars ($500.00), together with the initial license fee of one thousand dollars ($1,000) plus ten dollars ($10.00) per location within this State at which a money transmission business is to be conducted by the applicant or an authorized delegate.

(b) Annual License Fee. — On or before December 31 of each year, each licensee under this Article shall pay to the Commissioner a license fee in the amount of one thousand dollars ($1,000) plus ten dollars ($10.00) per location in this State at which the licensee or an authorized delegate is conducting a money transmitter business.

(c) Location Fee. — Notwithstanding the number of locations within this State at which a licensee or authorized delegate conducts a money transmitter business, the per location fee provided in subsections (a) and (b) of this section shall not exceed five thousand dollars ($5,000) per licensee per year. The per year location fee shall be based on the number of locations set forth in the annual report required by G.S. 53-208.11. (2001-443, s. 2.)

§ 53-208.10. Issuance of license.

(a) Upon the filing of a complete application, the Commissioner shall investigate the financial condition and responsibility, financial and business experience, and the character and general fitness of the applicant. The Commissioner may conduct an on-site investigation of the applicant, the reasonable cost of which shall be borne by the applicant. If the Commissioner finds that the applicant's business will be conducted honestly, fairly, and in a manner commanding the confidence and trust of the community and that the applicant has fulfilled the requirements imposed by this Article and has paid the required license fee, the Commissioner shall issue a license to the applicant authorizing the applicant to engage in the licensed activities in this State. If these requirements have not been met, the Commissioner shall deny the application in a written statement setting forth the reasons for the denial.

(b) The Commissioner shall approve or deny every application for an original license within 120 days from the date a complete application is submitted, which period may be extended by the written consent of the applicant. The Commissioner shall notify the applicant of the date when the application is deemed complete. In the absence of approval or denial of the application, or consent to the extension of the 120-day period, the application is deemed approved and the Commissioner shall issue the license effective as of the first day after the 120-day or extended period has elapsed.

(c) No license shall be denied except on 10 days' notice to the applicant. Any applicant aggrieved by a denial issued by the Commissioner under this section may at any time within five days from the date of receipt of written notice of the denial, contest the denial by serving a written demand for a hearing on the Commissioner. The serving of a written demand on the Commissioner shall automatically stay the denial until a ruling is issued. The Commissioner shall set a date for a hearing not later than 30 days after service of the response, unless a later date is set with the consent of the applicant. The hearing authorized by this subsection shall be an informal hearing. (2001-443, s. 2.)

§ 53-208.11. Renewal of license and annual report.

(a) The annual license fee shall be accompanied by a report, in a form prescribed by the Commissioner, to be filed by the licensee on or before December 31 of each year. The licensee shall include all of the following in its annual renewal report:

(1) A copy of its most recent audited consolidated annual financial statement, including balance sheet, statement of income or loss, statement of changes in shareholder's equity, and statement of changes in financial position, or, in the case of a licensee that is a wholly owned subsidiary of another corporation, the consolidated audited annual financial statement of the parent corporation may be filed in lieu of the licensee's audited financial statement.

(2) For the most recent quarter for which data is available prior to the date of the filing of the renewal application, but in no event more than 120 days prior to the renewal date, the licensee shall provide the number of payment instruments sold by the licensee in the State, the dollar amount of those instruments, and the dollar amount of those instruments currently outstanding.

(3) Any material changes to any of the information submitted by the licensee on its original application which have not previously been reported to the Commissioner on any other report required to be filed under this Article.

(4) A list of the licensee's permissible investments.

(5) A list of the locations within this State at which business regulated by this Article is being conducted by either the licensee or its authorized delegates, except for entities exempt under G.S. 53-208.4.

(b) A licensee that has not filed a renewal report or paid its annual license fee by the renewal filing deadline and has not been granted an extension of time to do so by the Commissioner shall be notified by the Commission, in writing, that a hearing will be scheduled at which time the licensee will be required to show cause why its license should not be suspended pending compliance with these requirements. (2001-443, s. 2.)

§ 53-208.12. Quarterly reports.

A licensee shall file for each calendar quarter, no later than 60 days after the quarter has ended, a report which contains the total number of authorized delegates in this State. In addition, a licensee shall promptly provide any additional information regarding any or all of its current and prior authorized delegates requested by the Commissioner. (2001-443, s. 2; 2004-171, s. 6.)

Editor's Note. — Session Laws 2004-171, s. 17, provides: "The Legislative Research Commission shall undertake a comprehensive study of those laws, including Chapters 53, 54B, and 54C of the General Statutes, which affect the establishment and operation of banks in North Carolina and shall make recommendations to the 2005 General Assembly, prior to the convening of the 2006 Regular Session as to which laws (i) are obsolete, unnecessary, or duplicative, (ii) are unnecessarily inconsistent in the treatment of banks, savings and loan associations, and savings banks, and (iii) unnecessarily restrict, impede, or prohibit activities of banks, savings and loan associations, and savings banks or the ability of the Commissioner of Banks to regulate banks and savings institutions in an effective, efficient, and equitable manner.

"In preparing its recommendations, the Commission shall actively solicit and consider information received from representatives of banks, savings and loan associations, savings banks, the State Banking Commission, the Commissioner of Banks and the Commissioner's staff, other interested parties, and the general public."

§ 53-208.13. Extraordinary reporting requirements.

(a) Within 15 days of the occurrence of any one of the events listed below, a licensee shall file a written report with the Commissioner describing the event and its expected impact on the licensee's activities in the State:

(1) The filing for bankruptcy or reorganization by the licensee.
(2) The institution of revocation or suspension proceedings against the licensee by any State or governmental authority with regard to the licensee's money transmission activities.
(3) Any felony indictment of the licensee or any of its key officers or directors related to money transmission activities.
(4) Any felony conviction of the licensee or any of its key officers or directors related to money transmission activities.

(b) A licensee shall update information contained in the original application filed with the Commissioner. If the information contained in the application is or becomes inaccurate in any material respect, the licensee shall file a corrected amendment as soon as practicable, but in no event later than 30 days after the effective date of the material changes. (2001-443, s. 2.)

§ 53-208.14. Changes in control of a license.

Within 15 days of a change or acquisition of control of a licensee, the licensee shall provide notice of the event to the Commissioner in writing and in a form prescribed by the Commissioner. The notice shall be accompanied by any information, data, and records required by the Commissioner. Notwithstanding the foregoing, the Commissioner may waive this notification requirement if, in the Commissioner's discretion, the change in control does not pose any risk to the interests of the public. (2001-443, s. 2.)

§ 53-208.15. Examinations.

(a) The Commissioner may conduct an annual on-site examination of a licensee. Should the Commissioner conclude that an on-site examination of a licensee is necessary, the licensee shall pay all reasonably incurred costs of the examination. If the Commissioner determines, based on the licensee's financial statements and past history of operations in the State, that an on-site examination is unnecessary, then the on-site examination may be waived by the Commissioner. An on-site examination may be conducted in conjunction with examinations to be performed by representatives of agencies of another state or states. The Commissioner, in lieu of an on-site examination, may accept the examination report of an agency of another state, or a report prepared by an independent accounting firm, and reports so accepted are considered for all purposes as an official report of the Commissioner. The Commissioner may examine a licensee without prior notice if the Commissioner has a reasonable basis to believe that the licensee is not in compliance with this Article.

(b) If the Commissioner has a reasonable basis to believe that the licensee or authorized delegate is not in compliance with this Article, the Commissioner may (i) request financial data from a licensee in addition to that required under G.S. 53-208.11, or (ii) conduct an on-site examination of any authorized delegate or of any location of a licensee within this State without prior notice to the authorized delegate or licensee. When the Commissioner examines an authorized delegate's operations, the authorized delegate shall pay all reasonably incurred costs of the examination. When the Commissioner examines a licensee's location within the State, the licensee shall pay all reasonably incurred costs of the examination. (2001-443, s. 2.)

§ 53-208.16. Maintenance of records and certificate of authority.

(a) Each licensee shall make, keep, and preserve the following books, accounts, and other records for a period of three years:

(1) A record or records of each payment instrument sold.

(2) A general ledger containing all assets, liability, capital, income, and expense accounts, which general ledger shall be posted at least monthly.

(3) Settlement sheets received from authorized delegates.

(4) Bank statements and bank reconciliation records.

(5) Records of outstanding payment instruments and stored value.

(6) Records of each payment instrument paid within the three-year period.

(7) A list of the names and addresses of all of the licensee's authorized delegates, if any.

(b) Maintenance of the documents required by this section in a photographic, electronic, or other similar form shall constitute compliance with this section.

(c) Records may be maintained at a location other than within this State so long as they are made accessible to the Commissioner on seven days' written notice. (2001-443, s. 2.)

§ 53-208.17. Confidentiality of data submitted to the Commissioner.

(a) Notwithstanding any other provision of law, all information or reports obtained by the Commissioner from an applicant, licensee, or authorized delegate, whether obtained through reports, applications, examination, audits, investigation, or otherwise, including (i) all information contained in or related to examination, investigation, operating, or condition reports prepared by, on behalf of, or for the use of the Commissioner; and (ii) financial statements, balance sheets, or authorized delegate information are confidential and may not be disclosed by the Commissioner or any officer or employee of the Commissioner. The Commissioner, however, may provide for the release of information to representatives of State or federal agencies who state in writing under oath that they will maintain the confidentiality of the information if: (i) the licensee provides consent prior to the release; or (ii) the Commissioner finds that the release is reasonably necessary for the protection of the public or in the interests of justice.

(b) Nothing in this section shall prohibit the Commissioner from releasing to the public a list of persons licensed under this Article or aggregated financial data on those licenses. (2001-443, s. 2.)

§ 53-208.18. Suspension or revocation of licenses.

After notice and hearing, the Commissioner may suspend or revoke a license issued under this Article if the Commissioner finds any of the following:

(1) Any fact or condition exists that, if it had existed at the time when the licensee applied for its license, would have been grounds for denying the application.

(2) The licensee's net worth becomes inadequate and the licensee, after 10 days' written notice from the Commissioner, fails to take such steps as the Commissioner deems necessary to remedy the deficiency.

(3) The licensee knowingly violates any material provision of this Article or any rule or order validly adopted by the Commissioner under authority of this title.

(4) The licensee is conducting its business in an unsafe or unsound manner.

(5) The licensee is insolvent.

(6) The licensee has suspended payment of its obligations, has made an assignment for the benefit of its creditors, or has admitted in writing its inability to pay its debts as they become due.

(7) The licensee has applied for an adjudication for bankruptcy, reorganization, arrangement, or other relief under any bankruptcy.

(8) The licensee refuses to permit the Commissioner to make any examination authorized by this Article.

(9) The licensee willfully fails to make any report required by this Article. (2001-443, s. 2.)

§ 53-208.19. Authorized delegate contracts.

Licensees desiring to conduct licensed activities through authorized delegates in this State shall authorize each delegate to operate pursuant to an express written contract, which shall provide the following:

(1) That the licensee appoints the person as its delegate with authority to engage in money transmission on behalf of the licensee.

(2) That neither a licensee nor an authorized delegate may authorize subdelegates without the written consent of the Commissioner.

(3) That licensees are subject to supervision and regulation by the Commissioner.

(4) A licensee shall issue a certificate of authority for each location at which it conducts licensed activities in this State through authorized delegates. The certificate shall be posted in public view at each location and shall state as follows: "Money transmission on behalf of (licensee) is conducted at this location pursuant to the Money Transmitters Act." (2001-443, s. 2.)

§ 53-208.20. Authorized delegate conduct.

(a) An authorized delegate shall not make any fraudulent or false statement or misrepresentation to a licensee or to the Commissioner.

(b) All money transmission or sale or issuance of payment instrument activities conducted by authorized delegates shall be strictly in accordance with the licensee's written procedures provided to the authorized delegates.

(c) An authorized delegate shall remit all money owing to the licensee in accordance with the terms of the contract between the licensee and the authorized delegate. The failure of an authorized delegate to remit all money owing to a licensee within the time presented shall result in liability of the authorized delegates to the licensee for three times the licensee's actual damages. The Commissioner may set, by regulation, the maximum remittance time.

(d) An authorized delegate is deemed to consent to the Commissioner's inspection, with or without prior notice to the licensee or authorized delegate, of the books and records of the authorized delegate of the licensee when the Commissioner has a reasonable basis to believe that the licensee or authorized delegate is not in compliance with this Article.

(e) An authorized delegate is under a duty to act only as authorized under the contract with the licensee. An authorized delegate who exceeds its authority is subject to cancellation of its contract and further disciplinary action by the Commissioner.

(f) All funds, less fees, received by an authorized delegate of a licensee from the sale or delivery of a payment instrument or stored value issued by a licensee or received by an authorized delegate for transmission shall constitute trust funds owned by and belonging to the licensee from the time the funds are received by the authorized delegate until the time when the funds or an equivalent amount are remitted by the authorized delegate to the licensee. If an authorized delegate commingles any funds with any other funds or property owned or controlled by the authorized delegate, all commingled proceeds and other property shall be impressed with a trust in favor of the licensee in an amount equal to the amount of the proceeds due the licensee.

(g) An authorized delegate shall report to the licensee the theft or loss of payment instruments within 24 hours from the time it knew or should have known of the theft or loss.

(h) An authorized delegate shall prominently post the certificate of authority specified in G.S. 53-208.19 at each location at which it conducts licensed activities in this State. (2001-443, s. 2.)

CASE NOTES

Federal Preemption. — Bankruptcy court held that the disputed issues of fact regarding tracing were immaterial, and that summary judgment was appropriate because the North Carolina Money Transmitters Act (NCMTA), G.S. 53-208.1 et seq., eliminated the need for a tracing analysis by creating a floating trust; however, the North Carolina legislature could not alter a federal tracing requirement. Even if the NCMTA established a floating trust as the bankruptcy court held, the floating nature of the trust conflicted with federal law and was preempted. Callaway v. Memo Money Order Co., 381 B.R. 650, 2008 U.S. Dist. LEXIS 8478 (E.D.N.C. 2008).

§ 53-208.21. Revocation or suspension of authorized delegates.

(a) If, after notice and a hearing, the Commissioner finds that any authorized delegate of a licensee or any director, officer, employee, or controlling person of the authorized delegate: (i) has violated any provision of this Article or of any rule or regulation or order issued under this Article; (ii) has engaged or participated in any unsafe or unsound act with respect to the business of selling or issuing payment instruments of the licensee or the business of money transmission; or (iii) has made or caused to be made in any application or report filed with the Commissioner or in any proceeding before the Commissioner, any statement which was at the time and in the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any application or report any material fact which is required to be stated therein, the Commissioner may issue an order suspending or barring the authorized delegate from continuing to be or becoming an authorized delegate of any licensee during the period for which the order is in effect. Upon issuance of the order, the licensee shall terminate its relationship with the authorized delegate according to the terms of the order.

(b) Any authorized delegate to whom an order is issued under this section may apply to the Commissioner to modify or rescind the order. The Commissioner shall not grant the application unless the Commissioner finds that (i) it is in the public interest to do so, and (ii) it is reasonable to believe that the person will comply with all applicable provisions of this Article and of any regulation and order issued under this Article if and when that person is permitted to resume being an authorized delegate of a licensee. The right of any authorized delegate to whom an order is issued under this section to petition for judicial review of the order shall not be affected by the failure of the person to apply to the Commissioner to modify or rescind the order. (2001-443, s. 2.)

§ 53-208.22. Licensee liability.

A licensee's responsibility to any person for a money transmission conducted on that person's behalf by the licensee or the licensee's authorized delegate shall be limited to the amount of money transmitted or the face amount of the payment instrument purchased. (2001-443, s. 2.)

§ 53-208.22A. Disclosures of transmissions.

(a) At the time of a monetary transmission transaction to a location outside of the United States, the licensee shall provide a receipt to the customer. The receipt shall state clearly (i) the amount of funds presented for transmission and any fee charged by the licensee and (ii) a toll-free telephone number or a local number that a customer can access at no charge to receive information about a monetary transmission.

(b) If the rate of exchange for a monetary transmission to be paid in the currency of another country is fixed by the licensee for a transaction at the time the monetary transmission is initiated, the receipt shall also state:

(1) The rate of exchange for that transaction.
(2) The amount to be paid in the foreign currency.
(3) The period, if any, in which the payment shall be made in order to qualify for the fixed rate of exchange.

(c) If the rate of exchange for a monetary transmission to be paid in the currency of another country is not fixed at the time the monetary transmission is initiated, the receipt shall also disclose that the rate of exchange for the transaction will be set at the time the recipient of the monetary transmission receives the funds in the foreign country.

(d) The licensee shall provide the disclosures required by this section to the customer before completing the transaction if the customer requests the disclosures. (2005-104, s. 1.)

Editor's Note. — Session Laws 2005-104, s. 2, made this section effective October 1, 2005, and applicable to transactions occurring on and after that date.

§ 53-208.23. Hearings; procedures.

Except as provided by G.S 53-208.10(c), hearings conducted pursuant to this Article shall proceed in accordance with Article 3A of Chapter 150B of the General Statutes. (2001-443, s. 2.)

§ 53-208.24. Civil penalties.

(a) If, after notice and hearing, the Commissioner finds that a person has intentionally violated this Article or a rule adopted under this Article, the Commissioner may order the person to pay to the Commissioner a civil penalty in an amount specified by the Commissioner, not to exceed one thousand dollars ($1,000) for each violation or, in the case of a continuing violation, one thousand dollars ($1,000) for each day that the violation continues. No proceeding shall be initiated and no penalty shall be assessed pursuant to this section until after the person has been notified in writing of the nature of the violation and has been afforded a reasonable period of time, as set forth in the notice, to correct the violation and has failed to do so.

(b) The Commissioner, in the exercise of the Commissioner's reasonable judgment, may compromise, settle, and collect civil penalties with any person for violations of any provision of this Article, or of any rule, regulation, or order issued or promulgated to this Article. (2001-443, s. 2.)

§ 53-208.25. Enforcement.

(a) If it appears to the Commissioner that any person has committed or is about to commit a violation of any provision of this Article or of any rule or order of the Commissioner, the Commissioner may apply to the Wake County Superior Court for an order enjoining the person from violating or continuing to violate this Article or any rule, regulation, or order and for injunctive or such other relief as the nature of the case may require.

(b) The Commissioner may enter into consent orders at any time with any person to resolve any matter arising under this Article. A consent order shall be signed by the person to whom it is issued or a duly authorized representative and shall indicate agreement to the terms contained therein. A consent order need not constitute an admission by any person that any provision of this Article, or any rule, regulation, or order promulgated or issued thereunder has been violated, nor need it constitute a finding by the Commissioner that the person has violated any provision of this Article or any rule, regulation, or order promulgated or issued thereunder.

(c) Notwithstanding the issuance of a consent order, the Commissioner may seek civil or criminal penalties or compromise civil penalties concerning matters encompassed by the consent order, unless the consent order by its terms expressly precludes the Commissioner from so doing. (2001-443, s. 2.)

§ 53-208.26. Criminal penalties.

(a) Any person who knowingly and willfully violates any provision of this Article for which a penalty is not specifically provided is guilty of a Class 1 misdemeanor.

(b) Any person who knowingly and willfully makes a material, false statement in any document filed or required to be filed under this Article with the intent to deceive the recipient of the document is guilty of a Class 1 misdemeanor.

(c) Any person who knowingly and willfully engages in the business of money transmission without a license as provided herein shall be guilty of a Class 1 misdemeanor. (2001-443, s. 2.)

§ 53-208.27. Rules.

(a) The Banking Commission may adopt rules necessary to implement this Article.

(b) The Banking Commission may review any rule, regulation, order, or act of the Commissioner done pursuant to or with respect to the provisions of this Article. Any person aggrieved by any such rule, regulation, order, or act may appeal, pursuant to G.S. 53-92(d), to the Commission for review upon providing notice in writing within 20 days after any rule, regulation, order, or act complained of is adopted, issued, or done. Notwithstanding any other provision of law, any aggrieved party to a decision of the Banking Commission shall be entitled to petition for judicial review pursuant to G.S. 53-92(d). (2001-443, s. 2; 2009-57, s. 3.)

Effect of Amendments. — Session Laws 2009-57, s. 3, effective June 5, 2009, in subsection (b), substituted "Article. Any" for "Article; and any", inserted "pursuant to G.S. 53-92(d)" in the second sentence, and substituted "petition for judicial review pursuant to G.S. 53-92(d)" for "an appeal pursuant to G.S. 53-92" in the last sentence.

§ 53-208.28. Severability.

Should any provision, sentence, clause, section, or part of this Article for any reason be held unconstitutional, illegal, or invalid, such unconstitutionality, illegality, or invalidity shall not affect or impair any of the remaining provisions, sentences, clauses, sections, or part of this Article. (2001-443, s. 2.)

§ 53-208.29. Appointment of Secretary of State as agent for service of process.

(a) Any licensee, authorized delegate, or other person who knowingly engages in business activities that are regulated under this Article, with or without filing an application, is deemed to have done both of the following:

(1) Consented to the jurisdiction of the courts of this State for all actions arising under this Article; and

(2) Appointed the Secretary of State as such person's agent for the purpose of accepting service of process in any action, suit, or proceeding that may arise under this Article.

(b) Within three business days after service of process upon the Secretary of State, the Secretary shall transmit by certified mail copies of all lawful process accepted by the Secretary as an agent of that person at its last known address. Service of process shall be considered complete three business days after the Commissioner deposits copies of the documents in the United States mail. (2001-443, s. 2.)

§ 53-208.30. Transition.

Any person who holds in good standing a money transmitters license issued by the Commissioner of Banks on November 1, 2001 may continue to engage in such business subject to the renewal requirements of G.S. 53-208.11, and upon renewal, proof that the licensee meets the net worth requirements of G.S. 53-208.5(a), and the bonding or other security requirements of G.S. 53-208.8. (2001-443, s. 2.)

ARTICLE 17.

North Carolina Reciprocal Interstate Banking Act.

§ 53-209. Title.

This Article shall be known and may be cited as the North Carolina Reciprocal Interstate Banking Act. (1983 (Reg. Sess., 1984), c. 1113, s. 1; 1993, c. 175, s. 7; 1993 (Reg. Sess., 1994), c. 599, s. 1.)

§ 53-210. Definitions.

Notwithstanding any other section of this Chapter, for the purposes of this Article:

(1) "Acquire" means:
  a. The merger or consolidation of one bank holding company with another bank holding company;
  b. The acquisition by a bank holding company of direct or indirect ownership or control of voting shares of another bank holding company or a bank, if, after such acquisition, the bank holding company making the acquisition will directly or indirectly own or control more than five percent (5%) of any class of voting shares of the other bank holding company or the bank;
  c. The direct or indirect acquisition by a bank holding company of all or substantially all of the assets of another bank holding company or of a bank; or
  d. Any other action that would result in direct or indirect control by a bank holding company of another bank holding company or a bank.

(2) "Bank" has the meaning set forth in Section 2(c) of the Bank Holding Company Act of 1956 as amended (12 U.S.C. 1841(c)).

(3) "Banking office" means the principal office of a bank, any branch of a bank, any limited service facility of a bank or any other office at which a bank accepts deposits: Provided, however, that "banking office" shall not mean:
  a. Unmanned automatic teller machines, point of sale terminals or other similar unmanned electronic banking facilities at which deposits may be accepted;
  b. Offices located outside the United States; or
  c. Loan production offices, representative offices or other offices at which deposits are not accepted.

(4) "Bank holding company" has the meaning set forth in Section 2(a) (1) of the Bank Holding Company Act of 1956 as amended (12 U.S.C. 1841(a)(1)).

(5) "Commissioner" means the Commissioner of Banks of this State.

(6) "Control" has the meaning set forth in Section 2(a)(2) of the Bank Holding Company Act of 1956 as amended (12 U.S.C. 1841(a)(2)).

(7) "Deposits" means all demand, time, and savings deposits, without regard to the location of the depositor. For purposes of this Article, determination of deposits shall be made with reference to the most recent available regulatory reports of condition or similar reports made by or to state and federal regulatory authorities.

(8) "North Carolina bank" means a bank that:
  a. Is organized under the laws of this State or of the United States; and
  b. Has banking offices located only in this State.

(9) "North Carolina bank holding company" means a bank holding company:
  a. That has its principal place of business in this State; and
  b. Repealed by Session Laws 1993, c. 175, s. 8, effective July 1, 1994.
  c. That is not controlled by a bank holding company other than a North Carolina bank holding company.

(9a) "Out-of-state bank holding company" means a bank holding company that has its principal place of business in a state other than North Carolina.

(10) "Principal place of business" of a bank holding company means the state in which the total deposits held by the banking offices of the bank holding company's bank subsidiaries were the largest on July 1,

1966, or the date on which the company became a bank holding company, whichever is later.

(11) through (13) Repealed by Session Laws 1993, c. 175, s. 8, effective July 1, 1994.

(14) "State" means any state of the United States or the District of Columbia.

(15) "Subsidiary" has the meaning set forth in Section 2(d) of the Bank Holding Company Act of 1956 as amended (12 U.S.C. 1841(d)). (1983 (Reg. Sess., 1984), c. 1113, s. 1; 1985 (Reg. Sess., 1986), c. 862; 1987 (Reg. Sess., 1988), c. 899; 1993, c. 175, ss. 1, 8; 1993 (Reg. Sess., 1994), c. 599, s. 1.)

Editor's Note. — The number of subdivision (9a) was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 175, s. 8 having been subdivision (11a).

§ 53-211. Acquisitions by out-of-state bank holding companies.

(a) An out-of-state bank holding company that does not have a North Carolina bank subsidiary, other than a North Carolina bank subsidiary that was acquired in a transaction involving assistance by the Federal Deposit Insurance Corporation or in the regular course of securing or collecting a debt previously contracted in good faith, as provided in Section 3(a) of the Bank Holding Company Act of 1956 as amended (12 U.S.C. 1842(a)), may acquire a North Carolina bank holding company or a North Carolina bank with the approval of the Commissioner. The out-of-state bank holding company shall submit to the Commissioner an application for approval of such acquisition, which application shall be approved only if the Commissioner determines that the laws of the state in which the out-of-state bank holding company making the acquisition has its principal place of business permit North Carolina bank holding companies to acquire banks and bank holding companies in that state. Additionally, the Commissioner shall make the acquisition subject to any conditions, restrictions, requirements, or other limitations that would apply to the acquisition by a North Carolina bank holding company of a bank or bank holding company in the state where the out-of-state bank holding company making the acquisition has its principal place of business but that would not apply to the acquisition of a bank or bank holding company in such state by a bank holding company all of the subsidiaries of which are located in that state. The applicant shall submit an application fee of five thousand dollars ($5,000) plus two thousand dollars ($2,000) for each North Carolina bank or bank holding company being acquired.

(b) An out-of-state bank holding company that has a North Carolina bank subsidiary (other than a North Carolina bank subsidiary that was acquired in a transaction involving assistance by the Federal Deposit Insurance Corporation or in the regular course of securing or collecting a debt previously contracted in good faith, as provided in Section 3(a) of the Bank Holding Company Act of 1956 as amended (12 U.S.C. 1842(a)), may acquire any North Carolina bank or North Carolina bank holding company with the approval of the Commissioner. The out-of-state bank holding company shall submit to the Commissioner an application for approval of such acquisition, which application shall be approved only if the Commissioner makes the acquisition subject to any conditions, restrictions, requirements or other limitations that would apply to the acquisition by a North Carolina bank holding company of a bank or bank holding company in the state where the out-of-state bank holding company making the acquisition has its principal place of business but that would not apply to the acquisition of a bank or bank holding company in such state by a bank holding company all the bank subsidiaries of which are located in that state.

(c) The Commissioner shall rule on any application submitted under this section not later than 90 days following the date of submission of a complete application. If the Commissioner fails to rule on the application within the requisite 90-day period, the failure to rule shall be deemed a final decision of the Commissioner approving the application.

(d) The Commissioner, within 30 days of receiving the complete application for acquisition, shall publish notice of the intent of an out-of-state bank holding company to acquire a North Carolina bank or North Carolina bank holding company under subsection (a) or (b) of this section. The notice shall be published in newspapers in the communities in which the principal offices of the North Carolina bank or North Carolina bank holding company and of the out-of-state bank holding company are located and, if there are no newspapers published in such communities, then in newspapers having a general circulation in such communities. Notwithstanding any other provision of this section, the application for acquisition shall not be approved until the requirement for publication has been met. (1983 (Reg. Sess., 1984), c. 1113, s. 1; 1987 (Reg. Sess., 1988), c. 898, ss. 1, 2; 1989, c. 9, s. 2; c. 471; 1993, c. 175, ss. 2, 9; 1993 (Reg. Sess., 1994), c. 599, ss. 1, 3.)

§ 53-212: Repealed by Session Laws 1993, c. 175, s. 10, as amended by Session Laws 1993 (Regular Session, 1994), c. 599, s. 1.

§ 53-212.1. Bank agent for deposit institution affiliate.

A bank may act as the agent of any depository institution affiliate in receiving deposits, renewing time deposits, closing loans, servicing loans, and receiving payments on loans and other obligations, without being deemed a branch of such affiliate, in accordance with Section 101(d) of the Reigle-Neal Interstate Banking and Branching Efficiency Act of 1994. An affiliate for the purposes of this section shall include (i) an affiliate as defined in Section 2(k) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841(k)), and (ii) an affiliate as defined in Section 23A(b)(1) of the Federal Reserve Act, as amended (12 U.S.C. § 371c(b)(1)), but without regard to whether the bank or the affiliate is a member of the Federal Reserve System. (1995 (Reg. Sess., 1996), c. 557, s. 1; 1997-241, s. 2.1; 1997-456, s. 39.)

§ 53-213. Prohibitions.

(a) Except as expressly permitted by this Article or by federal law, no out-of-state bank holding company shall acquire a North Carolina bank holding company or a North Carolina bank.

(b) Repealed by Session Laws 1993, c. 175, s. 11. (1983 (Reg. Sess., 1984), c. 1113, s. 1; 1993, c. 175, s. 11; 1993 (Reg. Sess., 1994), c. 599, s. 1.)

Editor's Note. — This section is set out in the form above at the direction of the Revisor of Statutes.

§ 53-214. Applicable laws, rules and regulations.

(a) Any North Carolina bank that is controlled by a bank holding company that is not a North Carolina bank holding company shall be subject to all laws of this State and all rules and regulations under such laws that are applicable to North Carolina banks that are controlled by North Carolina bank holding companies.

(b) The State Banking Commission shall adopt rules to implement and effectuate the provisions of this Article. (1983 (Reg. Sess., 1984), c. 1113, s. 1; 1993, c. 175, s. 4; 1993 (Reg. Sess., 1994), c. 599, s. 2.)

§ 53-215. Appeal of Commissioner's decision.

Any aggrieved party in a proceeding under G.S. 53-211 or G.S. 53-227.1 may, within 20 days after final decision of the Commissioner, appeal in writing any decision to the State Banking Commission. An appeal under this section shall be made pursuant to G.S. 53-92(d). Notwithstanding any other provision of law, any aggrieved party to a decision of the State Banking Commission shall be entitled to petition for judicial review pursuant to G.S. 53-92(d). (1983 (Reg. Sess., 1984), c. 1113, s. 1; 1985, c. 683, s. 3; 1993, c. 175, ss. 5, 12; 1993 (Reg. Sess., 1994), c. 599, s. 1; 2009-57, s. 4.)

Effect of Amendments. — Session Laws 2009-57, s. 4, effective June 5, 2009, rewrote the section.

§ 53-216. Periodic reports; interstate agreements.

The Commissioner may from time to time require reports under oath in such scope and detail as he may reasonably determine of each out-of-state bank holding company subject to this Article for the purpose of assuring continuing compliance with the provisions of this Article.

The Commissioner may enter into cooperative agreements with other bank regulatory authorities for the periodic examination of any out-of-state bank holding company that has a North Carolina bank subsidiary and may accept reports of examination and other records from such authorities in lieu of conducting its own examinations. The Commissioner may enter into joint actions with other bank regulatory authorities having concurrent jurisdiction over any out-of-state bank holding company that has a North Carolina bank subsidiary or may take such actions independently to carry out its responsibilities under this Article and assure compliance with the provisions of this Article and the applicable banking laws of this State. (1983 (Reg. Sess., 1984), c. 1113, s. 1; 1993, c. 175, s. 13; 1993 (Reg. Sess., 1994), c. 599, s. 1.)

§ 53-217. Enforcement.

The Commissioner shall have the power to enforce the provisions of this Article through an action in any court of this State or any other state or in any court of the United States, as provided in G.S. 53-94 and G.S. 53-134, for the purpose of obtaining an appropriate remedy for violation of any provision of this Article, including such criminal penalties as are contemplated by G.S. 53-134. (1983 (Reg. Sess., 1984), c. 1113, s. 1; 1993, c. 175, s. 14; 1993 (Reg. Sess., 1994), c. 599, s. 1.)

§ 53-218. Nonseverability.

It is the purpose of this Article 17 to facilitate orderly development within North Carolina of banking organizations that have banking offices in more than one state. It is not the purpose of this Article to authorize acquisitions of North Carolina bank holding companies or North Carolina banks by bank holding companies that do not have their principal place of business in this State on any basis other than as expressly provided in this Article. Therefore, if any portion of this Article pertaining to the terms and conditions for and limitations upon acquisition of North Carolina bank holding companies and North Carolina banks by bank holding companies that do not have their principal place of business in this State is determined to be invalid for any reason by a final nonappealable order of any North Carolina or federal court of competent jurisdiction, then this entire Article shall be null and void in its entirety and shall be of no further force or effect from the effective date of such order: Provided, however, that any transaction that has been lawfully consummated pursuant to this Article prior to a determination of invalidity shall be unaffected by such determination. (1983 (Reg. Sess., 1984), c. 1113, s. 1; 1993, c. 175, s. 15; 1993 (Reg. Sess., 1994), c. 599, s. 1.)

ARTICLE 17A.

Interstate Branch Banking.

§§ 53-219 through 53-224.8: Repealed by Session Laws 1995, c. 322, s. 1.

Cross References. — As to interstate branch banking, see G.S. 53-224.9 et. seq.

ARTICLE 17B.

Interstate Branch Banking.

Part 1. Definitions.

§ 53-224.9. Definitions.

The following definitions apply in this Article:

(1) "Acquisition of a branch" means the acquisition of a branch located in a host state without engaging in an "interstate merger transaction" as defined in Part 2 of this Article.

(2) "Bank" has the meaning set forth in 12 U.S.C. § 1813(h); provided that the term "bank" shall not include any "foreign bank" as defined in 12 U.S.C. § 3101(7), except that such term shall include any foreign bank organized under the laws of a territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands, the deposits of which are insured by the Federal Deposit Insurance Corporation.

(3) "Bank holding company" has the meaning set forth in 12 U.S.C. § 1841(a)(1).

(4) "Bank supervisory agency" means:
  a. The Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and any successor to these agencies; and
  b. Any agency of another state with primary responsibility for chartering and supervising banks.

(5) "Branch" means a full service office of a bank through which it receives deposits, checks are paid, or loans are made, other than its principal office. Any of the functions or services authorized to be engaged in by a bank may be carried out in an authorized branch office.

(6) "Commissioner" means the Commissioner of Banks for the State of North Carolina.

(7) "Control" has the meaning set forth in 12 U.S.C. § 1841(a)(2).

(8) "De novo branch" means a branch of a bank located in a host state which (i) is originally established by the bank as a branch and (ii) does not become a branch of the bank as a result of (A) the acquisition of another bank or a branch of another bank, or (B) the merger, consolidation, or conversion involving any such bank or branch.

(9) "Home state" means:
  a. With respect to a national bank, the state in which the main office of the bank is located;
  b. With respect to a state bank, the state by which the bank is chartered;
  c. With respect to a foreign bank, the state determined to be the home state of such foreign bank under 12 U.S.C. § 103(c).

(10) "Host state" means a state, other than the home state of a bank, in which the bank maintains, or seeks to establish and maintain a branch.

(11) "Interstate merger transaction" means:
  a. The merger or consolidation of banks with different home states, and the conversion of branches of any bank involved in the merger or consolidation into branches of the resulting bank; or
  b. The purchase of all or substantially all of the assets, including all or substantially all of the branches, of a bank whose home state is different from the home state of the acquiring bank.

(12) "North Carolina bank" means a bank whose home state is North Carolina.

(13) "North Carolina State bank" means a bank chartered under the laws of North Carolina.

(14) "Out-of-state bank" means a bank whose home state is a state other than North Carolina.

(15) "Out-of-state state bank" means a bank chartered under the laws of any state other than North Carolina.

(16) "Resulting bank" means a bank that has resulted from an interstate merger transaction under this Article.

(17) "State" means any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Virgin Islands, and the Northern Mariana Islands. (1995, c. 322, s. 2.)

Part 2. Interstate De Novo Branching and Acquisition of Branches.

§ 53-224.10. Purpose.

It is the express intent of this Part to permit interstate branching under sections 102 and 103 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Public Law 103-328, in accordance with the provisions in this Part. (1995, c. 322, s. 2.)

§ 53-224.11. Interstate branching by North Carolina State banks.

(a) With the prior approval of the Commissioner, any North Carolina State bank may establish and maintain a de novo branch or acquire a branch in a state other than North Carolina.

(b) A North Carolina State bank desiring to establish and maintain a branch in another state under this section shall file an application on a form prescribed by the Commissioner and pay the branch application fee prescribed by regulation pursuant to G.S. 53-122. If the Commissioner finds that the applicant has the financial resources sufficient to undertake the proposed expansion without adversely affecting its safety or soundness and that the establishment of the proposed branch is in the public interest, the Commissioner may approve the application. In acting on the application, the Commissioner shall consider the views of the appropriate bank supervisory agencies. The applicant bank may establish the branch when it has received the written approval of the Commissioner. (1995, c. 322, s. 2.)

§ 53-224.12. Interstate branching by de novo entry.

An out-of-state bank that does not have a branch in North Carolina and that meets the requirements of this Article may establish and maintain a de novo branch in this State. (1995, c. 322, s. 2.)

§ 53-224.13. Interstate branching through the acquisition of a branch.

An out-of-state bank that does not have a branch in North Carolina and that meets the requirements of this Article may establish and maintain a branch in this State through the acquisition of a branch. (1995, c. 322, s. 2.)

§ 53-224.14. Requirement of notice and other conditions.

(a) An out-of-state bank desiring to establish and maintain a de novo branch or to acquire a branch in this State shall provide written notice of the proposed transaction to the Commissioner not later than the date on which the bank applies to the responsible federal bank supervisory agency for approval to establish or acquire the branch. The filing of such notice shall be accompanied by the filing fee prescribed by the Commissioner by regulation.

(b) The out-of-state bank shall comply with the applicable requirements of Article 15 of Chapter 55 of the North Carolina General Statutes.

(c) An out-of-state bank may establish and maintain a de novo branch or may establish and maintain a branch through acquisition of a branch if:

(1) In the case of a de novo branch, the laws of the home state of the out-of-state bank permit North Carolina banks to establish and maintain de novo branches in that state under substantially the same terms and conditions as herein set forth; and

(2) In the case of a branch established through the acquisition of a branch, the laws of the home state of the out-of-state bank permit North Carolina banks to establish and maintain branches in that state through the acquisition of branches under substantially the same terms and conditions as herein set forth. (1995, c. 322, s. 2; 1997-54, s. 1; 1999-72, s. 3.)

§ 53-224.15. Conditions for approval.

In the case of notice under G.S. 53-224.14 by an out-of-state state bank, the notice shall be subject to approval by the Commissioner, which approval shall be effective only if:

(1) The bank confirms in writing to the Commissioner that as long as it maintains a branch in North Carolina, it will comply with all applicable laws of this State.

(2) The Commissioner, acting within 60 days after receiving notice of an application under G.S. 53-224.14, certifies to the responsible federal bank supervisory agency that the requirements of this Part have been met by the bank. (1995, c. 322, s. 2.)

§ 53-224.16. Powers.

(a) An out-of-state state bank which establishes and maintains one or more branches in North Carolina under this Article may conduct any activities at such branch or branches that are authorized under the laws of this State for North Carolina State banks, except to the extent such activities may be prohibited by other laws, regulations, or orders applicable to the out-of-state state bank.

(b) A North Carolina State bank may conduct any activities at a branch outside of North Carolina that are permissible for a bank chartered by the host state where the branch is located, except to the extent such activities are expressly prohibited by the laws of this State or by any regulation or order of the Commissioner applicable to the North Carolina State bank. (1995, c. 322, s. 2.)

Part 3. Interstate Bank Mergers.

§ 53-224.17. Purpose.

It is the express intent of this Part to permit interstate branching by merger under section 102 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Public Law 103-328, in accordance with the provisions of this Part. (1995, c. 322, s. 2.)

§ 53-224.18. Authority of State banks to establish interstate branches by merger.

With the prior approval of the Commissioner, a North Carolina State bank may establish, maintain, and operate one or more branches in a state other than North Carolina pursuant to an interstate merger transaction in which the North Carolina State bank is the resulting bank. Not later than the date on which the required application for the interstate merger transaction is filed with the responsible federal bank supervisory agency, the applicant North Carolina State bank shall file an application on a form prescribed by the Commissioner and pay the fee prescribed by regulation pursuant to G.S. 53-122. The applicant shall also comply with the applicable provisions of G.S. 53-12. If the Commissioner finds that (i) the proposed transaction will not be detrimental to the safety and soundness of the applicant or the resulting bank, (ii) any new officers and directors of the resulting bank are qualified by character, experience, and financial responsibility to direct and manage the resulting bank, and (iii) the proposed merger is consistent with the convenience and needs of the communities to be served by the resulting bank in this State and is otherwise in the public interest, it shall approve the interstate merger transaction and the operation of branches outside of North Carolina by the North Carolina State bank. Such an interstate merger transaction may be consummated only after the applicant has received the Commissioner's written approval. (1995, c. 322, s. 2.)

§ 53-224.19. Interstate merger transactions and branching permitted.

One or more North Carolina banks may enter into an interstate merger transaction with one or more out-of-state banks under this Article, and an out-of-state bank resulting from such an interstate merger transaction may maintain and operate the branches in North Carolina of a merged North Carolina bank provided that the conditions and filing requirements of this Article are met. (1995, c. 322, s. 2.)

§ 53-224.20. Notice and filing requirements.

Any out-of-state bank that will be the resulting bank pursuant to an interstate merger transaction involving a North Carolina bank shall notify the Commissioner of the proposed merger not later than the date on which it files an application for an interstate merger transaction with the responsible federal bank supervisory agency, and shall submit a copy of that application to the Commissioner and pay the filing fee required by the Commissioner. All banks which are parties to such interstate merger transaction involving a North Carolina State bank shall comply with G.S. 53-12 and with other applicable state and federal laws. Any out-of-state bank which shall be the resulting bank in such an interstate merger transaction shall comply with Article 15 of Chapter 55 of the North Carolina General Statutes. (1995, c. 322, s. 2.)

§ 53-224.21. Conditions for interstate merger prior to June 1, 1997.

An interstate merger transaction prior to June 1, 1997, involving a North Carolina bank shall not be consummated, and any out-of-state bank resulting from such a merger shall not operate any branch in North Carolina, unless the laws of the home state of each out-of-state bank involved in the interstate merger transaction permit North Carolina banks under substantially the same terms and conditions as are set forth in Part 3 to acquire banks and establish and maintain branches in that state by means of interstate merger transactions. (1995, c. 322, s. 2; 1995 (Reg. Sess., 1996), c. 742, s. 22.)

§ 53-224.22. Powers.

(a) An out-of-state state bank which establishes and maintains one or more branches in North Carolina under this Article may conduct any activities at such branch or branches that are authorized under the laws of this State for North Carolina State banks, except to the extent such activities may be prohibited by other laws, regulations, or orders applicable to the out-of-state state bank.

(b) A North Carolina State bank may conduct any activities at a branch outside of North Carolina that are permissible for a bank chartered by the host state where the branch is located, except to the extent such activities are expressly prohibited by the laws of this State or by any regulation or order of the Commissioner applicable to the North Carolina State bank. (1995, c. 322, s. 2.)

Part 4. Supervisory Authority.

§ 53-224.23. Applicability of supervisory authority.

The supervisory powers and other provisions set forth in G.S. 53-224.24 through G.S. 53-224.31 shall apply to Parts 2 and 3 of this Article. (1995, c. 322, s. 2.)

§ 53-224.24. Examinations; periodic reports; cooperative agreements; assessment of fees.

(a) The Commissioner may make such examinations of any branch of an out-of-state state bank established under this Article and located in this State as the Commissioner may deem necessary to determine whether the branch is operating in compliance with the laws of this State and to ensure that the branch is being operated in a safe and sound manner. The provisions of G.S. 53-117 apply to such examinations.

(b) The Commissioner may require periodic reports regarding any branch in North Carolina of an out-of-state bank to the extent that comparable reports are required from North Carolina State banks. Such reports shall be filed under oath with such frequency and in such scope and detail as may be appropriate for the purpose of assuring continuing compliance with the provisions of this Article.

(c) The Commissioner may enter into cooperative, coordinating, and information-sharing agreements with any other bank supervisory agencies or any organization affiliated with or representing one or more bank supervisory agencies with respect to the periodic examination or other supervision of any branch in North Carolina of an out-of-state state bank, or any branch of a North Carolina State bank in a host state, and the Commissioner may accept such parties' reports of examination and reports of investigation in lieu of conducting an additional examination or investigation. The Commissioner may enter into joint examinations or joint enforcement actions with other bank supervisory agencies having concurrent jurisdiction over any branch in North Carolina of an out-of-state state bank or any branch of a North Carolina State bank in any host state; provided, however, that the Commissioner may at any time take such actions independently if the Commissioner deems such actions to be necessary or appropriate to carry out the Commissioner's responsibilities under this Article and to ensure compliance with the laws of this State.

(d) Each out-of-state state bank that maintains one or more branches in this State may be assessed and, if assessed, shall pay supervisory and examination fees in accordance with the laws of this State and regulations of the Commissioner. Such fees may be shared with other bank supervisory agencies or any organization affiliated with or representing one or more bank supervisory agencies in accordance with agreements between such parties and the Commissioner. (1995, c. 322, s. 2.)

§ 53-224.25. Enforcement.

If the Commissioner determines that a branch maintained by an out-of-state state bank in this State is being operated in violation of any provision of the laws of this State, or that such branch is being operated in an unsafe and unsound manner, the Commissioner shall have the authority to take all such enforcement actions as the Commissioner would be empowered to take if the branch were a North Carolina State bank. (1995, c. 322, s. 2.)

§ 53-224.26. Rules.

The Commissioner, subject to review and approval of the North Carolina State Banking Commission, may adopt rules needed to implement this Article. Chapter 150B of the General Statutes governs the adoption of rules by the Commissioner. (1995, c. 322, s. 2.)

§ 53-224.27. Additional branches.

An out-of-state bank that has a branch in North Carolina may establish and acquire additional branches in this State to the same extent as a North Carolina State bank or to the same extent otherwise permitted by federal law. (1995, c. 322, s. 2.)

§ 53-224.28. Notice of subsequent merger or other change in control.

An out-of-state bank that maintains a branch in this State established pursuant to this Article shall give 30 days' prior written notice to the

Commissioner of any merger, consolidation, or other transaction that would cause a change of control with respect to such out-of-state bank or any bank holding company that controls such bank, with the result that an application would be required to be filed pursuant to the federal Change in Bank Control Act of 1978, as amended, 12 U.S.C. § 1817(j) or the federal Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 et seq., or any successor statutes thereto. (1995, c. 322, s. 2.)

§ 53-224.29. Branch closings.

An out-of-state state bank that is subject to an order or written agreement revoking its authority to establish or maintain a branch in North Carolina and any North Carolina State bank that is subject to an order or written agreement revoking its authority to establish or maintain a branch in another state shall wind up the business of that branch in an orderly manner that protects the depositors, customers, and creditors of the branch and that complies with all North Carolina laws and all other applicable laws regarding the closing of the branch. (1995, c. 322, s. 2.)

§ 53-224.30. Appeal of Commissioner's decision.

Any aggrieved party in a proceeding under this Article may, within 20 days after final decision of the Commissioner, appeal, in writing, such decision to the North Carolina State Banking Commission. An appeal under this section shall be made pursuant to G.S. 53-92(d). Notwithstanding any other provision of law, any aggrieved party to a decision of the Commission shall be entitled to petition for judicial review pursuant to G.S. 53-92(d). (1995, c. 322, s. 2; 2009-57, s. 5.)

Effect of Amendments. — Session Laws 2009-57, s. 5, effective June 5, 2009, rewrote the section.

§ 53-224.31. Severability.

If any provision of this Article or the application of such provision is found invalid as to any bank, branch, bank holding company, person, or circumstances, or shall otherwise be deemed superseded by federal law, the remaining provisions of this Article shall not be affected and shall remain valid and in effect as to any bank, branch, bank holding company, person, or circumstance. (1995, c. 322, s. 2.)

Article 18.

Bank Holding Company Act of 1984.

§ 53-225. Title and scope.

(a) This Article shall be known and may be cited as the North Carolina Bank Holding Company Act of 1984.

(b), (c) Repealed by Session Laws 1985, c. 683, s. 1.

(d) Except for the provisions of G.S. 53-227.1, nothing in this Article shall be deemed to apply to the registration, examination or supervision of banks or trust companies. (1983 (Reg. Sess., 1984), c. 1113, s. 1; 1985, c. 683, s. 1.)

CASE NOTES

Cited in Citicorp v. Currie, 75 N.C. App. 312, 330 S.E.2d 635 (1985).

§ 53-226. Definitions.

For the purposes of this Article:

(1) "Bank" means any insured bank as the term is defined in Section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. Section 1813(h)), or any institution eligible to become an insured bank as the term is defined therein, which, in either event:
  a. Accepts deposits that the depositor has a legal right to withdraw on demand; and
  b. Engages in the business of making commercial loans.

(2) "Bank holding company" means any company which has control over any bank.

(3) "Commissioner" means the Commissioner of Banks of this State.

(4) "Company" means a corporation, joint stock company, business trust, partnership, voting trust, association, and any similar organized group of persons, whether incorporated or not, and whether or not organized under the laws of this State or any other state or any territory or possession of the United States or under the laws of the foreign country, territory, colony or possession thereof, other than a corporation all the capital of which is owned by the United States or a corporation which is chartered by the Congress of the United States; "company" includes subsidiary and parent companies.

(5) "Control" means that:
  a. Any company directly or indirectly or acting through one or more persons owns, controls, or has power to vote twenty-five per centum (25%) or more of the voting securities of the bank;
  b. The company controls in any manner the election of a majority of the directors, managers or trustees of the bank or company; or
  c. The Commissioner determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.

(6) "Subsidiary", with respect to a bank holding company, means:
  a. Any company twenty-five per centum (25%) or more of whose voting shares (excluding shares owned by the United States or by any company wholly owned by the United States) is held by it with power to vote;
  b. Any company the election of a majority of whose directors is controlled in any manner by a bank holding company; or
  c. Any company with respect to the management or policies of which a bank holding company has the power, directly or indirectly, to exercise control, as determined by the Commissioner.

(7) For the purposes of any proceeding under subdivisions (5)c. and (6)c. of this section, there is a presumption that any company which directly or indirectly owns, controls, or has power to vote less than five percent (5%) of any class of voting securities of a given bank or company does not have control over that bank or company. (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

CASE NOTES

Cited in State ex rel. Banking Comm'n v. Citicorp Sav. Indus. Bank, 74 N.C. App. 474, 328 S.E.2d 895 (1985).

§ 53-227. Registration of bank holding companies.

Every bank holding company, not later than July 1, 1985, or within 180 days after becoming a bank holding company controlling a North Carolina federally or State-chartered bank or banks, or within 180 days after acquiring control, directly or indirectly, over a nonbank subsidiary or subsidiaries having offices located in this State shall register with the Commissioner on forms supplied by the Commissioner. (1983 (Reg. Sess., 1984), c. 1113, s. 1; 1989, c. 10.)

§ 53-227.1. Criteria for certain bank holding company acquisitions.

(a) In addition to the criteria set forth in G.S. 53-211(a) and (b) to be used by the Commissioner in reviewing applications for acquisitions of North Carolina banks and bank holding companies, the Commissioner shall:

(1) Apply the criteria which would be applied to a North Carolina bank holding company making an acquisition in another state by the regulatory authorities of the State in which the applicant has its principal place of business, as defined by G.S. 53-210(10); and

(2) Shall approve that application only if the Commissioner finds it meets those additional criteria.

(b) In the event that the state in which the applicant has its principal place of business has no criteria other than the criteria similar to those set forth in G.S. 53-211(a) and (b), the Commissioner shall approve that application only if he determines that:

(1) The proposed acquisition would be not detrimental to the safety and soundness of the applicant or of the North Carolina bank or bank holding company which applicant seeks to control or whose stock is to be acquired; and

(2) The applicant, its directors and officers, if applicable, and any proposed new directors and officers of the North Carolina bank or bank holding company which applicant seeks to control or whose stock is to be acquired, are qualified by character, experience and financial responsibility to control and operate a North Carolina bank. (1985, c. 683, s. 2.)

§ 53-228. Cease and desist.

Upon a finding that any action of a bank holding company or nonbank subsidiary subject to this Article may be in violation of any North Carolina banking law, the Commissioner, after a reasonable notice to the bank holding company or its nonbank subsidiary and an opportunity for it to be heard, shall have the authority to order it to cease and desist from such action. If the bank holding company or nonbank subsidiary fails to appeal such decision in accordance with G.S. 53-231 hereof and continues to engage in such action in violation of the Commissioner's order to cease and desist such action, it shall be subject to a penalty of one thousand dollars ($1,000), to be recovered with costs by the Commissioner in any court of competent jurisdiction in a civil action prosecuted by the Commissioner. The penalty provision of this section shall be in addition to and not in lieu of any other provision of law applicable to a bank holding company's or its nonbank subsidiary's failure to comply with an order of the Commissioner.

The clear proceeds of penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1983 (Reg. Sess., 1984), c. 1113, s. 1; 1998-215, s. 32.)

§ 53-229: Repealed by Session Laws 1995, c. 129, s. 3.

§ 53-230. Rules.

The Banking Commission may adopt such reasonable rules as may be necessary to effectuate the purposes of this Article. (1983 (Reg. Sess., 1984), c. 1113, s. 1; 1995, c. 129, s. 32.)

§ 53-231. Appeal of Commissioner's decision.

Any aggrieved party in a proceeding under this Article may, within 20 days after final decision of the Commissioner, appeal such decision in writing to the Banking Commission. An appeal under this section shall be made pursuant to G.S. 53-92(d). Notwithstanding any other provision of law, any aggrieved party to a decision of the Banking Commission shall be entitled to petition for judicial review pursuant to G.S. 53-92(d). (1983 (Reg. Sess., 1984), c. 1113, s. 1; 1995, c. 129, s. 33; 2009-57, s. 6.)

Effect of Amendments. — Session Laws 2009-57, s. 6, effective June 5, 2009, rewrote the section.

CASE NOTES

Cited in Citicorp v. Currie, 75 N.C. App. 312, 330 S.E.2d 635 (1985).

§ 53-232. Fees.

Each bank holding company subject to this act shall pay the following fees:
(1) An initial registration fee of $1,000.
(2) An annual registration fee of $750.00.
(3) A fee of $50.00 for the issuance of any certified copies of documents plus $1.00 per page over a number of pages specified by the Commissioner. (1983 (Reg. Sess., 1984), c. 1113, s. 1.)

ARTICLE 18A.

North Carolina International Banking Act.

§ 53-232.1. Title and scope.

(a) This act shall be known and cited as the North Carolina International Banking Act.

(b) This Article is intended to set forth the terms and conditions under which an international banking corporation may enter and do business in North Carolina. (1991, c. 679, s. 1.)

§ 53-232.2. Definitions.

(a) The following definitions apply in this Article:

(1) Commissioner. — The North Carolina Commissioner of Banks.

(2) Federal international bank institution. — A branch, agency, or representative office of an international banking corporation established and operating under the federal International Banking Act of 1978, 12 U.S.C. §§ 3101 et seq., as amended, and its regulations.

(3) Foreign country. — A country other than the United States, but including a territory or possession of the United States.

(4) International bank agency. — A business or any part of a banking business conducted in this State or through an office located in this State, other than a federal international bank institution, which exercises powers as set forth in G.S. 53-232.9(f) on behalf of an international banking corporation.

(5) International bank branch. — A business or any part of a banking business conducted in this State or through an office located in this State, other than a federal international bank institution, which exercises powers as set forth in G.S. 53-232.9(e) on behalf of an international banking corporation.

(6) International banking corporation. — A banking corporation organized and licensed under the laws of a foreign country or a political subdivision of a foreign country.

(7) International representative office. — A business location of a representative of an international banking corporation, other than a federal international bank institution, established to act in a liaison capacity with existing and potential customers of the international banking corporation and to generate new loans and other activities for the international banking corporation that is operating outside the State.

(b) Legal and financial terms used in this Article refer to equivalent terms used by the country in which the international banking corporation is organized. (1991, c. 679, s. 1.)

§ 53-232.3. Authority to establish and operate federal international bank institutions, international bank branches, international bank agencies, and international representative offices.

(a) An international banking corporation with a home state other than North Carolina may establish and operate, directly or indirectly, a federal international bank institution in this State in accordance with applicable federal law.

(b) An international banking corporation with no home state may establish and operate, directly or indirectly, a federal international bank institution in this State in accordance with applicable federal law.

(c) An international banking corporation with a home state other than North Carolina may establish and operate, directly or indirectly, an international bank branch, an international bank agency, or an international representative office in accordance with this Article and applicable federal law.

(d) An international banking corporation with no home state may establish and operate, directly or indirectly, an international bank branch, an international bank agency, or an international representative office in accordance with this Article and applicable federal law.

(e) For the purposes of this section, the home state of an international banking corporation that has branches, agencies, subsidiary commercial lending companies, or subsidiary banks, or any combination of branches, agencies, subsidiary commercial lending companies, or subsidiary banks in more than one state is whichever of the states is so elected by the international banking corporation. If the international banking corporation does not elect a home state, the Board of Governors of the Federal Reserve System or the Commissioner, as applicable, shall elect the home state. (1991, c. 679, s. 1.)

§ 53-232.4. Application of this Chapter.

(a) International banking corporations, other than federal international bank institutions, are subject to Articles 1 through 14 and Articles 17 and 18 of this Chapter, except where it appears, from the context or otherwise, that a provision is clearly applicable only to banks or trust companies organized under the laws of this State or the United States. An international banking corporation has no greater right under, or by virtue of, this Article than is granted to banks organized under the laws of this State.

(b) Nothing in this Article is construed as granting any authority, directly or indirectly, for a domestic bank or domestic bank holding company, the operations of which are conducted principally outside this State, to operate a branch in this State or to acquire, directly or indirectly, any voting shares of, or interest in, or all or substantially all of the assets of a bank in this State. (1991, c. 679, s. 1.)

§ 53-232.5. Application of the North Carolina Business Corporation Act.

Notwithstanding the definition of the term "foreign corporation" in G.S. 55-1-40(10), Article 15 of Chapter 55, relating to foreign corporations, where it is not inconsistent with Chapter 53, shall apply to all international banking corporations doing business in this State. (1991, c. 679, s. 1.)

§ 53-232.6. Requirements for carrying on banking business.

(a) No international banking corporation, other than a federal international bank institution, shall transact a banking business or maintain in this State any office for carrying on a banking business or any part of a banking business unless the corporation:

(1) Is authorized by its Articles to carry on a banking business and has complied with the laws of the country under which it is chartered;

(2) Has furnished to the Commissioner any proof as to the nature and character of its business and as to its financial condition as the Commissioner may require;

(3) Has filed with the Commissioner:

  a. A duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing the Commissioner its true and lawful attorney upon whom all process in any action against it may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the State;

  b. A written certificate of designation, which may be changed from time to time thereafter by the filing of a new certificate of designation, specifying the name and address of the officer, agent, or other person to whom the Commissioner shall forward the process; and

c. A certified copy of that information required to be supplied by foreign corporations to the Secretary of State by Article 15 of Chapter 55 of the General Statutes.

(4) Has paid to the Commissioner the fee established by regulation to defray the cost of investigation and supervision; and

(5) Has received a license duly issued to it by the Commissioner.

(b) The Commissioner shall not issue a license to an international banking corporation unless it is chartered in a foreign country that permits banks chartered in the United States or any of its states to establish similar facilities in that country. (1991, c. 679, s. 1.)

§ 53-232.7. Actions against international banking corporations.

(a) A resident of this State may maintain an action against an international banking corporation doing business in this State for any cause of action. For purposes of this subsection, the term "resident of this State" includes any individual domiciled in this State, or any corporation, partnership, or trust formed under the laws of this State.

(b) An international banking corporation or a nonresident of this State may maintain an action against an international banking corporation doing business in this State in the following cases only:

(1) Where the action is brought to recover damages for the breach of a contract made or to be performed within this State or relating to property situated within this State at the time of the making of the contract;

(2) Where the subject matter of the litigation is situated within this State;

(3) Where the cause of action arose within this State, except where the object of the action is to affect the title of real property situated outside this State; or

(4) Where the action is based on a liability for acts done within this State by an international banking corporation or its international bank agency, international bank branch, or international representative office.

(c) The limitations contained in subsection (b) of this section do not apply to a corporation formed and existing under the laws of the United States and that maintains an office in this State. (1991, c. 679, s. 1.)

§ 53-232.8. Application for license.

(a) Every international banking corporation, before being licensed by the Commissioner to transact a banking business in this State as an international bank branch or as an international bank agency or before maintaining in this State any office to carry on a banking business or any part of a banking business, shall subscribe and acknowledge and submit to the Commissioner, at the Commissioner's office, a separate application, in duplicate, which shall state:

(1) The name of the international banking corporation;

(2) The location by street and post office address and county where its business is to be transacted in this State and the name of the person who is in charge of the business and affairs of the office;

(3) The location where its initial registered office will be located in this State;

(4) The amount of its capital actually paid in and the amount subscribed for and unpaid; and

(5) The actual value of the assets of the international banking corporation, which must be at least fifty million dollars ($50,000,000) in

excess of its liabilities, and a complete and detailed statement of its financial condition as of a date within 60 days before the date of the application; except that the Commissioner may, when necessary or expedient, accept the statement of financial condition as of a date within 120 days before the date of the application.

(b) When the application is submitted to the Commissioner, the corporation shall also submit a duly authenticated copy of its Articles of Incorporation, or equivalent corporate document, and an authenticated copy of its bylaws, or an equivalent of the bylaws that is satisfactory to the Commissioner, and pay an investigation and supervision fee to be established by regulation. The international banking corporation shall also submit to the Commissioner a certificate issued by the banking or supervisory authority of the country in which the international banking corporation is organized and licensed stating that the international banking corporation is duly organized and licensed and lawfully existing in good standing, and is empowered to conduct a general banking business.

(c) The Commissioner may approve or disapprove the application, but the Commissioner shall not approve the application unless, in the Commissioner's opinion, the applicant meets every requirement of this Article and any other applicable provision of this Chapter and any regulations adopted under this Chapter. The Commissioner may specify any conditions as the Commissioner deems appropriate, considering the public interest, the need to maintain a sound and competitive banking system, and the preservation of an environment conducive to the conduct of an international banking business in this State.

(d) An international banking corporation may operate more than one international bank branch in this State, each at a different place of business, provided each branch office is separately licensed to transact a banking business or any part of a banking business under this Article. An international banking corporation may operate more than one international bank agency in this State, each at a different place of business, provided each agency office is separately licensed to transact a banking business or any part of a banking business under this Article.

(e) Notwithstanding subsection (d) of this section, no international banking corporation licensed to maintain one or more international bank branches in this State shall be licensed to maintain an international bank agency in this State except upon termination of the operation of its international bank branches under G.S. 53-232.13(b), and no international banking corporation licensed to maintain one or more international bank agencies in this State shall be licensed to maintain an international bank branch in this State except upon the termination of the operation of its international bank agencies under G.S. 53-232.13(b). (1991, c. 679, s. 1.)

§ 53-232.9. Effect, renewal, and revocation of licenses; permissible activities.

(a) When the Commissioner has issued a license to an international banking corporation, it may engage in the business authorized by this Article at, and only at, the office specified in the license for a period not exceeding one year from the date of the license or until the license is surrendered or revoked. No license is transferable or assignable. Every license shall be, at all times, conspicuously displayed in the place of business specified in the license.

(b) The international banking corporation may renew the license annually upon application to the Commissioner upon forms to be supplied by the Commissioner for that purpose. The application for renewal shall be submitted to the Commissioner no later than 60 days before the expiration of the license.

The license may be renewed by the Commissioner upon a determination, with or without examination, that the international banking corporation is in a safe and satisfactory condition, that it has complied with applicable requirements of law, and that the renewal of the license is proper and has been duly authorized by proper corporate action. Each application for renewal of an international banking corporation license shall be accompanied by an annual renewal fee to be determined by the Commissioner by regulation.

(c) The Commissioner may revoke the license, with or without examination, upon a determination that the international banking corporation does not meet the criteria established by subsection (b) of this section for renewal of licenses.

(d) If the Commissioner refuses to renew the license and, as a result, the license is revoked, all the rights and privileges of the international banking corporation to transact the business for which it was licensed shall immediately cease, and the license shall be surrendered to the Commissioner within 24 hours after written notice of the decision has been mailed by the Commissioner to the registered office of the international banking corporation set forth in its application, as amended, or has been personally delivered to any officer, director, employee, or agent of the international banking corporation who is physically present in this State.

(e) An international banking corporation licensed under this Article to carry on business in this State as an international bank branch may conduct a general banking business, including the right to receive deposits and exercise fiduciary powers, through its international bank branch in the same manner as banks existing under the laws of this State and under applicable federal law.

(f) An international banking corporation licensed under this Article to carry on business in this State as an international bank agency may conduct a general banking business through its international bank agency in the same manner as banks existing under the laws of this State, except that no international banking corporation shall, through its bank agency, exercise fiduciary powers or receive deposits, but may maintain for the account of others credit balances incidental to or arising out of the exercise of its lawful powers. (1991, c. 679, s. 1.)

§ 53-232.10. Securities, etc., to be held in this State.

(a) An international banking corporation licensed under this Article shall hold, at its office in this State, currency, bonds, notes, debentures, drafts, bills of exchange, or other evidence of indebtedness or other obligations payable in the United States or in United States funds or, with the prior approval of the Commissioner, in funds freely convertible into United States funds in an amount that is not less than one hundred eight percent (108%) of the aggregate amount of liabilities of the international banking corporation payable at or through its office in this State or as a result of the operations of the international bank branch or international bank agency, including acceptances, but excluding:

(1) Accrued expenses; and

(2) Amounts due and other liabilities to other offices, agencies, or branches of and wholly owned, except for a nominal number of directors' shares, subsidiaries of the international banking corporation.

(b) For the purpose of this Article, the Commissioner shall value marketable securities at principal amount or market value, whichever is lower, and may determine the value of any nonmarketable bond, note, debenture, draft, bill of exchange, or other evidence of indebtedness or of any other obligation held by or owed to the international banking corporation in this State. In determining the amount of assets for the purpose of computing the above ratio of assets, the Commissioner may exclude any particular assets, but may give credit, subject to any rules adopted by the Commissioner, to deposits and credit balances with unaffiliated banking institutions outside this State if the deposits or credit balances are payable in United States funds or in currencies freely convertible into United States funds. In no case shall credit given for the deposits and credit balances exceed in aggregate amounts any percentage, but not less than eight percent (8%), as the Commissioner may from time to time prescribe, of the aggregate amount of liabilities of the international banking corporations.

(c) If, by reason of the existence or the potential occurrence of unusual or extraordinary circumstances, the Commissioner considers it necessary or desirable for the maintenance of a sound financial condition, for the protection of creditors and the public interest, and to maintain public confidence in the business of the international bank agency of the international banking corporation, the Commissioner may reduce the credit to be given as provided in this section for deposits and credit balances with unaffiliated banking institutions outside this State and may require the assets to be held in this State under this Article with any bank or trust company existing under the laws of this State that the international banking corporation designates and the Commissioner approves.

(d) An international bank branch and international bank agency shall file any reports with the Commissioner as the Commissioner may require in order to determine compliance by the international bank branch or international bank agency with this section. (1991, c. 679, s. 1.)

§ 53-232.11. Financial certification; restrictions on investments, loans, and acceptances.

(a) Before opening an office in this State, and annually thereafter so long as a bank office is maintained in this State, an international banking corporation licensed under this Article shall certify to the Commissioner the amount of its paid-in capital, its surplus, and its undivided profits, each expressed in the currency of the country of its incorporation. The dollar equivalent of this amount, as determined by the Commissioner, is considered to be the amount of its capital, surplus, and undivided profits.

(b) Purchases and discounts of bills of exchange, bonds, debentures, and other obligations and extensions of credit and acceptances by an international bank agency within this State are subject to the same limitations as to amount in relation to capital, surplus, and undivided profits as are applicable to banks organized under the laws of this State. With the prior approval of the Commissioner, the capital notes and capital debentures of the international banking corporation may be treated as capital in computing the limitations. (1991, c. 679, s. 1.)

§ 53-232.12. Reports.

(a) An international banking corporation licensed under this Article shall, at the times and in the form prescribed by the Commissioner, make written reports in the English language to the Commissioner, under the oath of one of its officers, managers, or agents transacting business in this State, showing the amount of its assets and liabilities and containing any other matters required by the Commissioner. If an international banking corporation fails to make a report, as directed by the Commissioner, or if a report contains a false statement knowingly made, this is grounds for revocation of the license of the international banking corporation.

(b) G.S. 53-105 shall not apply to international banking corporations. (1991, c. 679, s. 1.)

§ 53-232.13. Dissolution.

(a) When an international banking corporation licensed to maintain an international bank branch or an international bank agency in this State is dissolved or its authority or existence is otherwise terminated or canceled in the jurisdiction of its incorporation, a certificate of the official responsible for records of banking corporations of the jurisdiction of incorporation of the international banking corporation attesting to the occurrence of this event or a certified copy of an order or decree of a court of the jurisdiction directing the dissolution of the international banking corporation or the termination of its existence or the cancellation of its authority shall be delivered to the Commissioner. The filing of the certificate, order, or decree has the same effect as the revocation of the international banking corporation's license as provided in G.S. 53-232.9(d).

(b) An international banking corporation that proposes to terminate the operation in this State of an international bank branch, an international bank agency, or an international representative office in this State shall comply with any procedures as the Commissioner may prescribe by rule to insure an orderly cessation of business in a manner that is not harmful to the public interest and shall surrender its license to the Commissioner or shall surrender its right to maintain an office in this State, as applicable.

(c) The Commissioner shall continue as agent of the international banking corporation upon whom process against it may be served in any action based upon any liability or obligation incurred by the international banking corporation within this State before the filing of the certificate, order, or decree; and the Commissioner shall promptly cause a copy of the process to be mailed by registered or certified mail, return receipt requested, to the international banking corporation at the post office address specified for this purpose on file with the Commissioner's office. (1991, c. 679, s. 1.)

§ 53-232.14. International representative offices.

(a) An international banking corporation that does not transact a banking business or any part of a banking business in or through an office in this State, but maintains an office in this State for other purposes is considered to have an international representative office in this State.

(b) An international representative office located in this State shall register with the Commissioner annually on forms prescribed by the Commissioner. The registration shall be filed before January 31 of each year, shall be accompanied by a registration fee prescribed by regulation, and shall list the name of the local representative, the street address of the office, and the nature of the business to be transacted in or through the office.

(c) The Commissioner may review the operations of an international representative office annually or at any greater frequency as is necessary to assure that the office does not transact a banking business.

(d) An international banking corporation desiring to convert its existing registered international representative office to a licensed international bank branch or licensed international bank agency shall submit to the Commissioner the application required by G.S. 53-232.8, and is required to meet the minimum criteria for licensing of an international bank branch or licensed international bank agency under this Article.

(e) An international representative office may act in a liaison capacity with existing and potential customers of an international banking corporation and in undertaking these activities may, through its employees or agents, without limitation, solicit loans, assemble credit information, make proprietary inspections and appraisals, complete loan applications and other preliminary paperwork in preparation for making a loan, but may not solicit or accept deposits. No international representative office shall conduct any banking business or part of a banking business in this State. (1991, c. 679, s. 1.)

§ 53-232.15. Rules.

The Banking Commission may adopt rules necessary to implement this Article. (1991, c. 679, s. 1.)

§ 53-232.16. Cease and desist.

Upon a finding that any action of an international banking corporation or its international banking agency, international banking branch, or international representative office subject to this Article may be in violation of any North Carolina banking law, the Commissioner, after a reasonable notice to the international banking corporation, international bank agency, international bank branch, or international representative office and an opportunity for it to be heard, may order it to cease and desist from the action. If the international banking corporation, international bank agency, international bank branch, or international representative office fails to appeal the decision in accordance with G.S. 53-232.17 and continues to engage in the action in violation of the Commissioner's order to cease and desist the action, it is subject to a penalty of one thousand dollars ($1,000), to be recovered with costs by the Commissioner in any court of competent jurisdiction in a civil action prosecuted by the Commissioner. This penalty is in addition to and not in lieu of any other law applicable to the failure of an international banking corporation, international bank agency, international bank branch, or international representative office to comply with an order of the Commissioner.

The clear proceeds of penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1991, c. 679, s. 1; 1998-215, s. 33.)

§ 53-232.17. Appeal of Commissioner's decision.

Any aggrieved party in a proceeding under this Article may, within 20 days after final decision of the Commissioner, appeal such decision in writing to the Banking Commission. An appeal under this section shall be made pursuant to G.S. 53-92(d). Notwithstanding any other provision of law, any aggrieved party to a decision of the Banking Commission shall be entitled to petition for judicial review pursuant to G.S. 53-92(d). (1991, c. 679, s. 1; 1995, c. 129, s. 34; 2009-57, s. 7.)

Effect of Amendments. — Session Laws 2009-57, s. 7, effective June 5, 2009, rewrote the section.

ARTICLE 19.

Registration of Mortgage Bankers and Brokers.

§§ 53-233 through 53-243: Repealed by Session Laws 1987 (Reg. Sess., 1988), c. 1017, s. 1.

Cross References. — For present provisions pertaining to the subject matter of the repealed article, see Article 19B (G.S. 53-244.010 et seq).

ARTICLE 19A.

Mortgage Lending Act.

§§ 53-243.01 through 53-243.18: Repealed by Session Laws 2009-374, s. 1, effective July 31, 2009, and applicable to all applications for licensure as a mortgage loan originator, mortgage lender, mortgage broker, or mortgage servicer filed on or after that date.

Editor's Note. — Session Laws 2009-374, s. 3, contains a severability clause.

Session Laws 2009-374, s. 4, provides: "Rules. — Unless inconsistent with the provisions of Article 19B of Chapter 53 of the General Statutes, as enacted by Section 2 of this act, the rules adopted pursuant to former Article 19A of Chapter 53 of the General Statutes governing mortgage bankers and brokers and loan officers shall remain in effect until superseded by rules adopted under Article 19B of Chapter 53 of the General Statutes, as enacted by Section 2 of this act."

Session Laws 2009-374, s. 5, as amended by Session Laws 2009-526, s. 1.1, and as amended by Session Laws 2009-550, s. 10.1, provides: "Transition. — All persons licensed and in good standing pursuant to Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, as of the effective date of this act, shall maintain their status as licensees and shall be subject to the provisions of Article 19B, as enacted by Section 2 of this act, in accordance with the following transitional rules:

"(1) All persons licensed and in good standing pursuant to Article 19A of Chapter 53 of the General Statutes as of the effective date of this act shall have the following licensed status:

"a. Any person licensed as a loan officer pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage loan originator as defined in G.S. 53-244.030(21), as enacted by Section 2 of this act.

"b. Any person licensed as a mortgage banker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage lender as defined in G.S. 53-244.030(20), as enacted by Section 2 of this act.

"c. Any person licensed as a mortgage broker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage broker as defined in G.S. 53-244.030(19).

"d. Any person licensed as a mortgage servicer pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage servicer as defined in G.S. 53-244.030(22).

"e. Any person licensed as an exclusive mortgage broker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as an exclusive mortgage broker as defined in G.S. 53-244.030(11a), as enacted by Section 2 of this act; provided that the exclusive mortgage broker obtains a separate license as a mortgage loan originator no later than July 31, 2010, and if such license has not been obtained by that date, the license of the exclusive mortgage broker shall be subject to summary suspension.

"f. Any person licensed as a limited loan officer pursuant to Article 19A of Chapter 53 of the General Statutes shall be permitted to act as a licensed mortgage loan originator as defined in G.S. 53-244.030(21), as enacted by Section 2 of this act; provided that the limited loan officer obtains a mortgage loan originator license no later than December 31, 2009, and if such license has not been obtained by that date, the license of the limited loan officer will expire.

"(2) For the renewal period ending December 31, 2009, any person deemed a mortgage loan originator pursuant to sub-subdivision (1)a. of this section must have met the requirements of this act for renewal, including the initial license requirements of G.S. 53-244.060, except G.S. 53-244.060(5) and G.S. 53-244.060(6), provided that the mortgage loan originator would have met the requirements for continuing education under G.S. 53-243.07(b), as repealed by Section 1 of this act. After December 31, 2009, applicants for renewal must meet all requirements for renewal under G.S. 53-244.101.

"(3) Persons who maintain a bond posted and accepted by the Commissioner as satisfying G.S. 53-243.05(f), as repealed by Section 1 of this act, shall be deemed to comply with the requirements of G.S. 53-244.103, as enacted by Section 2 of this act, through December 31, 2009.

"(4) To the extent that loss mitigation specialists are included in the definition of a mortgage loan originator through an action by the U.S. Department of Housing and Urban Development, the Commissioner shall take necessary steps to license these individuals as mortgage loan originators in a timely fashion in a manner that ensures this act fulfills the requirements of the S.A.F.E. Act to maintain jurisdiction and supervision of the mortgage business to the fullest extent possible.

"(5) Any person who has been enjoined by the Commissioner of Banks or a court of competent jurisdiction from serving in any capacity defined under Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, shall not be allowed to apply for or act in any similar capacity as defined by G.S. 53-244.030, as enacted by Section 2 of this act. Any person whose license under Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, was subject to any terms, conditions, or affirmative duties imposed by the Commissioner of Banks or a court of competent jurisdiction shall be subject to the same terms, conditions, or affirmative duties for any similar license issued under G.S. 53-244.060 or renewed under G.S. 53-244.101, as enacted by Section 2 of this act.

"(6) Nothing in this act shall adversely affect the Commissioner of Banks' ability to bring and maintain any action or pursue any remedy that the Commissioner could have brought under Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, against any person for any acts or omissions in violation of Article 19A occurring on or before July 30, 2009."

Session Laws 2009-374, s. 6, provides: "Except as otherwise provided by Section 5 of this act, this act becomes effective July 31, 2009, and applies to all applications for licensure as a mortgage loan originator, mortgage lender, mortgage broker, or mortgage servicer filed on or after that date."

§ 53-244: Reserved for future codification purposes.

Article 19B.

The Secure and Fair Enforcement Mortgage Licensing Act.

§ 53-244.010. Title.

This act may be cited as the "North Carolina Secure and Fair Enforcement (S.A.F.E.) Mortgage Licensing Act." (2009-374, s. 2.)

North Carolina Home Protection Pilot Program and Loan Fund. — Session Laws 2007-323, ss. 22.1(a)-(f), provide for continuation and expansion of the North Carolina Home Protection Pilot Program. See note at G.S. 122A-1.

For previous similar provisions, see Session Laws 2005-276, ss. 20.2(a)-(f).

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2009-374, s. 6, made this Article effective July 31, 2009, and applicable to all applications for licensure as a mortgage loan originator, mortgage lender, mortgage broker, or mortgage servicer filed on or after that date.

Session Laws 2009-374, s. 3, contains a severability clause.

Session Laws 2009-374, s. 4, provides: "Rules. — Unless inconsistent with the provisions of Article 19B of Chapter 53 of the General Statutes, as enacted by Section 2 of this act, the rules adopted pursuant to former Article 19A of Chapter 53 of the General Statutes governing mortgage bankers and brokers and loan officers shall remain in effect until superseded by rules adopted under Article 19B of Chapter 53 of the General Statutes, as enacted by Section 2 of this act."

Session Laws 2009-374, s. 5, as amended by Session Laws 2009-526, s. 1.1, and as amended by Session Laws 2009-550, s. 10.1, provides: "Transition. — All persons licensed and in good standing pursuant to Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, as of the effective date of this act, shall maintain their status as licensees and shall be subject to the provisions of Article 19B, as enacted by Section 2 of this act, in accordance with the following transitional rules:

"(1) All persons licensed and in good standing pursuant to Article 19A of Chapter 53 of the General Statutes as of the effective date of this act shall have the following licensed status:

"a. Any person licensed as a loan officer pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage loan originator as defined in G.S. 53-244.030(21), as enacted by Section 2 of this act.

"b. Any person licensed as a mortgage banker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage lender as defined in G.S. 53-244.030(20), as enacted by Section 2 of this act.

"c. Any person licensed as a mortgage broker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage broker as defined in G.S. 53-244.030(19).

"d. Any person licensed as a mortgage servicer pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage servicer as defined in G.S. 53-244.030(22).

"e. Any person licensed as an exclusive mortgage broker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as an exclusive mortgage broker as defined in G.S. 53-244.030(11a), as enacted by Section 2 of this act; provided that the exclusive mortgage broker obtains a separate license as a mortgage loan originator no later than July 31, 2010, and if such license has not been obtained by that date, the license of the exclusive mortgage broker shall be subject to summary suspension.

"f. Any person licensed as a limited loan officer pursuant to Article 19A of Chapter 53 of the General Statutes shall be permitted to act as a licensed mortgage loan originator as defined in G.S. 53-244.030(21), as enacted by Section 2 of this act; provided that the limited loan officer obtains a mortgage loan originator license no later than December 31, 2009, and if such license has not been obtained by that date, the license of the limited loan officer will expire.

"(2) For the renewal period ending December 31, 2009, any person deemed a mortgage loan originator pursuant to sub-subdivision (1)a. of this section must have met the requirements of this act for renewal, including the initial license requirements of G.S. 53-244.060, except G.S. 53-244.060(5) and G.S. 53-244.060(6), provided that the mortgage loan originator would have met the requirements for continuing education under G.S. 53-243.07(b), as repealed by Section 1 of this act. After December 31, 2009, applicants for renewal must meet all requirements for renewal under G.S. 53-244.101.

"(3) Persons who maintain a bond posted and accepted by the Commissioner as satisfying G.S. 53-243.05(f), as repealed by Section 1 of this act, shall be deemed to comply with the requirements of G.S. 53-244.103, as enacted by Section 2 of this act, through December 31, 2009.

"(4) To the extent that loss mitigation specialists are included in the definition of a mortgage loan originator through an action by the U.S. Department of Housing and Urban Development, the Commissioner shall take necessary steps to license these individuals as mortgage loan originators in a timely fashion in a manner that ensures this act fulfills the requirements of the S.A.F.E. Act to maintain jurisdiction and supervision of the mortgage business to the fullest extent possible.

"(5) Any person who has been enjoined by the Commissioner of Banks or a court of competent jurisdiction from serving in any capacity defined under Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, shall not be allowed to apply for or act in any similar capacity as defined by G.S. 53-244.030, as enacted by Section 2 of this act. Any person whose license under Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, was subject to any terms, conditions, or affirmative duties imposed by the Commissioner of Banks or a court of competent jurisdiction shall be subject to the same terms, conditions, or affirmative duties for any similar license issued under G.S. 53-244.060 or renewed under G.S. 53-244.101, as enacted by Section 2 of this act.

"(6) Nothing in this act shall adversely affect the Commissioner of Banks' ability to bring and maintain any action or pursue any remedy that the Commissioner could have brought under Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, against any person for any acts or omissions in violation of Article 19A occurring on or before July 30, 2009."

Session Laws 2009-374, s. 6, provides: "Except as otherwise provided by Section 5 of this act, this act becomes effective July 31, 2009, and applies to all applications for licensure as a mortgage loan originator, mortgage lender, mortgage broker, or mortgage servicer filed on or after that date."

§ 53-244.020. Purpose and construction.

(a) Purpose. — A primary purpose of this Article is to protect consumers seeking mortgage loans and to ensure that the mortgage lending industry operates without unfair, deceptive, and fraudulent practices on the part of mortgage loan originators. Therefore, the General Assembly establishes within this Article an effective system of supervision and enforcement of the mortgage lending industry by giving the Commissioner of Banks broad administrative authority to administer, interpret, and enforce this Article and adopt rules implementing this Article in order to carry out the intentions of the General Assembly.

(b) Construction. — It is the intent of the General Assembly that provisions of this Article be liberally construed to effect the purposes stated or clearly encompassed by the Article. (2009-374, s. 2.)

§ 53-244.030. Definitions.

For purposes of the Article, the following definitions apply:

(1) "Affiliate" means any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956 (12 U.S.C. § 1841, et seq.), as amended from time to time.

(2) "Audited Statement of Financial Condition" means a statement of financial condition prepared in accordance with generally accepted accounting principles and certified by a certified public accountant as fairly and accurately reflecting financial condition of the licensee as of the date specified in the statement.

(2a) "Banking Commission" means the North Carolina Banking Commission. For the purpose of complying with this Article by credit unions, Banking Commission means the North Carolina Credit Union Commission.

(3) "Branch manager" means the individual who is assigned to, is in charge of, and is responsible for the business operations of a branch office of a mortgage broker or mortgage lender.

(4) "Branch office" means an office of a mortgage broker or mortgage lender that is separate and distinct from the mortgage broker's or lender's principal office and from which its employees engage in the mortgage business. A branch office shall not be located at an individual's home or residence.

(5) "Certified Statement of Financial Condition" means a statement of financial condition prepared in accordance with generally accepted accounting principles and certified by the preparer or licensee as fairly and accurately reflecting the financial condition of the licensee as of the date specified in the statement.

(6) "Commissioner" means the North Carolina Commissioner of Banks and the Commissioner's designees. For the purpose of compliance with this Article by credit unions, Commissioner means the Administrator of the Credit Union Division of the Department of Commerce.

(7) "Control" means the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. Any person that (i) is a director, general partner, or executive officer; (ii) directly or indirectly has the right to vote ten percent (10%) or more of a class of voting security or has the power to sell or direct the sale of ten percent (10%) or more of a class of voting securities; (iii) in the case of a limited liability company, is a managing member; or (iv) in the case of a partnership, has the right to receive upon dissolution, or has contributed, ten percent (10%) or more of the capital, is presumed to control the company.

(8) "Depository institution" has the same meaning as in section 3 of the Federal Deposit Insurance Act and includes any credit union whose share and deposit accounts are insured by the National Credit Union Administration under the Federal Credit Union Act.

(9) "Dwelling" means a residential structure that contains one to four units, whether or not that structure is attached to real property. The

term includes an individual condominium unit, cooperative unit, manufactured home, mobile home, or trailer if it is used as a residence.

(10) "Employee" means an individual who has an employment relationship with a mortgage broker, mortgage lender, or mortgage servicer and who is treated as a common law employee for purposes of compliance with the federal income tax laws and whose income is reported on IRS Form W-2.

(11) "Engaging in the mortgage business" means:

a. For compensation or gain, or in the expectation of compensation or gain, either directly or indirectly, to accept or offer to accept an application for a residential mortgage loan from prospective borrowers, solicit or offer to solicit a residential mortgage loan from prospective borrowers, negotiate the terms or conditions of a residential mortgage loan with prospective borrowers, issue residential mortgage loan commitments or interest rate guarantee agreements to prospective borrowers, or engage in tablefunding of residential mortgage loans, whether any such acts are done through contact by telephone, by electronic means, by mail, or in person with the borrowers or prospective borrowers.

b. To make or fund, or offer to make or fund, or advance funds on residential mortgage loans for compensation or gain, or in the expectation of compensation or gain.

c. To engage, whether for compensation or gain from another or on one's own behalf, in the business of receiving any scheduled periodic payments from a borrower pursuant to the terms of any residential mortgage loan, including amounts for escrow accounts, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the residential mortgage loan, the residential mortgage loan servicing documents, or servicing contract, or otherwise to meet the definition of the term "servicer" in 12 U.S.C. § 2605(i)(2) with respect to residential mortgage loans.

(11a) "Exclusive mortgage broker" means an individual who acts as a mortgage broker exclusively for a single mortgage lender or mortgage broker licensee or a single exempt mortgage lender and who is licensed pursuant to G.S. 53-244.050(b)(3). Unless otherwise indicated, an exclusive mortgage broker shall be subject to the requirements of a mortgage broker under this Article.

(12) "Federal banking agencies" means the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the National Credit Union Administration, and the Federal Deposit Insurance Corporation.

(13) "Immediate family member" means a spouse, child, sibling, parent, grandparent, or grandchild, or the spouse of an immediate family member. This term includes stepparents, stepchildren, stepsiblings, and adoptive relationships.

(14) "Individual" means a natural person.

(15) "Licensee" means a mortgage loan originator, mortgage broker, mortgage lender, or mortgage servicer or other person who is licensed pursuant to this Article.

(16) "Loan processor or underwriter" means an individual who performs clerical or support duties as an employee at the direction of and subject to the supervision and instruction of a person licensed or exempt from licensing under this Article. Clerical or support duties may include, subsequent to the receipt of an application:

a. The receipt, collection, distribution, and analysis of information common for the processing or underwriting of a residential mortgage loan; and
b. Communicating with a consumer to obtain the information necessary for the processing or underwriting of a loan, to the extent that such communication does not include offering or negotiating loan rates or terms or counseling consumers about residential mortgage loan rates or terms.

Any person who represents to the public, through advertising or other means of communication, or provides information, including the use of business cards, stationery, brochures, signs, rate lists, or other promotional items, that the individual can or will perform any of the activities of a mortgage loan originator shall not be deemed to be a loan processor or underwriter under this definition.

(17) "Loss mitigation specialist" means an employee of a mortgage servicer authorized to (i) collect or receive payments, including payments of principal, interest, escrow amounts, and other amounts due on existing residential mortgage loans due and owing to the licensed lender or servicer when the borrower is in default or in reasonably foreseeable likelihood of default, (ii) work with the borrower to collect data, and (iii) make decisions necessary to modify, either temporarily or permanently, certain terms of those residential mortgage loans or to otherwise finalize collection through the foreclosure process. Such decisions shall include any change in the principal amount of the debt, the rate of annual interest charged, the term of the loan, the waiver of any fees or charges, including late charges, the deferral of payments, or any other similar matter.

(18) "Make a residential mortgage loan" means to advance funds, to offer to advance funds, to make a commitment to advance funds to a borrower under a mortgage loan, or to fund a residential mortgage loan.

(19) "Mortgage broker" means a person engaged in the mortgage business as defined in sub-subdivision a. of subdivision (11) of this section.

(20) "Mortgage lender" means a person engaged in the mortgage business as defined in sub-subdivision b. of subdivision (11) of this section. However, the definition does not include a person who acts as a mortgage lender only in a tablefunding transaction.

(21) "Mortgage loan originator" means:

a. An individual who for compensation or gain or in the expectation of compensation or gain, whether through contact by telephone, by electronic means, by mail, or in person with prospective borrowers, either:
   1. Takes a residential mortgage loan application or offers or negotiates terms of a residential mortgage loan,
   2. Accepts or offers to accept applications for mortgage loans,
   3. Solicits or offers to solicit a mortgage loan,
   4. Negotiates the terms or conditions of a mortgage loan, or
   5. Issues mortgage loan commitments or interest rate guarantee agreements to prospective borrowers.
b. The term includes an individual acting solely as a loss mitigation specialist if the United States Department of Housing and Urban Development issues a guideline, rule, regulation, or interpretative letter that such individuals are loan originators as the term is defined by § 1503 of Title V of the Housing and Economic Recovery Act of 2008, Public Law 110-289, and only to the extent of such an issuance or determination.

c. The term does not include:
  1. An individual engaged solely as a loan processor or underwriter;
  2. A person or entity that only performs real estate brokerage activities and is licensed or registered as such in accordance with State law, unless the person or entity is compensated by a mortgage lender, a mortgage broker, or other mortgage loan originator or by any agent of a mortgage lender, mortgage broker, or other mortgage loan originator;
  3. A person or entity solely involved in extensions of credit or sale of time share instruments relating to time share plans, as that term is defined in G.S. 93A-41(9a); or
  4. An individual who only informs a prospective borrower of the availability of persons engaged in the mortgage business, does not take or assist in the completion of a loan application, and does not discuss specific terms or conditions of a mortgage loan. The taking of basic preapplication information for facilitating a residential mortgage loan transaction, such as the name and contact information of the prospective borrower, the prospective borrower's own assessment of creditworthiness, desired loan types, and resources to make a down payment, but not including social security number, credit score, credit or employment history, or specific rates of a desired mortgage loan, to connect prospective borrowers to persons engaged in the mortgage business does not prevent an individual from qualifying for this exclusion.
  5. An individual who is a salesperson for a licensed manufactured housing retailer that performs the purely administrative and clerical tasks of physically handling or transmitting to a licensed mortgage loan originator on behalf of a prospective borrower an application and other forms completed by the prospective borrower. Nothing in this subpart prohibits a salesperson, upon the written request of a mortgage loan originator and after a prospective borrower completes an application, from pulling and transmitting a credit report with the application.

(22) "Mortgage servicer" means a person engaged in the mortgage business who directly or indirectly engages in the mortgage business as defined in sub-subdivision c. of subdivision (11) of this section.

(23) "Nationwide Mortgage Licensing System and Registry" means the mortgage licensing system developed and maintained by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators for the licensing and registration of licensed mortgage loan originators.

(24) "Nontraditional mortgage product" means any residential mortgage loan product other than a 30-year fixed rate mortgage.

(25) "Person" means an individual, partnership, limited liability company, limited partnership, corporation, association, or other group engaged in joint business activities however organized.

(26) "Principal office" means a principal place of business that shall consist of at least one enclosed room or building of stationary construction in which negotiations of mortgage loan transactions may be conducted and carried on in privacy and in which all of the books, records, and files pertaining to mortgage loan transactions relating to borrowers in this State are maintained. A principal office shall not be located at an individual's home or residence.

(27) "Qualifying individual" means a person who meets the experience and other requirements of G.S. 53-244.050(b) and who agrees to be primarily responsible for the operations of a licensed mortgage broker or mortgage lender or mortgage servicer.

(28) "Real estate brokerage activity" means any activity that involves offering or providing real estate brokerage services to the public, including:
- a. Acting as a real estate agent or real estate broker for a buyer, seller, lessor, or lessee of real property;
- b. Bringing together parties interested in the sale, purchase, lease, rental, or exchange of real property;
- c. Negotiating, on behalf of any party, any portion of a contract relating to the sale, purchase, lease, rental, or exchange of real property, other than in connection with providing financing with respect to any such transaction;
- d. Engaging in any activity for which a person engaged in the activity is required to be registered or licensed as a real estate agent or real estate broker under Chapter 93A of the General Statutes; and
- e. Offering to engage in any activity, or act in any capacity, described in sub-subdivision a., b., c., or d. of this subdivision.

(29) "Registered mortgage loan originator" means any individual who meets the definition of mortgage loan originator, is registered with, and maintains a unique identifier through the Nationwide Mortgage Licensing System and Registry and is an employee of:
- a. A depository institution;
- b. A subsidiary that is owned and controlled by a depository institution and regulated by a federal banking agency; or
- c. An institution regulated by the Farm Credit Administration.

(30) "Residential mortgage loan or mortgage loan" means any loan made or represented to be made to a natural person or persons primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling located within this State or residential real estate upon which is constructed or intended to be constructed a dwelling.

(31) "Residential real estate" means any real property located in this State upon which is constructed or intended to be constructed a dwelling.

(32) "RESPA" means the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, et seq., as it may be hereafter amended.

(33) "Tablefunding" means a transaction in which a person closes a residential mortgage loan in its own name but with funds provided by another and in which the loan is assigned to the mortgage lender actually providing the funds within one business day of the funding of the loan.

(34) "Unique identifier" means a number or other identifier assigned by protocols established by the Nationwide Mortgage Licensing System and Registry. (2009-374, s. 2; 2009-570, s. 34.1.)

Editor's Note. — The definitions for "Engaging in the mortgage business" and "Employee", as enacted by Session Laws 2009-374, s. 2, were originally designated as subdivisions (10) and (11), respectively. The order of those definitions was reversed at the direction of the Revisor of Statutes to maintain alphabetical order.

Session Laws 2009-374, s. 5, as amended by Session Laws 2009-550, s. 1, and as amended by Session Laws 2009-550, s. 10.1, provides: "Transition. — All persons licensed and in good standing pursuant to Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, as of the effective date of this act, shall maintain their status as licensees and shall be subject to the provisions of Article 19B, as enacted by Section 2 of this act, in accordance with the following transitional rules:

"(1) All persons licensed and in good standing pursuant to Article 19A of Chapter 53 of the General Statutes as of the effective date of this act shall have the following licensed status:

"a. Any person licensed as a loan officer pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage loan originator as defined in G.S. 53-244.030(21), as enacted by Section 2 of this act.

"b. Any person licensed as a mortgage banker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage lender as defined in G.S. 53-244.030(20), as enacted by Section 2 of this act.

"c. Any person licensed as a mortgage broker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage broker as defined in G.S. 53-244.030(19).

"d. Any person licensed as a mortgage servicer pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage servicer as defined in G.S. 53-244.030(22).

"e. Any person licensed as an exclusive mortgage broker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as an exclusive mortgage broker as defined in G.S. 53-244.030(11a), as enacted by Section 2 of this act; provided that the exclusive mortgage broker obtains a separate license as a mortgage loan originator no later than July 31, 2010, and if such license has not been obtained by that date, the license of the exclusive mortgage broker shall be subject to summary suspension.

"f. Any person licensed as a limited loan officer pursuant to Article 19A of Chapter 53 of the General Statutes shall be permitted to act as a licensed mortgage loan originator as defined in G.S. 53-244.030(21), as enacted by Section 2 of this act; provided that the limited loan officer obtains a mortgage loan originator license no later than December 31, 2009, and if such license has not been obtained by that date, the license of the limited loan officer will expire.

"(2) For the renewal period ending December 31, 2009, any person deemed a mortgage loan originator pursuant to sub-subdivision (1)a. of this section must have met the requirements of this act for renewal, including the initial license requirements of G.S. 53-244.060, except G.S. 53-244.060(5) and G.S. 53-244.060(6), provided that the mortgage loan originator would have met the requirements for continuing education under G.S. 53-243.07(b), as repealed by Section 1 of this act. After December 31, 2009, applicants for renewal must meet all requirements for renewal under G.S. 53-244.101.

"(3) Persons who maintain a bond posted and accepted by the Commissioner as satisfying G.S. 53-243.05(f), as repealed by Section 1 of this act, shall be deemed to comply with the requirements of G.S. 53-244.103, as enacted by Section 2 of this act, through December 31, 2009.

"(4) To the extent that loss mitigation specialists are included in the definition of a mortgage loan originator through an action by the U.S. Department of Housing and Urban Development, the Commissioner shall take necessary steps to license these individuals as mortgage loan originators in a timely fashion in a manner that ensures this act fulfills the requirements of the S.A.F.E. Act to maintain jurisdiction and supervision of the mortgage business to the fullest extent possible.

"(5) Any person who has been enjoined by the Commissioner of Banks or a court of competent jurisdiction from serving in any capacity defined under Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, shall not be allowed to apply for or act in any similar capacity as defined by G.S. 53-244.030, as enacted by Section 2 of this act. Any person whose license under Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, was subject to any terms, conditions, or affirmative duties imposed by the Commissioner of Banks or a court of competent jurisdiction shall be subject to the same terms, conditions, or affirmative duties for any similar license issued under G.S. 53-244.060 or renewed under G.S. 53-244.101, as enacted by Section 2 of this act.

"(6) Nothing in this act shall adversely affect the Commissioner of Banks' ability to bring and maintain any action or pursue any remedy that the Commissioner could have brought under Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, against any person for any acts or omissions in violation of Article 19A occurring on or before July 30, 2009."

Effect of Amendments. — Session Laws 2009-570, s. 34.1, effective August 28, 2009, substituted "sub-subdivision b. of subdivision (11) of this section" for "sub-subdivision a. of subdivision (11) of this section" in subdivision (20).

Decisions Under Prior Law

Editor's Note. — *The cases cited below were decided under former § 53-243.01.*

Jurisdiction. — Wisconsin limited liability companies' (LLCs') actions of registering as a mortgage banker in North Carolina and accepting payments on loans it sold to a bank from the bank's North Carolina offices were sufficient to satisfy the due process requirement for minimum contacts in North Carolina, and the appellate court affirmed the trial court's judgment denying the LLCs' motion to dismiss the bank's action for lack of personal jurisdiction. First Union Nat'l Bank of Del. v. Bankers Whsle. Mtg., LLC, 153 N.C. App. 248, 570 S.E.2d 217, 2002 N.C. App. LEXIS 1129 (2002).

Denial of Application Upheld. — North Carolina State Banking Commission's decision denying the applications for licensure for two mortgage loan officers was upheld on appeal and the lower court did not err by relying upon a previously entered default judgment against the two since the applicants' prior mortgage company had been awarded that default judgment for engaging in a pattern of business operations regarding false and misleading representations and they were not exempt from the qualifications of G.S. 53-243.05 pursuant to a grandfather provision, because that grandfather provision only exempted already licensed persons from taking the three-year training requirement. State ex rel. Banking Comm'n Against Weiss v. N.C. Comm'r of Banks, 174 N.C. App. 78, 620 S.E.2d 540, 2005 N.C. App. LEXIS 2282 (2005).

§ 53-244.040. License and registration requirements.

(a) Except as provided in subsection (d) of this section, no person may engage in the mortgage business or act as a mortgage loan originator with respect to any dwelling located in this State without first obtaining and maintaining a license under this Article. It shall be unlawful for any person, other than an exempt person, to act as a mortgage loan originator without a mortgage loan originator license, which authorizes an individual who is employed by a licensee holding a license as provided in subsection (b) of this section to conduct the business of a mortgage loan originator.

(b) Four types of licenses are granted to entities under this Article, and it shall be unlawful for any person, other than an exempt person, to engage in the mortgage business without one of the following licenses:

(1) A mortgage broker license authorizes a person to act as a mortgage broker as defined in G.S. 53-244.030(19).

(2) A mortgage lender license authorizes a person to act as a mortgage lender as defined in G.S. 53-244.030(20), a mortgage broker as defined under G.S. 53-244.030(19), and upon notice to the Commissioner, a mortgage servicer as defined in G.S. 53-244.030(22).

(3) A mortgage servicer license authorizes a person to act only as a mortgage servicer as defined in G.S. 53-244.030(22).

(4) An exclusive mortgage broker license authorizes a person to act as an exclusive mortgage broker as defined in G.S. 53-244.030(11a).

(c) Each mortgage loan originator and person engaged in the mortgage business must register with and maintain a valid unique identifier issued by the Nationwide Mortgage Licensing System and Registry.

(d) The following are exempt from all provisions of this Article except the provisions of G.S. 53-244.111:

(1) Registered mortgage loan originators as defined in G.S. 53-244.030(29);

(2) Any individual who offers or negotiates terms of a residential mortgage loan with or on behalf of an immediate family member of the individual when making the family member a residential mortgage loan;

(3) Any individual seller who offers or negotiates terms and makes a residential mortgage loan secured by the dwelling that served as the selling individual's residence;

(4) An attorney licensed pursuant to Chapter 84 of the General Statutes who negotiates the terms of a residential mortgage loan on behalf of a client in the course of and incident to the attorney's representation of the client, so long as the attorney does not hold himself out as engaged in the mortgage business and is not compensated by a

mortgage lender, a mortgage broker, or other mortgage loan originator when negotiating the terms of a residential mortgage loan;

(5) Any entity described in G.S. 53-244.030(29)a., b., or c., upon acceptance of the notice of exemption filed with the Commissioner as specified in G.S. 53-244.050(g);

(6) Any officer or employee of an entity described in subdivision (5) of this subsection when acting within the scope of his or her employment;

(7) A State or federally chartered credit union, upon filing of a notice of exemption with the Administrator of the Credit Union Division of the Department of Commerce as specified in G.S. 53-244.050(g); or

(8) Any person who, as seller, receives in one calendar year no more than five residential mortgage loans as security for purchase money obligations, unless the United States Department of Housing and Urban Development has expressly and definitively determined that such persons are loan originators as the term is defined by § 1503 of Title V of the Housing and Economic Recovery Act of 2008, Public Law 110-289, and such determination is in effect on July 31, 2010.

(e) Each mortgage broker, mortgage lender, or mortgage servicer licensed under this Article shall have a qualifying individual who operates the business under that person's full charge, control, and supervision. Each mortgage broker, mortgage lender, or mortgage servicer licensed under this Article shall file through the Nationwide Mortgage Licensing System and Registry a form acceptable to the Commissioner indicating the licensee's designation of qualifying individual and each qualifying individual's acceptance of the responsibility. Each mortgage broker, mortgage lender, or mortgage servicer licensed under this Article shall notify the Commissioner within 15 days of any change in its designated qualifying individual. Any individual licensee who operates as a sole proprietorship shall qualify as and be considered the qualifying individual for the purposes of this subsection.

(f) Mortgage lenders and mortgage brokers may not operate branch offices, except as permitted by this Article. Each principal office and each branch office of a mortgage broker or mortgage lender licensed under this Article shall have a branch manager who meets the experience requirements under G.S. 53-244.050(b). The qualifying individual for a licensee's business also may serve as the branch manager of one of the licensee's branch offices. Each mortgage broker or mortgage lender licensed under this Article shall file through the Nationwide Mortgage Licensing System and Registry a form acceptable to the Commissioner indicating the licensee's designation of branch manager for each branch. Each mortgage broker or mortgage lender licensed under this Article shall notify the Commissioner within 15 days of the change of any branch manager. (2009-374, s. 2; 2009-570, s. 48.)

Effect of Amendments. — Session Laws 2009-570, s. 48, effective August 28, 2009, transferred "or" from the end of subdivision (d)(6) to (d)(7) and made minor stylistic changes.

§ 53-244.050. License and registration application; claim of exemption.

(a) Applicants for a license shall apply through the Nationwide Mortgage Licensing System and Registry on a form acceptable to the Commissioner, including the following information:

(1) The applicant's name and address, including street address, mailing address, e-mail, telephone contact information, and social security number or taxpayer identification number.

(2) The applicant's form and place of organization, if applicable.

(3) The applicant's proposed method of and locations for doing business, if applicable.

(4) The qualifications and business history of the applicant and, if applicable, the business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the applicant, including:
   a. A description of any injunction or administrative order by any state or federal authority to which the person is or has been subject;
   b. Any conviction, within the past 10 years, of a misdemeanor involving moral turpitude or any fraud, false statement or omission, any theft or wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or conspiracy to commit any of these offenses, or involving any financial service or financial service- related business; and
   c. Any felony convictions.

(5) With respect to an application for licensing as a mortgage lender, mortgage broker, or mortgage servicer, the applicant's financial condition, credit history, and business history, and, with respect to an application for licensing as a mortgage loan originator, the applicant's credit history and business history.

(6) The applicant's consent to a federal and State criminal history record check and a set of the applicant's fingerprints in a form acceptable to the Commissioner. In the case of an applicant that is a person other than a natural person, each individual who has control of the applicant or who is the qualifying individual or a branch manager shall consent to a federal and State criminal history record check and submit a set of that individual's fingerprints pursuant to this subdivision.

(b) The eligibility requirements for an application for licensure under this Article are as follows:

(1) Each individual applicant for licensure as a mortgage loan originator or qualifying individual shall:
   a. Be at least 18 years of age;
   b. Have satisfactorily completed, within the three years immediately preceding the date of application, the mortgage lending prelicensing education as required under G.S. 53-244.070; and
   c. Have passed, within the three years immediately preceding the date of application, the test required under G.S. 53-244.080.

(2) Each applicant for licensure as a mortgage broker or mortgage lender or mortgage servicer at the time of application shall comply with the following requirements:
   a. If the applicant is a sole proprietor, the applicant shall have at least three years of experience in residential mortgage lending or other experience or meet competency requirements as the Commissioner may impose.
   b. If the applicant is a corporation, limited liability company, general or limited partnership, association, or other group engaged in a joint enterprise, however organized, at least one of its principal officers, managers, or general partners shall have three years of experience in residential mortgage lending or other experience or meet competency requirements as the Commissioner may impose.
   c. If the applicant will be a qualifying individual or branch manager, the applicant shall have at least three years of experience in residential mortgage lending or other experience or meet competency requirements as the Commissioner may impose.

(3) If an individual applicant to be licensed as a mortgage broker is a licensed mortgage loan originator and meets the requirements for licensure as a mortgage broker, but is not an employee as defined in G.S. 53-244.030(10) and does not meet the experience requirements of G.S. 53-244.050(b)(2)a., the individual may be licensed as an exclusive mortgage broker upon compliance with all of the following:
  a. Successfully completes a 16-hour residential mortgage lending course approved by the Commissioner supplementing the prelicensing education required under G.S. 53-244.070.
  b. Acts exclusively as a mortgage broker and shall be an agent for a single mortgage lender or mortgage broker licensee or a single exempt mortgage lender, who:
    1. Shall be responsible for supervising the broker as required by this Article and in accordance with a plan of supervision approved by the Commissioner in the Commissioner's discretion;
    2. Shall sign the license application of the applicant; and
    3. Shall be jointly and severally liable with the broker for any claims arising from the broker's mortgage brokering activities.
  c. Shall be compensated on a basis that is not dependent upon the interest rate, fees, or other terms of the loan brokered, provided that this sub-subdivision shall not prohibit compensation based on the principal balance of the loan.
  d. Shall offer only fixed-term, fixed-rate, fully amortizing mortgage loans originated by a single mortgage lender with substantially equal monthly mortgage payments and without a prepayment penalty, unless the Commissioner shall approve, in the Commissioner's discretion, the sale of other mortgage loan products for that lender.
  e. Shall not handle borrower or other third-party funds in connection with the brokering or closing of mortgage loans.
  f. Shall meet the surety bond requirement of a mortgage broker or otherwise be covered by a surety bond provided by the mortgage lender or broker licensee or exempt mortgage lender of the lesser of five million dollars ($5,000,000) or an amount equal to or greater than the sum of the surety bond requirements for each exclusive mortgage broker supervised by the broker or lender.

(c) In connection with an application for licensing as a mortgage loan originator, mortgage lender, mortgage broker, or mortgage servicer, the applicant and its owners, qualifying individual, and controlling persons shall furnish to the Nationwide Mortgage Licensing System and Registry information concerning the applicant's identity, including:

(1) Fingerprints for submission to the Federal Bureau of Investigation and any governmental agency or entity authorized to receive such information for a state, national, and international criminal history background check.
(2) Personal history and experience in a form prescribed by the Nationwide Mortgage Licensing System and Registry and the Commissioner to obtain:
  a. Independent credit reports obtained from a consumer reporting agency described in section 603(p) of the Fair Credit Reporting Act; and
  b. Information related to any administrative, civil, or criminal findings by any governmental jurisdiction.
(3) The personal history may be obtained by the Commissioner at any time and the fingerprint information shall be furnished upon the Commissioner's request.

(4) An authorization for the Commissioner to obtain personal history or fingerprint information at any time.

(d) For the purposes of this section and in order to reduce the points of contact that the Federal Bureau of Investigation may have to maintain for purposes of the criminal information required by this section, the Commissioner may use the Nationwide Mortgage Licensing System and Registry as a channeling agent for requesting information from and distributing information to the Department of Justice or any governmental agency.

(e) For the purposes of this section and in order to reduce the points of contact that the Commissioner may have to maintain for purposes of the noncriminal information required by this section, the Commissioner may use the Nationwide Mortgage Licensing System and Registry as a channeling agent for requesting and distributing information to and from any source so directed by the Commissioner.

(f) For purposes of this section, the Commissioner may request and the North Carolina Department of Justice may provide a criminal record check to the Commissioner for any person who has applied for or holds a mortgage lender, mortgage broker, mortgage servicer, or mortgage loan originator license as provided by this section. The Commissioner shall provide the Department of Justice, along with the request, the fingerprints of the person, any additional information required by the Department of Justice, and a form signed by the person consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The person's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Department of Justice may charge a fee for each person for conducting the checks of criminal history records authorized by this section.

(g) Except as provided by subsection (h) of this section, persons engaged in the mortgage business and exempt from licensure pursuant to G.S. 53-244.040(d)(5) shall notify the Commissioner in order to claim and confirm the exemption and to facilitate the referral of consumers that contact the Commissioner. The Commissioner shall prescribe a form for such a claim of exemption that shall contain:

(1) The name of the exempt person;
(2) The basis of the exempt status of the exempt person;
(3) The principal business address and contact information for the exempt person; and
(4) The State or federal regulatory authority responsible for the exempt person's supervision, examination, or regulation.

(h) A State or federally chartered credit union may claim and confirm an exemption from this Article by notifying the Administrator of the Credit Union Division of the Department of Commerce and providing substantially the same information required by subsection (g) of this section.

(i) The Commissioner shall keep all information pursuant to this section privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes. (2009-374, s. 2.)

Decisions Under Prior Law

***Editor's Note.** — The case cited below was decided under former § 53-243.05.*

Denial of Application Upheld. — North Carolina State Banking Commission's decision denying the applications for licensure for two mortgage loan officers was upheld on appeal and the lower court did not err by relying upon a previously entered default judgment against the two since the applicants' prior mortgage company had been awarded that default judgment for engaging in a pattern of business operations regarding false and misleading representations, and they were not exempt from the qualifications of G.S. 53-243.05 pursuant to a grandfather provision because that grandfather provision only exempted already licensed persons from taking the three-year training requirement. State ex rel. Banking Comm'n Against Weiss v. N.C. Comm'r of Banks, 174 N.C. App. 78, 620 S.E.2d 540, 2005 N.C. App. LEXIS 2282 (2005).

§ 53-244.060. Issuance of license.

If an applicant satisfies the requirements of G.S. 53-244.050, the Commissioner shall issue a mortgage lender, mortgage broker, mortgage servicer, or mortgage loan originator license unless the Commissioner finds any of the following:

(1) The applicant has had a mortgage loan originator or mortgage lender, mortgage broker, or mortgage servicer license revoked in any governmental jurisdiction, except that a subsequent formal vacation of the revocation shall not be deemed a revocation.

(2) The applicant or its controlling persons have been convicted of or plead guilty or nolo contendere to a felony in a domestic, foreign, or military court:

a. During the seven-year period preceding the date of the application for licensing and registration; or

b. At any time preceding the date of application, if the felony involved an act of fraud, dishonesty, a breach of trust, or money laundering.

A pardon of a conviction shall not be a conviction for purposes of this subdivision.

(3) The applicant or any of its controlling persons have been convicted of or plead guilty or nolo contendere to any charge in a domestic, foreign, or military court, within the past five years, of a misdemeanor involving moral turpitude or any fraud, false statement or omission, any theft or wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or conspiracy to commit any of these offenses, or involving any financial service or financial service-related business.

(4) The applicant has demonstrated a lack of financial responsibility, character, or general fitness such as to fail to command the confidence of the community and to warrant a determination that the mortgage loan originator or other licensee will operate honestly, fairly, and efficiently within the purposes of this Article. For purposes of this subdivision, a person shows a lack of financial responsibility when the person has shown a disregard in the management of the person's own financial affairs. Evidence that a person has not shown financial responsibility may include:

a. Current outstanding judgments, except judgments resulting solely from medical expenses;

b. Current outstanding tax liens or other government liens and filings;

c. Foreclosures within the past three years; or

d. A pattern of serious delinquent accounts within the past three years.

(5) The mortgage loan originator applicant has failed to complete the prelicensing education requirement described in G.S. 53-244.070.

(6) The mortgage loan originator applicant has failed to pass a written test that meets the requirements described in G.S. 53-244.080.

(7) The mortgage lender, mortgage broker, or mortgage servicer applicant has failed to meet the surety bond requirement described in G.S. 53-244.103.

(8) The mortgage lender, mortgage broker, or mortgage servicer applicant fails to meet the minimum net worth requirement as described in G.S. 53-244.104.

(9) The applicant's participation in the mortgage business will not be in the public interest. (2009-374, s. 2.)

Editor's Note. — Session Laws 2009-374, s. 5, as amended by Session Laws 2009-526, s. 1.1, and as amended by Session Laws 2009-550, s. 10.1, provides: "Transition. — All persons licensed and in good standing pursuant to Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, as of the effective date of this act, shall maintain their status as licensees and shall be subject to the provisions of Article 19B, as enacted by Section 2 of this act, in accordance with the following transitional rules:

"(1) All persons licensed and in good standing pursuant to Article 19A of Chapter 53 of the General Statutes as of the effective date of this act shall have the following licensed status:

"a. Any person licensed as a loan officer pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage loan originator as defined in G.S. 53-244.030(21), as enacted by Section 2 of this act.

"b. Any person licensed as a mortgage banker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage lender as defined in G.S. 53-244.030(20), as enacted by Section 2 of this act.

"c. Any person licensed as a mortgage broker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage broker as defined in G.S. 53-244.030(19).

"d. Any person licensed as a mortgage servicer pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage servicer as defined in G.S. 53-244.030(22).

"e. Any person licensed as an exclusive mortgage broker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as an exclusive mortgage broker as defined in G.S. 53-244.030(11a), as enacted by Section 2 of this act; provided that the exclusive mortgage broker obtains a separate license as a mortgage loan originator no later than July 31, 2010, and if such license has not been obtained by that date, the license of the exclusive mortgage broker shall be subject to summary suspension.

"f. Any person licensed as a limited loan officer pursuant to Article 19A of Chapter 53 of the General Statutes shall be permitted to act as a licensed mortgage loan originator as defined in G.S. 53-244.030(21), as enacted by Section 2 of this act; provided that the limited loan officer obtains a mortgage loan originator license no later than December 31, 2009, and if such license has not been obtained by that date, the license of the limited loan officer will expire.

"(2) For the renewal period ending December 31, 2009, any person deemed a mortgage loan originator pursuant to sub-subdivision (1)a. of this section must have met the requirements of this act for renewal, including the initial license requirements of G.S. 53-244.060, except G.S. 53-244.060(5) and G.S. 53-244.060(6), provided that the mortgage loan originator would have met the requirements for continuing education under G.S. 53-243.07(b), as repealed by Section 1 of this act. After December 31, 2009, applicants for renewal must meet all requirements for renewal under G.S. 53-244.101.

"(3) Persons who maintain a bond posted and accepted by the Commissioner as satisfying G.S. 53-243.05(f), as repealed by Section 1 of this act, shall be deemed to comply with the requirements of G.S. 53-244.103, as enacted by Section 2 of this act, through December 31, 2009.

"(4) To the extent that loss mitigation specialists are included in the definition of a mortgage loan originator through an action by the U.S. Department of Housing and Urban Development, the Commissioner shall take necessary steps to license these individuals as mortgage loan originators in a timely fashion in a manner that ensures this act fulfills the requirements of the S.A.F.E. Act to maintain jurisdiction and supervision of the mortgage business to the fullest extent possible.

"(5) Any person who has been enjoined by the Commissioner of Banks or a court of competent jurisdiction from serving in any capacity defined under Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, shall not be allowed to apply for or act in any similar capacity as defined by G.S. 53-244.030, as enacted by Section 2 of this act. Any person whose license under Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, was subject to any terms, conditions, or affirmative duties imposed by the Commissioner of Banks or a court of competent jurisdiction shall be subject to the same terms, conditions, or affirmative duties for any similar license issued under G.S. 53-244.060 or renewed under G.S. 53-244.101, as enacted by Section 2 of this act.

"(6) Nothing in this act shall adversely affect the Commissioner of Banks' ability to bring and maintain any action or pursue any remedy that the Commissioner could have brought under

Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, against any person for any acts or omissions in violation of Article 19A occurring on or before July 30, 2009."

§ 53-244.070. Educational requirements for mortgage loan originators.

(a) In order to be eligible to apply for a mortgage loan originator license, an individual must complete at least 24 hours of prelicensing education approved in accordance with subsection (b) of this section, which shall include:

(1) Three hours of federal law and regulations;
(2) Three hours of ethics, including instruction on fraud, consumer protection, and fair lending issues;
(3) Two hours of training related to lending standards for nontraditional mortgage products; and
(4) Four hours of North Carolina laws and regulations.

(b) Prelicensing education courses and the course providers shall be reviewed and approved by the Nationwide Mortgage Licensing System and Registry using reasonable standards consistently applied, subject to the Commissioner's approval of any course of study required by subdivision (a)(4) of this section. Review and approval of a prelicensing education course shall include review and approval of the course provider.

(c) Nothing in this section shall preclude any prelicensing education course, approved by the Nationwide Mortgage Licensing System and Registry, that is provided by the employer of the applicant or an entity that is affiliated with the applicant by an agency contract, or any subsidiary or affiliate of the employer or entity.

(d) Except as provided in subsection (e) of this section, prelicensing education may be offered only in a classroom or classroom equivalent setting, as approved by the Nationwide Mortgage Licensing System and Registry.

(e) An individual having successfully completed the prelicensing educational requirements in any other state, if the requirements have been approved by the Nationwide Mortgage Licensing System and Registry, shall be given credit for those hours toward the completion of the prelicensing requirements in this State, other than the hours required under subdivision (a)(4) of this section.

(f) An individual previously licensed under this Article whose license expires and who requests a late renewal of license pursuant to G.S. 53-244.101 must prove that the individual has completed all of the continuing education requirements for the preceding year. (2009-374, s. 2.)

§ 53-244.080. Testing requirements for mortgage loan originators.

(a) An individual must pass a qualified written test, as defined by subsection (b) of this section, developed by the Nationwide Mortgage Licensing System and Registry and administered by a test provider approved by the Nationwide Mortgage Licensing System and Registry. In addition, prior to licensure in this State, an individual must take a qualified written test that tests the individual's knowledge and comprehension of North Carolina law and regulation.

(b) A written test shall not be treated as a qualified written test unless the test adequately measures the applicant's knowledge and comprehension in the following subject areas:

(1) Ethics;
(2) Federal law and regulation pertaining to mortgage origination;

(3) North Carolina law and regulation pertaining to mortgage origination; and

(4) Federal and North Carolina law and regulations relating to fraud, consumer protection, nontraditional mortgage products, and fair lending issues.

(c) Nothing in this section shall prohibit a test provider approved by the Nationwide Mortgage Licensing System and Registry from providing a test at the location of the employer of the applicant or the location of any subsidiary or affiliate of the employer of the applicant, or the location of any entity which is licensed by North Carolina to engage in the mortgage lending business.

(d) An applicant shall be considered to have passed a qualified written test provided the applicant achieves a test score of at least seventy-five percent (75%) correct answers to questions. In addition, an applicant shall not be considered to have passed a qualified written test if the individual did not achieve a test score of at least seventy-five percent (75%) correct answers to questions related to North Carolina law and regulation.

(e) An applicant may retake a test three consecutive times with each consecutive test occurring at least 30 days after the preceding test. After failing three consecutive tests, an applicant must wait at least six months before retaking the test. A licensed mortgage loan originator who fails to maintain a valid license for a period of three years or longer must retake the test. (2009-374, s. 2.)

§ 53-244.090. License application fees.

(a) Every applicant for initial licensure shall pay a nonrefundable filing fee of one thousand two hundred fifty dollars ($1,250) for licensure as a mortgage broker, mortgage lender, or mortgage servicer, three hundred dollars ($300.00) for licensure as an exclusive mortgage broker, or one hundred twenty-five dollars ($125.00) for licensure as a mortgage loan originator. In addition, an applicant must pay the actual cost of obtaining a credit report, State and national criminal history record checks, and the processing fees required by the Nationwide Mortgage Licensing System and Registry.

(b) Each principal and each branch office of a mortgage broker or mortgage lender licensed under the provisions of this Article shall be issued a separate license for which the Commissioner shall assess a nonrefundable filing fee of one hundred twenty-five dollars ($125.00) in addition to the Nationwide Mortgage Licensing System and Registry processing fee. A licensed mortgage broker or mortgage lender shall file with the Commissioner a notice on a form prescribed by the Commissioner that identifies the address of the principal office and each branch office and its designated branch manager. Payment of the license fee under subsection (a) of this section shall be deemed to cover the location license fee for the principal office of each mortgage lender, mortgage broker, or mortgage servicer without payment of an additional one hundred twenty-five dollars ($125.00) under this subsection. (2009-374, s. 2.)

§ 53-244.100. Active license requirements and assignability.

(a) It is unlawful for any person to engage in the mortgage business without first obtaining a license as a mortgage loan originator, mortgage lender, mortgage broker, or mortgage servicer issued by the Commissioner under this Article. It is unlawful for any person to employ, to compensate, or to appoint as its agent a mortgage loan originator unless the person is a licensed mortgage loan originator under this Article. Persons defined in G.S. 53-244.030(8) or G.S. 53-244.030(29) are not subject to this subsection.

(b) The license of a mortgage loan originator is not effective during any period when that person is not employed by a mortgage lender, mortgage broker, or mortgage servicer licensed under this Article. When a mortgage loan originator ceases to be employed by a mortgage lender, mortgage broker, or mortgage servicer licensed under this Article, the mortgage loan originator, and the mortgage lender, mortgage broker, or mortgage servicer licensed under this Article by whom that person is employed shall promptly notify the Commissioner in writing. The mortgage lender, mortgage broker, or mortgage servicer shall include a statement of the specific reason for the termination of the mortgage loan originator's employment. A mortgage loan originator shall not be employed simultaneously by more than one mortgage lender, mortgage broker, or mortgage servicer licensed under this Article.

(c) Each mortgage lender, mortgage broker, and mortgage servicer licensed under this Article shall maintain on file with the Commissioner a list of all mortgage loan originators who are employed with the mortgage lender, mortgage broker, or mortgage servicer.

(d) No person, other than an exempt person, shall hold himself or herself out as a mortgage lender, a mortgage broker, a mortgage servicer, or a mortgage loan originator unless the person is licensed in accordance with this Article.

(e) Licenses issued under this Article are not assignable. Control of a licensee shall not be acquired through a stock purchase, merger, or other device without the prior written consent of the Commissioner. The Commissioner shall not give written consent if the Commissioner finds that any of the grounds for denial, revocation, or suspension of a license are applicable to the acquiring person. (2009-374, s. 2.)

§ 53-244.101. License renewal.

(a) All licenses issued by the Commissioner under the provisions of this Article shall expire annually on the 31st day of December following issuance or on any other date that the Commissioner may determine. The license is invalid after that date and shall remain invalid unless renewed under subsection (b) of this section.

(b) A license may be renewed on or after November 1 of each year by complying with the requirements of subsection (c) of this section and by paying to the Commissioner, in addition to the actual cost of obtaining credit reports and State and national criminal history record checks and of processing fees of the nationwide system as the Commissioner shall require, nonrefundable renewal fees as follows:

(1) Licensed mortgage lenders, licensed mortgage brokers, and licensed mortgage servicers shall pay an annual renewal fee of six hundred twenty-five dollars ($625.00), licensed exclusive mortgage brokers shall pay an annual renewal fee of three hundred dollars ($300.00), and licensed mortgage lenders and mortgage brokers shall pay one hundred twenty-five dollars ($125.00) for each licensed branch office.

(2) Licensed mortgage loan originators shall pay an annual renewal fee of sixty-seven dollars and fifty cents ($67.50).

(c) Licensees may apply to renew a mortgage loan originator, mortgage lender, mortgage broker, and mortgage servicer license. The application for renewal shall demonstrate that:

(1) The licensee continues to meet the initial minimum standards for licensure under G.S. 53-244.060;

(2) The mortgage loan originator has satisfied the annual continuing education requirements described in G.S. 53-244.102; and

(3) The licensee has paid all required fees for renewal of the license.

(d) If a mortgage lender, mortgage broker, or mortgage servicer's license is not renewed prior to the expiration date, then the licensee shall pay two hundred fifty dollars ($250.00) as a nonrefundable late fee in addition to the renewal fee set forth in subsection (b) of this section. If a mortgage loan originator's license is not renewed prior to the expiration date, then the licensee shall pay a nonrefundable late fee of one hundred dollars ($100.00) in addition to the renewal fee set forth in subsection (b) of this section. In the event a licensee fails to obtain a reinstatement of the license prior to March 1, the Commissioner shall require the licensee to comply with the requirements for the initial issuance of a license under the provisions of this Article.

(e) When required by the Commissioner, each person shall furnish to the Commissioner the person's consent to a criminal history record check and a set of the person's fingerprints in a form acceptable to the Commissioner or to the Nationwide Mortgage Licensing System and Registry. Refusal to consent to a criminal history record check shall constitute grounds for the Commissioner to deny renewal of the license of the person as well as the license of any other person by whom the person is employed, over which the person has control, or as to which the person is the current or proposed qualifying individual or current or proposed branch manager. (2009-374, s. 2.)

Editor's Note. — Session Laws 2009-374, s. 5, as amended by Session Laws 2009-526, s. 1.1, and as amended by Session Laws 2009-550, s. 10.1, provides: "Transition. — All persons licensed and in good standing pursuant to Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, as of the effective date of this act, shall maintain their status as licensees and shall be subject to the provisions of Article 19B, as enacted by Section 2 of this act, in accordance with the following transitional rules:

"(1) All persons licensed and in good standing pursuant to Article 19A of Chapter 53 of the General Statutes as of the effective date of this act shall have the following licensed status:

"a. Any person licensed as a loan officer pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage loan originator as defined in G.S. 53-244.030(21), as enacted by Section 2 of this act.

"b. Any person licensed as a mortgage banker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage lender as defined in G.S. 53-244.030(20), as enacted by Section 2 of this act.

"c. Any person licensed as a mortgage broker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage broker as defined in G.S. 53-244.030(19).

"d. Any person licensed as a mortgage servicer pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage servicer as defined in G.S. 53-244.030(22).

"e. Any person licensed as an exclusive mortgage broker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as an exclusive mortgage broker as defined in G.S. 53-244.030(11a), as enacted by Section 2 of this act; provided that the exclusive mortgage broker obtains a separate license as a mortgage loan originator no later than July 31, 2010, and if such license has not been obtained by that date, the license of the exclusive mortgage broker shall be subject to summary suspension.

"f. Any person licensed as a limited loan officer pursuant to Article 19A of Chapter 53 of the General Statutes shall be permitted to act as a licensed mortgage loan originator as defined in G.S. 53-244.030(21), as enacted by Section 2 of this act; provided that the limited loan officer obtains a mortgage loan originator license no later than December 31, 2009, and if such license has not been obtained by that date, the license of the limited loan officer will expire.

"(2) For the renewal period ending December 31, 2009, any person deemed a mortgage loan originator pursuant to sub-subdivision (1)a. of this section must have met the requirements of this act for renewal, including the initial license requirements of G.S. 53-244.060, except G.S. 53-244.060(5) and G.S. 53-244.060(6), provided that the mortgage loan originator would have met the requirements for continuing education under G.S. 53-243.07(b), as repealed by Section 1 of this act. After December 31, 2009, applicants for renewal must meet all requirements for renewal under G.S. 53-244.101.

"(3) Persons who maintain a bond posted and accepted by the Commissioner as satisfying G.S. 53-243.05(f), as repealed by Section 1 of this act, shall be deemed to comply with the requirements of G.S. 53-244.103, as enacted by Section 2 of this act, through December 31, 2009.

"(4) To the extent that loss mitigation specialists are included in the definition of a mortgage loan originator through an action by the U.S. Department of Housing and Urban Development, the Commissioner shall take necessary steps to license these individuals as mortgage loan originators in a timely fashion in a manner that ensures this act fulfills the requirements of the S.A.F.E. Act to maintain jurisdiction and supervision of the mortgage business to the fullest extent possible.

"(5) Any person who has been enjoined by the Commissioner of Banks or a court of competent jurisdiction from serving in any capacity defined under Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, shall not be allowed to apply for or act in any similar capacity as defined by G.S. 53-244.030, as enacted by Section 2 of this act. Any person whose license under Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, was subject to any terms, conditions, or affirmative duties imposed by the Commissioner of Banks or a court of competent jurisdiction shall be subject to the same terms, conditions, or affirmative duties for any similar license issued under G.S. 53-244.060 or renewed under G.S. 53-244.101, as enacted by Section 2 of this act.

"(6) Nothing in this act shall adversely affect the Commissioner of Banks' ability to bring and maintain any action or pursue any remedy that the Commissioner could have brought under Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, against any person for any acts or omissions in violation of Article 19A occurring on or before July 30, 2009."

§ 53-244.102. Continuing education for mortgage loan originators.

(a) A licensed mortgage loan originator shall annually complete at least eight hours of continuing education approved in accordance with subsection (b) of this section, including:

(1) Three hours of federal law and regulations;
(2) Two hours of ethics, including instruction on fraud, consumer protection, and fair lending issues;
(3) Two hours of training related to lending standards for nontraditional mortgage products; and
(4) One hour of North Carolina law and regulations.

(b) Continuing education courses shall be reviewed and approved by the Nationwide Mortgage Licensing System and Registry based upon reasonable standards. Approval of a continuing education course shall include approval of the course provider.

(c) Nothing in this section shall preclude any continuing education course, approved by the Nationwide Mortgage Licensing System and Registry, that is provided by the employer of the mortgage loan originator or an entity affiliated with the mortgage loan originator by an agency contract, or any subsidiary or affiliate of such employer or entity. Continuing education may be offered either in a classroom, online, or by any other means approved by the Nationwide Mortgage Licensing System and Registry.

(d) A licensed mortgage loan originator:

(1) Except for G.S. 53-244.070(a) and subsection (e) of this section, may only receive credit for a continuing education course in the year in which the course is taken; and
(2) May not take the same approved course in the same or successive years to meet the annual requirements for continuing education.

(e) A licensed mortgage loan originator who is an approved instructor of an approved continuing education course may receive credit for the licensed mortgage loan originator's own annual continuing education requirement at the rate of two hours credit for every one hour taught.

(f) A licensee having successfully completed the education requirements approved by the Nationwide Mortgage Licensing System and Registry in subdivisions (a)(1), (a)(2), and (a)(3) of this section for any state shall be accepted as credit toward completion of continuing education requirements in North Carolina. (2009-374, s. 2.)

§ 53-244.103. Surety bond requirements.

(a) Each mortgage loan originator shall be covered by a surety bond through employment with a licensee in accordance with this section. The surety bond shall provide coverage for each mortgage loan originator employed by the licensee in an amount as prescribed by subsection (b) of this section and shall be in a form prescribed by the Commissioner. The Commissioner may adopt rules with respect to the requirements for the surety bonds as needed to accomplish the purposes of the Article.

(b) Licensees shall be required to post a surety bond with the Commissioner at application to be subsequently adjusted as follows:

(1) A mortgage broker shall post a minimum surety bond of seventy-five thousand dollars ($75,000). Provided, however, if a mortgage broker has originated mortgage loans in North Carolina in a 12-month period ending December 31 in excess of ten million dollars ($10,000,000) but less than fifty million dollars ($50,000,000), then the mortgage broker's minimum bond amount shall be one hundred twenty-five thousand dollars ($125,000), and if a mortgage broker has originated mortgage loans in North Carolina in a 12-month period ending December 31 of fifty million dollars ($50,000,000) or more, the mortgage broker's minimum bond shall be two hundred fifty thousand dollars ($250,000).

(2) A mortgage lender or mortgage servicer shall post a minimum surety bond of one hundred fifty thousand dollars ($150,000). Provided, however, if a mortgage lender has originated mortgage loans in North Carolina in a 12-month period ending December 31 in excess of ten million dollars ($10,000,000) but less than fifty million dollars ($50,000,000), then the mortgage lender's minimum bond amount shall be two hundred fifty thousand dollars ($250,000), and if a mortgage lender has originated mortgage loans in North Carolina in a 12-month period ending December 31 of fifty million dollars ($50,000,000) or more, then the mortgage lender's minimum bond shall be five hundred thousand dollars ($500,000).

(3) Any increased surety bond required under subdivision (1) or (2) of this subsection shall be filed with the Commissioner on or before May 31 immediately following the end of the 12-month December 31 period.

(c) The surety bond shall be in a form satisfactory to the Commissioner and shall run to the State for the benefit of any claimants against the licensee to secure the faithful performance of the obligations of the licensee under this Article. The aggregate liability of the surety shall not exceed the principal sum of the bond. A party having a claim against the licensee may bring suit directly on the surety bond, or the Commissioner may bring suit on behalf of any claimants, either in one action or in successive actions. Consumer claims shall be given priority in recovering from the bond. When an action is commenced on a licensee's bond, the Commissioner may require the filing of a new bond. In this case, the licensee shall file a replacement bond in the required amount within 30 days. Immediately upon recovery upon any action on the bond the licensee shall file a new bond.

(d) In the Commissioner's discretion and upon written request of the licensee, the Commissioner may waive the requirement of the bond for any licensee, if:

(1) The licensee has been licensed by the Commissioner for at least three years;

(2) The licensee can demonstrate a net worth, according to the most recent audited financial statement, at least four times the required bond amount, and the licensee certifies that its net worth will be

maintained at or above this level at all times and agrees to notify the Commissioner and to secure an appropriate bond in the event the net worth falls below this level;

(3) The Commissioner believes the licensee has a satisfactory history of resolving complaints from consumers and responding to findings of investigations or examinations by the Commissioner; and

(4) The Commissioner has no reason to believe the licensee will be unable to resolve complaints, respond to examination or investigative findings, or fulfill financial obligations under this Article.

(e) If the Commissioner has waived the bond requirement of a licensee based on subsection (d) of this section, the Commissioner may summarily reinstate the bond requirement on any licensee if the Commissioner has reason to believe the licensee no longer meets the standards in subsection (d) of this section. In this event, the licensee shall submit a bond, as required in subsection (b) of this section, within 30 days. Failure to submit a bond as directed by the Commissioner shall be grounds for summary suspension. (2009-374, s. 2.)

Editor's Note. — Session Laws 2009-374, s. 5, as amended by Session Laws 2009-526, s. 1.1, and as amended by Session Laws 2009-550, s. 10.1, provides: "Transition. — All persons licensed and in good standing pursuant to Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, as of the effective date of this act, shall maintain their status as licensees and shall be subject to the provisions of Article 19B, as enacted by Section 2 of this act, in accordance with the following transitional rules:

"(1) All persons licensed and in good standing pursuant to Article 19A of Chapter 53 of the General Statutes as of the effective date of this act shall have the following licensed status:

"a. Any person licensed as a loan officer pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage loan originator as defined in G.S. 53-244.030(21), as enacted by Section 2 of this act.

"b. Any person licensed as a mortgage banker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage lender as defined in G.S. 53-244.030(20), as enacted by Section 2 of this act.

"c. Any person licensed as a mortgage broker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage broker as defined in G.S. 53-244.030(19).

"d. Any person licensed as a mortgage servicer pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as a mortgage servicer as defined in G.S. 53-244.030(22).

"e. Any person licensed as an exclusive mortgage broker pursuant to Article 19A of Chapter 53 of the General Statutes shall be deemed to be licensed as an exclusive mortgage broker as defined in G.S. 53-244.030(11a), as enacted by Section 2 of this act; provided that the exclusive mortgage broker obtains a separate license as a mortgage loan originator no later than July 31, 2010, and if such license has not been obtained by that date, the license of the exclusive mortgage broker shall be subject to summary suspension.

"f. Any person licensed as a limited loan officer pursuant to Article 19A of Chapter 53 of the General Statutes shall be permitted to act as a licensed mortgage loan originator as defined in G.S. 53-244.030(21), as enacted by Section 2 of this act; provided that the limited loan officer obtains a mortgage loan originator license no later than December 31, 2009, and if such license has not been obtained by that date, the license of the limited loan officer will expire.

"(2) For the renewal period ending December 31, 2009, any person deemed a mortgage loan originator pursuant to sub-subdivision (1)a. of this section must have met the requirements of this act for renewal, including the initial license requirements of G.S. 53-244.060, except G.S. 53-244.060(5) and G.S. 53-244.060(6), provided that the mortgage loan originator would have met the requirements for continuing education under G.S. 53-243.07(b), as repealed by Section 1 of this act. After December 31, 2009, applicants for renewal must meet all requirements for renewal under G.S. 53-244.101.

"(3) Persons who maintain a bond posted and accepted by the Commissioner as satisfying G.S. 53-243.05(f), as repealed by Section 1 of this act, shall be deemed to comply with the requirements of G.S. 53-244.103, as enacted by Section 2 of this act, through December 31, 2009.

"(4) To the extent that loss mitigation specialists are included in the definition of a mortgage loan originator through an action by the U.S. Department of Housing and Urban Development, the Commissioner shall take necessary steps to license these individuals as mortgage loan originators in a timely fashion in a manner that ensures this act fulfills the requirements of the S.A.F.E. Act to maintain jurisdiction and supervision of the mortgage business to the fullest extent possible.

"(5) Any person who has been enjoined by the Commissioner of Banks or a court of competent jurisdiction from serving in any capacity defined under Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, shall not be allowed to apply for or act in any similar capacity as defined by G.S. 53-244.030, as enacted by Section 2 of this act. Any person whose license under Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, was subject to any terms, conditions, or affirmative duties imposed by the Commissioner of Banks or a court of competent jurisdiction shall be subject to the same terms, conditions, or affirmative duties for any similar license issued under G.S. 53-244.060 or renewed under G.S. 53-244.101, as enacted by Section 2 of this act.

"(6) Nothing in this act shall adversely affect the Commissioner of Banks' ability to bring and maintain any action or pursue any remedy that the Commissioner could have brought under Article 19A of Chapter 53 of the General Statutes, as repealed by Section 1 of this act, against any person for any acts or omissions in violation of Article 19A occurring on or before July 30, 2009."

§ 53-244.104. Minimum net worth requirements.

(a) A minimum net worth shall be continuously maintained for licensees in accordance with this section. In the event that the mortgage loan originator is an employee or exclusive agent of a person subject to this Article, the net worth of the person subject to this Article can be used in lieu of the mortgage loan originator's minimum net worth requirement. The minimum net worth to be maintained for each license is as follows:

(1) If the licensee is a mortgage lender, it shall maintain a net worth of at least one hundred thousand dollars ($100,000), including evidence of liquidity of one million dollars ($1,000,000), which may include a warehouse line of credit of one million dollars ($1,000,000) or other evidence of funding capacity to conduct mortgage originations as documented by an unqualified audited statement of financial condition.

(2) If the licensee is a mortgage servicer, it shall maintain a net worth of at least one hundred thousand dollars ($100,000), not including monies in any escrow accounts held for others.

(3) If the licensee is a mortgage broker, it shall maintain a net worth of at least twenty-five thousand dollars ($25,000), including evidence of liquidity of ten thousand dollars ($10,000), as certified by the licensee in a certified statement of financial condition.

(b) The Commissioner may adopt rules to require additional minimum net worth or otherwise amend net worth requirements as are necessary to ensure licensees maintain adequate financial responsibility and accomplish the purposes of this Article. (2009-374, s. 2.)

§ 53-244.105. Records, addresses, escrow funds, or trust accounts.

(a) Every licensee shall make and keep the accounts, correspondence, memoranda, papers, books, and other records as prescribed in rules adopted by the Commissioner. All records shall be preserved for three years unless the Commissioner, by rule, prescribes otherwise for particular types of records.

(b) No person shall make any false statement or knowingly and willfully make any omission of a material fact in connection with any information or reports filed with the Commissioner, a governmental agency, or the Nationwide Mortgage Licensing System and Registry or in connection with any oral or written communication with the Commissioner or another governmental agency. If the information contained in any document filed with the Commissioner or the Nationwide Mortgage Licensing System and Registry is or becomes inaccurate or incomplete in any material respect, the licensee or exempt entity shall within 30 days file a correcting amendment to the information contained in the document.

(c) Each mortgage broker licensee shall maintain and transact business from a principal place of business in this State. The Commissioner may, by rule, impose terms and conditions under which the records and files of a mortgage lender or mortgage servicer may be maintained outside of this State. A principal place of business shall not be located at an individual's home or residence. A mortgage lender, mortgage broker, or mortgage servicer licensee shall maintain a record of the principal place of business with the Commissioner and report any change of address of the principal place of business or any branch office within 15 days after the change.

(d) A licensee shall maintain in a segregated escrow fund or trust account any funds which come into the licensee's possession but which are not the licensee's property and which the licensee is not entitled to retain under the circumstances. The escrow fund or trust account shall be held on deposit in a federally insured financial institution. Individual loan applicants' or borrowers' accounts may be aggregated into a common trust fund so long as (i) interests in the common fund can be individually tracked and accounted for and (ii) the common fund is kept separate from and is not commingled with the licensee's own funds. (2009-374, s. 2.)

§ 53-244.106. Display of license.

Each mortgage broker or mortgage lender licensed under this Article shall display, in plain public view, the certificate of licensure issued by the Commissioner in its principal office and in each branch office. Each mortgage loan originator licensed under this Article shall display, in plain public view, in each branch office in which the individual acts as a mortgage loan originator the certificate of licensure issued by the Commissioner. (2009-374, s. 2.)

§ 53-244.107. Unique identifier shown.

The unique identifier of any mortgage loan originator or other person engaged in the mortgage business as defined in G.S. 53-244.030(11) shall be clearly shown on all residential mortgage loan application forms, solicitations, advertisements, including business cards or Web sites, and any other documents as established by rule or order of the Commissioner. (2009-374, s. 2.)

§ 53-244.108. Reports.

Each mortgage lender, mortgage broker, or mortgage servicer licensee shall submit to the Commissioner and to the Nationwide Mortgage Licensing System and Registry reports of condition and any other reports requested by the Commissioner pursuant to G.S. 53-244.115(d). The reports shall be in the form and shall contain any information that the Commissioner or Nationwide Mortgage Licensing System and Registry may require. (2009-374, s. 2.)

§ 53-244.109. Mortgage broker duties.

Any mortgage broker engaged in the mortgage business as defined by G.S. 53-244.030(11)a., in addition to duties imposed by other statutes or at common law, shall do all of the following:

(1) Safeguard and account for any money handled for the borrower.
(2) Follow reasonable and lawful instructions from the borrower.

(3) Act with reasonable skill, care, and diligence.
(4) Make reasonable efforts to secure a loan that is reasonably advantageous to the borrower considering all the circumstances, including the rates, charges, and repayment terms of the loan.
(5) Timely and clearly disclose to the borrower material information that may be expected to influence the borrower's decision and is reasonably accessible to the mortgage broker, including the total compensation the mortgage broker expects to receive from any and all sources in connection with each loan option presented to the borrower.
(6) Notify before closing each lender of the particulars of each of the other lender's loans if the mortgage broker knows that more than one mortgage loan will be made by different lenders contemporaneously to a borrower.
(7) Ensure that any services offered to any applicant shall be available and offered to all similarly situated applicants on an equal basis.
(8) In transactions where the mortgage broker has the ability to make credit decisions, use reasonable means to provide the borrower with prompt credit decisions on its loan applications and, where the credit is denied, to comply fully with the notification requirements of applicable State and federal law.
(9) Ensure that advertising materials are designed to make customers and potential customers aware that the mortgage broker does not discriminate on any prohibited basis.
(10) Represent the borrower's best interest in the course of brokering a mortgage loan.
(11) Have a duty of loyalty to the borrower, which shall include a duty not to compromise a borrower's right or interest in favor of another's right or interest, including a right or interest of the mortgage broker. (2009-374, s. 2.)

§ 53-244.110. Mortgage servicer duties.

Any mortgage servicer engaged in the mortgage business as defined by G.S. 53-244.030(11)c., in addition to duties imposed by other statutes or at common law, shall do all of the following:
(1) Safeguard and account for any money handled for the borrower.
(2) Follow reasonable and lawful instructions from the borrower.
(3) Act with reasonable skill, care, and diligence.
(4) File with the Commissioner a complete, current schedule of the ranges of costs and fees it charges borrowers for its servicing-related activities with its application and renewal and with its supplemental filings made from time to time.
(5) File with the Commissioner upon request a report in a form and format acceptable to the Commissioner detailing the servicer's activities in this State, including:
  a. The number of mortgage loans the servicer is servicing.
  b. The type and characteristics of the loans in this State.
  c. The number of serviced loans in default, along with a breakdown of 30-, 60-, and 90-day delinquencies.
  d. Information on loss mitigation activities, including details on workout arrangements undertaken.
  e. Information on foreclosures commenced in this State.
(6) At the time a servicer accepts assignment of servicing rights for a mortgage loan, the servicer shall disclose to the borrower all of the following:
  a. Any notice required by RESPA or by regulations promulgated thereunder.

b. A schedule of the ranges and categories of its costs and fees for its servicing-related activities, which shall comply with North Carolina law and which shall not exceed those reported to the Commissioner.
c. A notice in a form and content acceptable to the Commissioner that the servicer is licensed by the Commissioner and that complaints about the servicer may be submitted to the Commissioner.
d. Any notice required by Article 2A, 4, or 10 of Chapter 45 of the General Statutes.

(7) In the event of a delinquency or other act of default on the part of the borrower, the mortgage servicer shall act in good faith to inform the borrower of the facts concerning the loan and the nature and extent of the delinquency or default and, if the borrower replies, to negotiate with the borrower, subject to the mortgage servicer's duties and obligations under the mortgage servicing contract, if any, to attempt a resolution or workout to the delinquency. (2009-374, s. 2.)

§ 53-244.111. Prohibited acts.

In addition to the activities prohibited under other provisions of this Article, it shall be unlawful for any person in the course of any residential mortgage loan transaction:

(1) To misrepresent or conceal the material facts or make false promises likely to influence, persuade, or induce an applicant for a mortgage loan or a mortgagor to take a mortgage loan, or to pursue a course of misrepresentation through agents or otherwise.
(2) To improperly refuse to issue a satisfaction of a mortgage.
(3) To fail to account for or to deliver to any person any funds, documents, or other thing of value obtained in connection with a mortgage loan, including money provided by a borrower for a real estate appraisal or a credit report, which the mortgage lender, mortgage broker, mortgage servicer, or mortgage loan originator is not entitled to retain under the circumstances.
(4) To pay, receive, or collect in whole or in part any commission, fee, or other compensation for brokering or servicing a mortgage loan in violation of this Article, including a mortgage loan brokered or serviced by any unlicensed person other than an exempt person.
(5) To charge or collect any fee or rate of interest or to make or broker or service any mortgage loan with terms or conditions or in a manner contrary to the provisions of Chapter 24, 45, or 54 of the General Statutes.
(6) To advertise mortgage loans, including rates, margins, discounts, points, fees, commissions, or other material information, including material limitations on the loans, unless the person is able to make the mortgage loans available to a reasonable number of qualified applicants.
(7) To fail to disburse funds in accordance with a written commitment or agreement to make a mortgage loan.
(8) To engage in any transaction, practice, or course of business that is not in good faith or fair dealing or that constitutes a fraud upon any person in connection with the brokering or making or servicing of, or purchase or sale of, any mortgage loan.
(9) To fail to pay promptly when due reasonable fees to a licensed appraiser for appraisal services that are:
a. Requested from the appraiser in writing by the mortgage broker or mortgage lender or an employee of the mortgage broker or mortgage lender; and

b. Performed by the appraiser in connection with the origination or closing of a mortgage loan for a customer or the mortgage broker or mortgage lender.

(10) To broker a mortgage loan that contains a prepayment penalty if the principal amount of the loan is one hundred fifty thousand dollars ($150,000) or less or if the loan is a rate spread home loan as defined in G.S. 24-1.1F.

(11) To improperly influence or attempt to improperly influence the development, reporting, result, or review of a real estate appraisal sought in connection with a mortgage loan. Nothing in this subdivision shall be construed to prohibit a mortgage lender, mortgage broker, or mortgage servicer from asking the appraiser to do one or more of the following:

a. Consider additional appropriate property information.

b. Provide further detail, substantiation, or explanation for the appraiser's value conclusion.

c. Correct errors in the appraisal report.

(12) To fail to comply with the mortgage loan servicing transfer, escrow account administration, or borrower inquiry response requirements imposed by sections 6 and 10 of RESPA and regulations adopted thereunder.

(13) To broker a rate spread adjustable rate mortgage loan without disclosing to the borrower the terms and costs associated with a fixed rate loan from the same lender at the lowest annual percentage rate for which the borrower qualifies.

(14) To fail to comply with applicable State and federal laws and regulations related to mortgage lending or mortgage servicing.

(15) To engage in unfair, misleading, or deceptive advertising related to a solicitation for a mortgage loan.

(16) In connection with the brokering or making of a rate spread home loan as defined under G.S. 24-1.1F, no lender shall provide nor shall any broker receive any compensation that changes based on the terms of the loan. This subdivision shall not prohibit compensation based on the principal balance of the loan.

(17) For a mortgage servicer to fail to comply with the mortgage servicer's obligations under Article 10 of Chapter 45 of the General Statutes.

(18) For a mortgage servicer to fail to provide written notice to a borrower upon taking action to place hazard, homeowner's, or flood insurance on the mortgaged property or to place such insurance when the mortgage servicer knows or has reason to know that the insurance is in effect.

(19) For a mortgage servicer to place hazard, homeowner's, or flood insurance on a mortgaged property for an amount that exceeds either the value of the insurable improvements or the last known coverage amount of insurance.

(20) For a mortgage servicer to fail to provide to the borrower a refund of unearned premiums paid by a borrower or charged to the borrower for hazard, homeowner's, or flood insurance placed by a mortgage lender or mortgage servicer if the borrower provides reasonable proof that the borrower has obtained coverage such that the forced placement is no longer necessary and the property is insured. If the borrower provides reasonable proof within 12 months of the placement that no lapse in coverage occurred such that the forced placement was not necessary, the mortgage servicer shall refund the entire premium.

(21) For a mortgage servicer to refuse to reinstate a delinquent loan upon a tender of payment made timely under the contract which is

sufficient in amount, based upon the last written statement received by the borrower, to pay all past due amounts, outstanding or overdue charges, and restore the loan to a nondelinquent status, but this reinstatement shall be available to a borrower no more than twice in any 24-month period.

(22) For a person acting as a mortgage servicer to fail to mail, at least 45 days before foreclosure is initiated, a notice addressed to the borrower at the borrower's last known address with the following information:
  a. An itemization of all past due amounts causing the loan to be in default.
  b. An itemization of any other charges that must be paid in order to bring the loan current.
  c. A statement that the borrower may have options available other than foreclosure and that the borrower may discuss the options with the mortgage lender, the mortgage servicer, or a counselor approved by the U.S. Department of Housing and Urban Development (HUD).
  d. The address, telephone number, and other contact information for the mortgage lender, the mortgage servicer, or the agent for either of them who is authorized to attempt to work with the borrower to avoid foreclosure.
  e. The name, address, telephone number, and other contact information for one or more HUD-approved counseling agencies operating to assist borrowers in North Carolina to avoid foreclosure.
  f. The address, telephone number, and other contact information for the consumer complaint section of the Office of the Commissioner of Banks.

(23) To fail to make all payments from any escrow account held for the borrower for insurance, taxes, and other charges with respect to the property in a timely manner so as to ensure that no late penalties are assessed or other negative consequences result regardless of whether the loan is delinquent, unless there are not sufficient funds in the account to cover the payments and the mortgage servicer has a reasonable basis to believe that recovery of the funds will not be possible. (2009-374, s. 2.)

§ 53-244.112. Criminal penalties for unlicensed activity.

Engaging in the mortgage business as defined by G.S. 53-244.030(11) or acting as a mortgage loan originator without a license as required by the provisions of G.S. 53-244.040 is a Class 3 misdemeanor. Each transaction involving unlicensed activity is a separate offense. (2009-374, s. 2.)

§ 53-244.113. Regulatory authority.

(a) Unless otherwise provided, all actions, hearings, and procedures under this Article shall be governed by Article 3A of Chapter 150B of the General Statutes.

(b) For purposes of this Article, the Commissioner shall be deemed to have complied with the requirements of law concerning service of process upon mailing by certified mail any notice required or permitted to a licensee under this Article, postage prepaid and addressed to the last known address of the licensee on file with the Commissioner pursuant to G.S. 53-244.105(c).

(c) Upon the issuance of any summary order permitted under this Article, including summary suspensions and cease and desist orders, the Commissioner shall promptly notify the person subject to the order that the order has been entered and the reasons for the order. Within 20 days of receiving notice of the order, the person subject to the order may request in writing a hearing before the Commissioner. Upon receipt of such a request, the Commissioner shall calendar a hearing within 15 days. If a licensee does not request a hearing, the order will remain in effect unless it is modified or vacated by the Commissioner. (2009-374, s. 2.)

§ 53-244.114. Licensure authority.

(a) The Commissioner may, by order, deny, suspend, revoke, or refuse to issue or renew a license of a licensee or applicant under this Article, or may restrict or limit the manner in which a licensee, applicant, or any person who owns an interest in or participates in the business of a licensee engages in the mortgage business, if the Commissioner finds both of the following:

(1) That the order is in the public interest; and

(2) That any of the following circumstances apply to the applicant, licensee, or any partner, member, manager, officer, director, loan officer, limited loan officer, qualifying individual, or any person occupying a similar status or performing similar functions or any person directly or indirectly controlling the applicant or licensee. The person:

a. Has filed an application for licensure, report, or other document to the Commissioner that, as of its effective date or as of any date after filing, contained any statement that, in light of the circumstances under which it was made, is false or misleading with respect to any material fact;

b. Has violated or failed to comply with any provision of this Article, rule adopted by the Commissioner, or order of the Commissioner;

c. Is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the mortgage business;

d. Is the subject of an order of the Commissioner denying or suspending that person's license as a mortgage loan originator, mortgage broker, mortgage lender, or mortgage servicer;

e. Is the subject of an order entered within the past five years by the authority of any state with jurisdiction over that state's mortgage brokerage, mortgage lending, or mortgage servicing industry denying that person's license as a mortgage loan originator, mortgage broker, mortgage lender, or mortgage servicer;

f. Fails at any time to meet the requirements of G.S. 53-244.060, 53-244.070, 53-244.080, 53-244.090, 53-244.100, 53-244.103, or 53-244.104;

g. Controls or has controlled any mortgage broker, mortgage lender, or mortgage servicer who has been subject to an order or injunction described in sub-subdivision c., d., or e. of this subdivision;

h. Has been the qualifying individual, branch manager, or mortgage loan originator of a licensee who had knowledge of or reasonably should have had knowledge of, or participated in, any activity that resulted in the entry of an order under this Article suspending or withdrawing the license of a licensee;

i. Has failed to respond to inquiries from the Commissioner or the Commissioner's designee regarding any complaints filed against the licensee which allege or appear to involve violation of this Article or any law or rule affecting the mortgage lending business; or

j. Has failed to respond to and cooperate fully with notices from the Commissioner or the Commissioner's designee relating to the scheduling and conducting of an examination or investigation under this Article.

(b) In the event the Commissioner has reason to believe that a licensee, individual, or person subject to this Article may have violated or failed to comply with any provision of this Article, the Commissioner may:

(1) Summarily order the licensee, individual, or person to cease and desist from any harmful activities or violations of this Article; or

(2) Summarily suspend the license of the licensee under this Article.

These summary powers are in addition to the summary suspension procedures authorized by G.S. 150B-3(c). (2009-374, s. 2.)

§ 53-244.115. Investigation and examination authority.

(a) For purposes of initial licensing, license renewal, suspension, conditioning, revocation, or termination, or general or specific inquiry, investigation, or examination to determine compliance with this Article, the Commissioner may, at the expense of the applicant or licensee, access, receive, and use any books, accounts, records, files, documents, information, or evidence, including:

(1) Criminal, civil, and administrative history information, including nonconviction data;

(2) Personal history and experience information, including independent credit reports obtained from a consumer reporting agency described in section 603(p) of the Fair Credit Reporting Act; and

(3) Any other documents, information, or evidence the Commissioner deems relevant to the inquiry, investigation, or examination regardless of the location, possession, control, or custody of the documents, information, or evidence.

(b) For purposes of investigating violations or complaints arising under this Article, or for the purposes of examination, the Commissioner may review, investigate, or examine any licensee, individual, or person subject to this Article as often as necessary in order to carry out the purposes of this Article. The Commissioner may interview the officer, principals, person with control, qualified individual, mortgage loan originators, employees, independent contractors, agents, and customers of the licensee, individual, or person concerning their business. The Commissioner may direct, subpoena, or order the attendance of and examine under oath all persons whose testimony may be required about the loans or the business or subject matter of any examination or investigation and may direct, subpoena, or order the person to produce books, accounts, records, files, and any other documents the Commissioner deems relevant to the inquiry. The reasonable cost of the investigation or examination shall be charged against the licensee, individual, or person subject to this Article.

(c) Each licensee, individual, or person subject to this Article shall make available to the Commissioner upon request the books and records relating to the operations of the licensee, individual, or person. No licensee, individual, or person subject to investigation or examination under this section may knowingly withhold, abstract, remove, mutilate, destroy, or secrete any books, records, computer records, or other information. Each licensee, individual, or person subject to this Article shall also make available for interview by the Commissioner the officers, principals, persons with control, qualified individuals, mortgage loan originators, employees, independent contractors, agents, and customers of the licensee, individual, or person concerning their business.

(d) Each licensee, individual, or person subject to this Article shall make or compile such reports or prepare other information as may be directed or requested by the Commissioner in order to carry out the purposes of this section, including:

(1) Accounting compilations;
(2) Information lists and data concerning loan transactions in a format prescribed by the Commissioner;
(3) Periodic reports, including:
  a. Annual Report Questionnaire,
  b. Servicer Activity Report,
  c. Servicer Schedule of the Ranges of Costs and Fees,
  d. Lender/Servicer Audited Statements of Financial Condition,
  e. Broker Certified Statements of Financial Condition, and
  f. Quarterly Loan Origination Reports.
(4) Any other information deemed necessary to carry out the purposes of this section.

(e) In making any examination or investigation authorized by this Article, the Commissioner may control access to any documents and records of the licensee or person under examination or investigation. The Commissioner may take possession of the documents and records or place a person in exclusive charge of the documents and records in the place where they are usually kept. During the period of control, no individual or person shall remove or attempt to remove any of the documents and records except pursuant to a court order or with the consent of the Commissioner. Unless the Commissioner has reasonable grounds to believe the documents or records of the licensee have been or are at risk of being altered or destroyed for purposes of concealing a violation of this Article, the licensee or owner of the documents and records shall have access to the documents or records as necessary to conduct its ordinary business.

(f) In order to carry out the purposes of this section, the Commissioner may:

(1) Retain attorneys, accountants, or other professionals and specialists as examiners, auditors, or investigators to conduct or assist in the conduct of examinations or investigations;
(2) Enter into agreements or relationships with other government officials or regulatory associations in order to improve efficiencies and reduce regulatory burden by sharing resources, standardized or uniform methods or procedures, documents, records, information, or evidence obtained under this section;
(3) Use, hire, contract, or employ public or privately available analytical systems, methods, or software to examine or investigate the licensee, individual, or person subject to this Article;
(4) Accept and rely on examination or investigation reports made by other government officials, within or without this State; or
(5) Accept audit reports made by an independent certified public accountant for the licensee, individual, or person in the course of that part of the examination covering the same general subject matter as the audit and may incorporate the audit report in the report of the examination, report of investigation, or other writing of the Commissioner.

(g) In addition to the authority granted by G.S. 53-244.113 and G.S. 53-244.115, the Commissioner is authorized to take action, including summary suspension of the license, if the licensee fails, within 20 days or a lesser time if specifically requested for good cause, to:

(1) Respond to inquiries from the Commissioner or the Commissioner's designee regarding any complaints filed against the licensee that allege or appear to involve violation of this Article or any law or rule affecting the mortgage lending business;
(2) Respond to and cooperate fully with notices from the Commissioner or the Commissioner's designee relating to the scheduling and conducting of an examination or investigation under this Article; or

(3) Consent to a criminal history record check. The refusal shall constitute grounds for the Commissioner to deny licensure to the applicant as well as to any entity:
  a. By whom or by which the applicant is employed,
  b. Over which the applicant has control, or
  c. As to which the applicant is the current or proposed qualifying individual or a current or proposed branch manager.

(h) The authority of this section shall remain in effect, whether a licensee, individual, or person subject to this Article acts or claims to act under any licensing law of the State, or claims to act without such authority. (2009-374, s. 2.)

§ 53-244.116. Disciplinary authority.

(a) The Commissioner may, by order:

(1) Take any action authorized under G.S. 53-244.113.

(2) Impose a civil penalty upon a licensee, individual, or person subject to this Article, or upon any partner, officer, director, or other person occupying a similar status or performing similar functions on behalf of a licensee or other person subject to this Article for any violation of or failure to comply with this Article. The civil penalty shall not exceed twenty-five thousand dollars ($25,000) for each violation of or failure to comply with this Article. Each violation of or failure to comply with this Article shall be a separate and distinct violation.

(3) Impose a civil penalty upon a licensee, individual, or person subject to this Article, or upon any partner, officer, director, or other person occupying a similar status or performing similar functions on behalf of a licensee or other person subject to this Article for any violation of or failure to comply with any directive or order of the Commissioner. The civil penalty shall not exceed twenty-five thousand dollars ($25,000) for each violation of or failure to comply with any directive or order of the Commissioner. Each violation of or failure to comply with any directive or order of the Commissioner shall be a separate and distinct violation.

(4) Require a licensee, individual, or person subject to this Article to disgorge and pay to a borrower or other individual any amounts received by the licensee, individual, or person subject to the Article, including any employee of the person, to the extent that the amounts were collected in violation of Chapter 24 of the General Statutes or in excess of those allowed by law.

(5) Prohibit licensees under this Article from engaging in acts and practices in connection with residential mortgage loans that the Commissioner finds to be unfair, deceptive, designed to evade the laws of this State, or that are not in the best interest of the borrowing public.

(b) When a licensee is accused of any act, omission, or misconduct that would subject the licensee to disciplinary action, the licensee, with the consent and approval of the Commissioner, may surrender the license and all the rights and privileges pertaining to it. A person who surrenders a license shall not be eligible for or submit any application for licensure under this Article.

(c) The requirements of this Article apply to any person who seeks to avoid its application by any device, subterfuge, or pretense whatsoever, including structuring a loan in a manner to avoid classification of the loan as a residential mortgage loan. (2009-374, s. 2.)

§ 53-244.117. Foreclosure suspension.

In the event the Commissioner shall have evidence that a material violation of law has occurred in the origination or servicing of a loan then being foreclosed or then delinquent and in threat of foreclosure, and that the putative violation would be sufficient in law or equity to base a claim or affirmative defense that would affect the validity or enforceability of the underlying contract or the right to foreclose, then the Commissioner may notify the clerk of superior court, and the clerk shall suspend foreclosure proceedings on the mortgage for 60 days from the date of the notice. In the event that the Commissioner notifies the clerk, the Commissioner shall also notify the servicer, if known, and provide an opportunity to cure the violation or provide information to the Commissioner to rebut the evidence of the suspected violation. If the violation is cured or the information satisfies the Commissioner that no material violation has occurred, the Commissioner shall notify the clerk so that the foreclosure proceeding may be resumed. The authority granted to the Commissioner in this section is in addition to any powers or authority granted to the Commissioner under Chapter 45 of the General Statutes. (2009-374, s. 2.)

§ 53-244.118. Rule-making authority; records.

(a) The Commissioner may adopt any rules that the Commissioner deems necessary to carry out the provisions of this Article, to provide for the protection of the borrowing public, to prohibit unfair or deceptive practices, to instruct mortgage lenders, mortgage brokers, mortgage servicers, or mortgage loan originators in interpreting this Article, and to implement and interpret the provisions of G.S. 24-1.1E, 24-1.1F, and 24-10.2 as they apply to licensees under this Article.

(b) The Commissioner shall keep a list of all applicants for licensure under this Article or claimants of exempt status under G.S. 53-244.050(g) that includes the date of application, name, place of residence, and whether the license or claim of exempt status was granted or denied.

(c) The Commissioner shall keep a current roster showing the names and places of business of all licensees that shows their respective mortgage loan originators and a roster of exempt persons required to file a notice under G.S. 53-244.050(g). The roster shall:

(1) Be kept on file in the office of the Commissioner;
(2) Contain information regarding all orders or other actions taken against the licensees and other persons; and
(3) Be open to public inspection. (2009-374, s. 2.)

§ 53-244.119. Commissioner's participation in nationwide registry.

(a) The Commissioner shall require mortgage loan originators to be licensed and registered through the Nationwide Mortgage Licensing System and Registry. In order to carry out this requirement, the Commissioner is authorized to participate in the Nationwide Mortgage Licensing System and Registry. For this purpose, the Commissioner may establish by rule any requirements as necessary, including:

(1) Background checks for:
    a. Criminal history through fingerprint or other databases;
    b. Civil or administrative records;
    c. Credit history; or
    d. Any other information as deemed necessary by the Nationwide Mortgage Licensing System and Registry.

(2) The payment of fees to apply for, renew, or amend licenses through the Nationwide Mortgage Licensing System and Registry;

(3) The setting or resetting as necessary of renewal or reporting dates; and

(4) Requirements for amending or surrendering a license or any other activities as the Commissioner deems necessary for participation in the Nationwide Mortgage Licensing System and Registry.

(b) The Commissioner is authorized to establish relationships or contracts with the Nationwide Mortgage Licensing System and Registry or other entities designated by the Nationwide Mortgage Licensing System and Registry to collect and maintain records and process transaction fees or other fees related to licensees or other persons subject to this Article.

(c) For the purpose of participating in the Nationwide Mortgage Licensing System and Registry, the Commissioner is authorized to waive or modify, in whole or in part, any or all of the requirements of this Article and to establish new requirements as reasonably necessary to participate in the Nationwide Mortgage Licensing System and Registry.

(d) The Commissioner is authorized to enter into agreements to license the use of the proprietary software owned by the Office of the Commissioner of Banks to banking, mortgage, or financial services supervisory agencies of other states. (2009-374, s. 2.)

§ 53-244.120. Confidentiality of information.

(a) Notwithstanding any State law to the contrary, the Commissioner shall report enforcement actions under this Article and may report other relevant information to the Nationwide Mortgage Licensing System and Registry.

(b) The Commissioner is authorized to enter agreements or sharing arrangements with other governmental agencies, the Conference of State Bank Supervisors, the American Association of Residential Mortgage Regulators, or other associations representing governmental agencies and may share otherwise confidential information pursuant to these written agreements.

(c) The requirements of G.S. 53-99(b) regarding the privacy or confidentiality of any information or material provided under subsections (a) and (b) of this section, and any privilege arising under any other federal or State law with respect to such information or material, shall continue to apply to the information or material after it has been disclosed to an entity described in subsection (a) or (b) of this section. Information or material held by such an entity shall not be subject to disclosure under any State law governing the disclosure to the public of information held by an officer or agency of the State. The entities described in subsections (a) and (b) of this section may share information and material with all State and federal regulatory officials with mortgage industry oversight authority without the loss of privilege or the loss of confidentiality protections provided by State or federal law.

(d) Any provision of Chapter 132 of the General Statutes relating to the disclosure of confidential supervisory information or of any information or material described in subsection (a) of this section that is inconsistent with this section shall be superseded by the requirements of this section.

(e) The confidentiality provisions contained in subsection (c) of this section shall not apply with respect to the information or material relating to the employment history of and publicly adjudicated disciplinary and enforcement actions against mortgage lenders, mortgage brokers, mortgage servicers, or mortgage loan originators that are included in the Nationwide Mortgage Licensing System and Registry for access by the public. (2009-374, s. 2.)

§ 53-244.121. Review by Banking Commission.

The Banking Commission may review any rule, regulation, order, or act of the Commissioner made pursuant to or with respect to the provisions of this Article, and any person aggrieved by any rule, regulation, order, or act may, pursuant to G.S. 53-92(d), appeal to the Banking Commission for review upon giving 20 days' written notice after the rule, regulation, order, or act is adopted or issued. The notice of appeal shall specifically state the grounds for appeal and, in the case of an appeal from a contested case proceeding before the Commissioner, shall set forth in numbered order the assignments of error for review by the Banking Commission. Failure to specify the assignments of error shall constitute grounds to dismiss the appeal. Failure to comply with the briefing schedule as provided by the Banking Commission shall also constitute grounds to dismiss the appeal. Notwithstanding any other provision of law, any party aggrieved by a decision of the Banking Commission shall be entitled to an appeal pursuant to G.S. 53-92(d). (2009-374, s. 2.)

Article 20.

Refund Anticipation Loan Act.

§ 53-245. Title and scope.

(a) Title. This Article shall be known and cited as the "Refund Anticipation Loan Act".

(b) Scope. No person may individually or in conjunction or cooperation with another person process, receive, or accept for delivery an application for a refund anticipation loan or a check in payment of refund anticipation loan proceeds or in any other manner facilitate the making of a refund anticipation loan unless the person has complied with the provisions of this Article. In addition, G.S. 143B-426.40A prohibits refund anticipation loans repaid from refunds of North Carolina tax. (1989 (Reg. Sess., 1990), c. 881, s. 2; 2006-66, s. 6.19(a); 2006-203, s. 17; 2006-221, s. 3A; 2006-259 s. 40(a).)

Editor's Note. — Session Laws 2006-66, s. 6.19(a), as added by Session Laws 2006-221, s. 3A, substituted G.S. 143B-426.39D for G.S. 143B-426.39A, which had been substituted for "G.S. 143-3.3" by Session Laws 2006-203, s. 17. The reference to G.S. 143B-426.39D has been changed to G.S. 143B-426.40A at the direction of the Revisor of Statutes.

Session Laws 2006-203, s. 126, provides that "This act becomes effective July 1, 2007, and applies to the budget for the 2007-2009 biennium and each subsequent biennium thereafter. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

Constitutionality. — This Act does not violate either the Supremacy Clause or the Commerce Clause of the United States Constitution. North Carolina Ass'n of Elec. Tax Filers, Inc. v. Graham, 333 N.C. 555, 429 S.E.2d 544, cert. denied, 510 U.S. 946, 114 S. Ct. 388, 126 L. Ed. 2d 336 (1993).

§ 53-246. Definitions.

The following definitions apply in this Article:

(1) Applicant. A person who applies for registration as a facilitator of refund anticipation loans.

(2) Commission. The State Banking Commission.

(3) Commissioner. The Commissioner of Banks.
(4) Creditor. A person who makes a refund anticipation loan.
(5) Debtor. A person who receives the proceeds of a refund anticipation loan.
(6) Facilitator. A person who individually or in conjunction or cooperation with another person processes, receives, or accepts for delivery an application for a refund anticipation loan or a check in payment of refund anticipation loan proceeds or in any other manner facilitates the making of a refund anticipation loan.
(7) Person. An individual, a firm, a partnership, an association, a corporation, or another entity.
(8) Refund anticipation loan. A loan that the creditor arranges to be repaid directly from the proceeds of the debtor's income tax refund.
(9) Refund anticipation loan fee. The charges, fees, or other consideration charged or imposed by the creditor or facilitator for the making of a refund anticipation loan. This term does not include any charge, fee, or other consideration usually charged or imposed by the facilitator in the ordinary course of business for nonloan services, such as fees for tax return preparation and fees for electronic filing of tax returns.
(10) Registrant. A person who is registered as a facilitator of refund anticipation loans under this Article. (1989 (Reg. Sess., 1990), c. 881, s. 2.)

§ 53-247. Registration requirement.

(a) Registration Requirement. No person may individually or in conjunction or cooperation with another person process, receive, or accept for delivery an application for a refund anticipation loan or a check in payment of refund anticipation loan proceeds without first being registered with the Commissioner in accordance with the registration procedure provided in this Article.

(b) Criminal Penalty. Violation of this section is a Class 2 misdemeanor, which may include a fine of up to two thousand dollars ($2,000).

(c) Exemption. This section does not apply to a person doing business as a bank, savings association, or credit union, under the laws of this State or the United States. (1989 (Reg. Sess., 1990), c. 881, s. 2; 1993, c. 539, s. 427; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 53-248. Registration procedure; informal hearing.

(a) Initial Registration. An application to become registered as a facilitator shall be in writing, under oath, and in a form prescribed by the Commissioner. The application shall contain all information prescribed by the Commissioner. Each application for registration shall be accompanied by a fee, payable to the Commissioner, of two hundred fifty dollars ($250.00) for each office where the registrant intends to facilitate refund anticipation loans.

Upon the filing of an application for registration, if the Commissioner finds that the responsibility and general fitness of the applicant are such as to command the confidence of the community and to warrant belief that the business of facilitating refund anticipation loans will be operated within the purposes of this Article, the Commissioner shall register the applicant as a facilitator of refund anticipation loans and shall issue and transmit to the applicant a certificate attesting to the registration. If the Commissioner does not so find, he shall not register the applicant and shall notify the applicant of the reasons for the denial.

Upon receipt of a certificate of registration, the applicant is registered under this Article and may engage in the business of facilitating refund anticipation loans at the offices identified on the application for registration.

(b) Renewal. Each registration as a facilitator of refund anticipation loans shall expire on December 31 following the date it was issued, unless it is renewed for the succeeding year. Before the registration expires, the registrant may renew the registration by filing with the Commissioner an application for renewal in the form and containing all information prescribed by the Commissioner. Each application for renewal of registration shall be accompanied by a fee of one hundred dollars ($100.00) for each office where the registrant intends to facilitate refund anticipation loans during the succeeding year.

Upon the filing of an application for renewal of registration under this Article, the Commissioner shall renew the registration unless the Commissioner determines that the fitness of the registrant or the operations of the registrant would not support registration of the registrant under subsection (a). If the Commissioner makes such a determination, he shall so notify the registrant, stating the reasons for the determination.

(c) Display of Certificate. Each registrant shall prominently display a certificate issued under this Article in each place of business in the State where the registrant facilitates the making of refund anticipation loans.

(d) Within five days of receipt of the Commissioner's notice, as required by subsections (a) and (b) of this section, the applicant may make written demand of the Commissioner for a hearing. The hearing before the Commissioner shall be an informal hearing and shall be held with reasonable promptness. (1989 (Reg. Sess., 1990), c. 881, s. 2; 1995, c. 129, s. 39.)

§ 53-249. Filing and posting of loan fees; disclosures.

(a) Filing of Fee Schedule. On or before January 2 of each year, each registrant shall file with the Commissioner a schedule of the refund anticipation loan fees for refund anticipation loans to be facilitated by the registrant during the succeeding year. Immediately upon learning of any change in the refund anticipation loan fee for that year, the registrant shall file an amendment with the Commissioner setting out the change. Filing is effective upon receipt by the Commissioner.

(b) Notice of Unconscionable Fee. If the Commissioner finds that a refund anticipation loan fee filed pursuant to subsection (a) is unconscionable, he shall notify the registrant that (i) in his opinion the fee is unconscionable and (ii) the consequences of charging a refund anticipation loan fee in an amount that the Commissioner has notified the registrant is unconscionable include liability to the debtor for three times the amount of that fee and possible revocation of registration as a facilitator after notice and a hearing.

(c) Posting of Fee Schedule. Every registrant shall prominently display at each office where the registrant is facilitating refund anticipation loans a schedule showing the current refund anticipation loan fees for refund anticipation loans facilitated at the office and the current electronic filing fees for the electronic filing of the taxpayer's tax return. Every registrant shall also prominently display on each fee schedule a statement to the effect that the taxpayer may have the tax return filed electronically without also obtaining a refund anticipation loan. No registrant may facilitate a refund anticipation loan unless (i) the schedule required by this subsection is displayed and (ii) the refund anticipation loan fee actually charged is the same as the fee displayed on the schedule and the fee filed with the Commissioner pursuant to subsection (a).

(d) Disclosures. At the time a debtor applies for a refund anticipation loan, the registrant shall disclose to the debtor on a form separate from the application:

(1) The fee for the loan.

(2) The fee for electronic filing of a tax return.

(3) The time within which the proceeds of the loan will be paid to the debtor if the loan is approved.
(4) That the debtor is responsible for repayment of the loan and related fees in the event the tax refund is not paid or is not paid in full.
(5) The availability of electronic filing of the taxpayer's tax return, along with the average time announced by the appropriate taxing authority within which a taxpayer can expect to receive a refund if the taxpayer's return is filed electronically and the taxpayer does not obtain a refund anticipation loan.
(6) Examples of the annual percentage rates, as defined by the Truth In Lending Act, 15 U.S.C. § 1607 and 12 C.F.R. Section 226.22, for refund anticipation loans of five hundred dollars ($500.00), seven hundred fifty dollars ($750.00), one thousand dollars ($1,000), one thousand five hundred dollars ($1,500), two thousand dollars ($2,000), and three thousand dollars ($3,000). Regardless of disclosures of the annual percentage rate required by the Truth In Lending Act, if the debtor is required to establish or maintain a deposit account with the creditor for receipt of the debtor's tax refund to offset the amount owed on the loan, the maturity of the loan for the purpose of determining the annual percentage rate disclosure under this section shall be assumed to be the estimated date when the tax refund will be deposited in the debtor's account. (1989 (Reg. Sess., 1990), c. 881, s. 2.)

§ 53-250. Prohibited activities.

A facilitator of a refund anticipation loan may not engage in any of the following activities:

(1) Misrepresenting a material factor or condition of a refund anticipation loan.
(2) Failing to arrange for a refund anticipation loan promptly after the debtor applies for the loan.
(3) Engaging in any transaction, practice, or course of business that operates a fraud upon any person in connection with a refund anticipation loan.
(4) Facilitating a refund anticipation loan for which the refund anticipation loan fee is (i) different from the fee posted or the fee filed with the Commissioner or (ii) in an amount that the Commissioner has notified the facilitator is unconscionable.
(5) Directly or indirectly arranging for payment of any portion of the refund anticipation loan for check cashing, credit insurance, or any other good or service unrelated to (i) preparing and filing tax returns or (ii) facilitating refund anticipation loans.
(6) Arranging for a creditor to take a security interest in any property of the debtor other than the proceeds of the debtor's tax refund to secure payment of the loan. (1989 (Reg. Sess., 1990), c. 881, s. 2.)

§ 53-251. Cease and desist; revocation of registration; penalties.

(a) Cease and Desist Order. Upon the finding that any action of a registrant may be in violation of this Article or that the registrant has engaged in an unfair or deceptive act or practice, the Commissioner shall give reasonable notice to the registrant of the suspected violation or unfair or deceptive act or practice, and an opportunity for the registrant to be heard. If, following the hearing, the Commissioner finds that an action of the registrant is in violation of this Article or that the registrant has engaged in an unfair or deceptive act or practice, the Commissioner shall order the registrant to cease and desist from the action.

If the registrant fails to appeal a cease and desist order of the Commissioner in accordance with G.S. 53-252 and continues to engage in an action in violation of the Commissioner's order to cease and desist from the action, the registrant shall be subject to a penalty of one thousand dollars ($1,000) for each action it takes in violation of the Commissioner's order.

The clear proceeds of penalties provided for in this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Revocation of Registration. After notice and hearing, and upon the finding that a registrant has (i) engaged in a course of conduct that is in violation of this Article or (ii) continued to engage in an action in violation of a cease and desist order of the Commissioner that has not been stayed upon application of the registrant, the Commissioner may revoke the registration of the registrant temporarily or permanently in the discretion of the Commissioner.

(c) Civil Penalties. Except in the case of a refund anticipation loan that is not approved by the creditor, a facilitator who fails to deliver to the debtor the proceeds of a refund anticipation loan within 48 hours after the time period promised by the facilitator when the debtor applied for the loan shall pay to the debtor an amount equal to the refund anticipation loan fee. A facilitator who engages in an activity prohibited under G.S. 53-250 in connection with a refund anticipation loan is liable to the debtor for damages of three times the amount of the refund anticipation loan fee or other unauthorized charge plus a reasonable attorney's fee. (1989 (Reg. Sess., 1990), c. 881, s. 2; 1998-215, s. 35.)

§ 53-252. Appeal of Commissioner's decision.

The Commission may review any rule, regulation, order, or act of the Commissioner done pursuant to or with respect to the provisions of this Article. Any person aggrieved by any such rule, regulation, order, or act may appeal, pursuant to G.S. 53-92(d), to the Commission for review upon giving notice in writing within 20 days after such rule, regulation, order, or act complained of is adopted, issued, or done. Notwithstanding any other provision of law, any aggrieved party to a decision of the Banking Commission shall be entitled to petition for judicial review pursuant to G.S. 53-92(d). (1989 (Reg. Sess., 1990), c. 881, s. 2; 1995, c. 129, s. 40; 2009-57, s. 8.)

Effect of Amendments. — Session Laws 2009-57, s. 8, effective June 5, 2009, in the first sentence, substituted "may review" for "shall have full authority to review", and "Article. Any" for "Article; and any"; in the second sentence, inserted "pursuant to G.S. 53-92(d)"; and in the last sentence, substituted "petition for judicial review pursuant to G.S. 53-92(d)" for "an appeal pursuant to G.S. 53-92."

§ 53-253. Rules; enforcement.

The Banking Commission may adopt reasonable rules as necessary to effectuate the purpose of this Article, to provide for the protection of the borrowing public, and to assist registrants in interpreting this Article. In order to enforce this Article, the Commissioner may make investigations, subpoena witnesses, require audits and reports, and conduct hearings regarding possible violations of its provisions. (1989 (Reg. Sess., 1990), c. 881, s. 2; 1995, c. 129, s. 41.)

§ 53-254. Exemption.

This Article does not apply to a person who does not deal directly with debtors but who acts solely as an intermediary by processing or transmitting, electronically or otherwise, tax or credit information or by preparing for a facilitator refund anticipation loan checks to be delivered by the facilitator to the debtor. (1989 (Reg. Sess., 1990), c. 881, s. 2.)

ARTICLE 21.

Reverse Mortgages.

§ 53-255. Title.

This Article shall be known and may be cited as the Reverse Mortgage Act. (1991, c. 546, s. 1; 1995, c. 115, s. 1.)

CASE NOTES

Unfair and Deceptive Practices. — Lender was entitled to summary judgment in a borrower's action against it that alleged unfair and deceptive practices because, in part, there was no provision under G.S. 53-255 et seq. requiring that a lender recommend a reverse mortgage. Melton v. Family First Mortg. Corp., 156 N.C. App. 129, 576 S.E.2d 365, 2003 N.C. App. LEXIS 67 (2003).

§ 53-256. Purpose.

It is the intent of the General Assembly that reverse mortgage loans be available so that elderly homeowners may use the equity in their homes to meet their financial needs. The General Assembly recognizes that there may be restrictions and requirements governing traditional mortgage transactions that should not apply to reverse mortgages. The purpose of this Article is to authorize reverse mortgage transactions and to clarify other provisions of North Carolina law that might otherwise apply to reverse mortgage loans, and to provide protection for elderly homeowners who enter into reverse mortgage transactions. (1991, c. 546, s. 1; 1995, c. 115, s. 1.)

§ 53-257. Definitions.

The following definitions apply in this Article:

(1) Authorized lender or lender. — The North Carolina Housing Finance Agency, any lender authorized to engage in business as a bank, savings institution, or credit union under the laws of this State or of the United States, or any other person, firm, or corporation authorized to make reverse mortgage loans by the Commissioner of Banks.

(2) Borrower. — A natural person 62 years of age or older who occupies and owns, in fee simple individually, or with another borrower as tenants by the entireties or as joint tenants with right of survivorship, an interest in residential real property securing a reverse mortgage loan, and who borrows money under a reverse mortgage loan.

(3) Commissioner. — The Commissioner of Banks of this State.

(4) Counselor. — An individual who has completed a training curriculum on reverse mortgage counseling provided or approved by the North Carolina Housing Finance Agency and whose name is maintained on the Commissioner's list of approved reverse mortgage counselors.

(5) Outstanding balance. — The current net amount of money owed by the borrower to the lender, calculated in accordance with G.S. 53-262(b),

whether or not the sum is suspended under the terms of the reverse mortgage loan agreement or is immediately due and payable.

(6) Reverse mortgage loan or loan. — A loan for a definite or indefinite term (i) secured by a first mortgage or first deed of trust on the principal residence of the mortgagor located in North Carolina, (ii) the proceeds of which are disbursed to the mortgagor in one or more lump sums, or in equal or unequal installments, either directly by the lender or the lender's agent, and (iii) that requires no repayment until a future time, upon the earliest occurrence of one or more events specified in the reverse mortgage loan contract.

(7) Shared appreciation. — An agreement by the lender and the borrower that, in addition to the principal and any interest accruing on the outstanding balance of a reverse mortgage loan, the lender may collect an additional amount equal to a percentage of the increase in the value of the property from the date of origination of the loan to the date of loan repayment.

(7a) Shared value. — An agreement by the lender and the borrower that, in addition to the principal and any interest accruing on the outstanding balance of a reverse mortgage loan, the lender may collect an additional amount equal to a percentage of the value of the property at the time of loan repayment.

(8) Total annual percentage rate. — The annual average rate of interest, which provides the total amount owed at loan maturity when this rate is applied to the loan advances, excluding closing costs not paid to third parties, over the term of the reverse mortgage loan. (1991, c. 546, s. 1; 1995, c. 115, s. 1; 1998-116, s. 3; 2004-171, s. 15.)

Editor's Note. — Session Laws 2004-171, s. 17, provides: "The Legislative Research Commission shall undertake a comprehensive study of those laws, including Chapters 53, 54B, and 54C of the General Statutes, which affect the establishment and operation of banks in North Carolina and shall make recommendations to the 2005 General Assembly, prior to the convening of the 2006 Regular Session as to which laws (i) are obsolete, unnecessary, or duplicative, (ii) are unnecessarily inconsistent in the treatment of banks, savings and loan associations, and savings banks, and (iii) unnecessarily restrict, impede, or prohibit activities of banks, savings and loan associations, and savings banks or the ability of the Commissioner of Banks to regulate banks and savings institutions in an effective, efficient, and equitable manner.

"In preparing its recommendations, the Commission shall actively solicit and consider information received from representatives of banks, savings and loan associations, savings banks, the State Banking Commission, the Commissioner of Banks and the Commissioner's staff, other interested parties, and the general public."

Subdivision (6), as amended by Session Laws 2004-171, s. 15, effective October 1, 2004, is applicable to acts occurring and transactions or agreements entered into on or after that date.

§ 53-258. Authority and procedures governing reverse mortgage loans.

(a) Except as provided in subsection (b1) of this section, no person, firm, or corporation shall engage in the business of making reverse mortgage loans without first being approved as an authorized reverse mortgage lender by the Commissioner. Mortgage lenders licensed under Article 19A of this Chapter must also be authorized under this Article before making reverse mortgage loans.

(b) An application for authorization to make reverse mortgage loans shall be in writing to the Commissioner and in the form prescribed by the Commissioner. The application shall contain the name and complete business address or addresses of the applicant. The application shall also include affirmation of financial solvency and all capitalization requirements that are required by the

Commissioner. The application shall be accompanied by a nonrefundable fee, payable to the Commissioner, of five hundred dollars ($500.00).

(b1) Each of the following lenders shall be considered authorized to engage in the business of making reverse mortgage loans without being required to apply pursuant to subsection (b) of this section and may represent to the public that it is so authorized:

(1) The North Carolina Housing Finance Agency.
(2) A bank, savings institution, or credit union formed under the laws of this or any other state or of the United States.
(3) A wholly owned subsidiary of an entity described in subdivision (2) of this subsection.

Each lender listed in this subsection may, upon written request to the Commissioner of Banks, obtain written confirmation of its authority to engage in the business of making reverse mortgage loans. In the case of lenders listed in subdivisions (2) and (3) of this subsection, the request shall be accompanied by the fee set forth in subsection (d) of this section.

(c) Repealed by Session Laws 2004-171, s. 16, effective October 1, 2004, and applicable to acts occurring and transactions or agreements entered into on or after that date.

(d) The Commissioner shall, upon determination that an applicant should be authorized to make reverse mortgage loans, issue notice of this authority to the lender. The authority to issue reverse mortgage loans is valid for the period of time specified by the Commissioner. A lender to whom a notice of authority is issued shall display the notice prominently in any and all offices of the lender that make reverse mortgage loans. Authorizations issued under this section are nontransferable. Except for lenders described in subsection (b1) of this section, each lender to which an authorization is issued shall pay an annual renewal fee of two hundred fifty dollars ($250.00). (1991, c. 546, s. 1; 1995, c. 115, s. 1; 2004-171, s. 16.)

§ 53-259. Application of rules.

In addition to the provisions of this Article, authorized lenders shall comply with rules adopted by the Commissioner that are reasonable and necessary to effectuate the purposes of this Article and to protect the public interest. Provided, however, that provisions in Chapters 24 or 45 of the General Statutes and the rules adopted under those Chapters that conflict with this Article shall not apply to reverse mortgage transactions governed by this Article. (1991, c. 546, s. 1; 1995, c. 115, s. 1.)

§ 53-260. Interest.

Notwithstanding any other provisions of law to the contrary, the parties to a reverse mortgage loan may contract for the payment of interest at a rate agreed to by the parties. Interest shall be deferred until the earliest occurrence of one or more events specified in the reverse mortgage loan contract. Payment of interest on deferred interest shall be as agreed upon by the parties to the contract. The parties may agree that the deferred interest may be added to the outstanding balance of the loan. The Commissioner may determine that the total annual percentage rate is excessive. If the Commissioner determines the total annual percentage rate to be excessive, that determination shall be included in the information provided to counselors under G.S. 53-264(a)(7), and to applicants for reverse mortgage loans under G.S. 53-264(b). (1991, c. 546, s. 1; 1995, c. 115, s. 1.)

§ 53-261. Taxes, insurance, and assessments.

A reverse mortgage loan contract may provide that it is the primary obligation of the borrower to pay all property taxes, insurance premiums, and assessments in a timely manner, and that the failure of the borrower to make these payments and to provide evidence of payment to the lender may constitute grounds for default of the loan. A reverse mortgage loan contract shall state that if a borrower fails to pay property taxes, insurance premiums, or assessments, the lender may choose, at the lender's option, to pay the amounts due, charge them to the reverse mortgage loan, and recalculate regularly scheduled payments under the loan to account for the increased outstanding loan balance. (1991, c. 546, s. 1; 1995, c. 115, s. 1.)

§ 53-262. Renegotiation of loan; calculation of outstanding balance; prepayment.

(a) If a reverse mortgage loan contract allows for a change in the payments or payment options, the lender may charge a reasonable fee when payments are recalculated.

(b) The outstanding loan balance shall be calculated by adding the current totals of items described in subdivisions (1) through (4) below, and subtracting the current totals of all reverse mortgage loan payments made by the borrower to the lender:

(1) The sum of all disbursements made by the lender to the borrower, or to another party on the borrower's behalf.

(2) All taxes, assessments, insurance premiums, and other similar charges paid to date by the lender under G.S. 53-261 and not reimbursed by the borrower within 60 days of the date payment was made by the lender.

(3) All actual closing costs the borrower has deferred, if a deferral provision is contained in the loan agreement.

(4) The total accrued interest to date.

(c) Prepayment of the reverse mortgage loan, in whole or part, shall be permitted without penalty at any time during the term of the loan. (1991, c. 546, s. 1; 1995, c. 115, s. 1.)

§ 53-263. Limits on borrowers' liability.

(a) When a reverse mortgage loan becomes due, if the borrower mortgaged one hundred percent (100%) of the full value of the house then the amount owed by the borrower shall not be greater than (i) the fair market value of the house, minus sale costs, or (ii) the outstanding balance of the loan, whichever amount is less.

(b) If the borrower mortgaged less than one hundred percent (100%) of the full value of the house, the amount owed by the borrower shall not be greater than (i) the outstanding balance of the loan, or (ii) the percentage of the fair market value, minus sale costs, as provided in the contract, whichever amount is less.

(c) The lender shall enforce the debt only through the sale of the property and shall not obtain a deficiency judgment against the borrower. (1991, c. 546, s. 1; 1995, c. 115, s. 1.)

§ 53-264. Disclosures of loan terms.

(a) On forms prescribed by the Commissioner, all authorized lenders shall provide all of the following information to the Commissioner for dissemination to all counselors who provide counseling to prospective reverse mortgage borrowers:

(1) The borrower's rights, obligations, and remedies with respect to the borrower's temporary absence from the home, late payments by the lender, and payment default by the lender.

(2) Conditions or events that require the borrower to repay the loan obligation.
(3) The right of the borrower to mortgage less than the full value of the home, if permitted by the reverse mortgage loan contract.
(4) The projected total annual percentage rate applicable under various loan terms and appreciation rates and interest rates applicable at sample ages of borrowers.
(5) Standard closing costs.
(6) All service fees to be charged during the term of the loan.
(7) Other information required by the Commissioner.
(8) Information relating to contracts for shared appreciation or shared value, as required by G.S. 53-270.1.

(b) Within 10 business days after application is made by a borrower, but not less than 20 business days before closing of the loan, lenders shall provide applicants with the same information required in subsection (a) of this section, shall inform applicants that reverse mortgage counseling is required before the loan can be closed, and shall provide the names and addresses of counselors listed with the Commissioner's office. (1991, c. 546, s. 1; 1995, c. 115, s. 1; 1998-116, s. 4.)

§ 53-265. Information required of lender.

(a) At the closing of the reverse mortgage loan, the lender shall provide to the borrower the name of the lender's employee or agent who has been designated specifically to respond to inquiries concerning reverse mortgage loans. This information shall be provided by the lender to the borrower at least annually, and whenever the information concerning the designated employee or agent changes.

(b) On an annual basis and when the loan becomes due, the lender shall issue to the borrower, without charge, a statement of account regarding the activity of the mortgage for the preceding calendar year, or for the period since the last statement of account was provided. The statement shall include all of the following information for the preceding year:
(1) The outstanding balance of the loan at the beginning of the statement period.
(2) Disbursements to the borrower.
(3) The total amount of interest added to the outstanding balance of the loan.
(4) Any property taxes, insurance premiums, or assessments paid by the lender.
(5) Payments made to the lender.
(6) The total mortgage balance owed to date.
(7) The remaining amount available to the borrower in reverse mortgage loans wherein proceeds have been reserved to be disbursed in one or more lump sum amounts. (1991, c. 546, s. 1; 1995, c. 115, s. 1.)

§ 53-266. Effects of lender's default.

(a) A lender's failure to make loan advances to the borrower under the reverse mortgage loan contract shall be deemed the lender's default of the contract. Upon the lender's default, the lender shall forfeit any right to collect interest or service charges under the contract. The lender's right to recovery at loan maturity shall be limited to the outstanding balance as of the date of default, minus all interest. Lenders may also be subject to other default penalties established by the Commissioner.

(b) Subsection (a) of this section shall not apply if the lender has previously declared the borrower in default under G.S. 53-267, or if the lender makes the required loan advance within the time stated in the mortgage contract or within 30 days of receipt of notice from the borrower that the loan advance was not received. (1991, c. 546, s. 1; 1995, c. 115, s. 1.)

§ 53-267. Repayment upon borrower's default.

A reverse mortgage loan contract may provide for a borrower's default, thereby triggering early repayment of the loan, based only upon one or more of the following terms and conditions:

(1) The borrower fails to maintain the residence as required by the contract.
(2) The borrower sells or otherwise conveys title to the home to a third party.
(3) The borrower dies and the home is not the principal residence of the surviving borrower.
(4) The home is not the principal residence of at least one of the borrowers for a period of 12 consecutive months for reasons of physical or mental illness.
(5) For reasons other than physical or mental illness, the home ceases to be the principal residence of the borrower for a period of 180 consecutive days and is not the principal residence of another borrower under the loan, without prior written permission from the lender.
(6) The borrower fails to pay property taxes, insurance premiums, and assessments under G.S. 53-261. (1991, c. 546, s. 1; 1995, c. 115, s. 1.)

§ 53-268. Time for initiation of foreclosure.

When a borrower's obligation to repay the reverse mortgage loan is triggered under G.S. 53-267, in addition to all rights conferred upon owners and borrowers under Chapter 45 of the General Statutes, the lender must give the borrower not less than 90 days' notice of its intent to initiate foreclosure proceedings. If the contract so provides, interest will continue to accrue during the 90-day period. (1991, c. 546, s. 1; 1995, c. 115, s. 1.)

§ 53-269. Counseling provisions.

(a) The North Carolina Housing Finance Agency shall adopt rules governing the training of counselors and necessary standards for counselor training and shall establish reasonable fees for training. The North Carolina Housing Finance Agency shall forward the names of all persons satisfying counselor training requirements to the Commissioner.

(b) The Commissioner shall maintain a list of counselors who have satisfied training requirements and shall periodically provide an up-to-date copy of the list to all authorized lenders.

(c) The Commissioner shall provide to all counselors who have satisfied training requirements information provided to the Commissioner by authorized lenders under G.S. 53-265. (1991, c. 546, s. 1; 1995, c. 115, s. 1.)

§ 53-270. Prohibited acts.

Reverse mortgage lenders are prohibited from engaging in any of the following acts in connection with the making, servicing, or collecting of a reverse mortgage loan:

(1) Misrepresenting material facts, making false promises, or engaging in a course of misrepresentation through agents or otherwise.

(2) Failing to disburse funds in accordance with the terms of the reverse mortgage loan contract or other written commitment.
(3) Improperly refusing to issue a satisfaction of a mortgage.
(4) Engaging in any action or practice that is unfair or deceptive, or that operates a fraud on any person.
(5) Contracting for or receiving shared appreciation or shared value, except as provided in G.S. 53-270.1.
(6) Closing a reverse mortgage loan without receiving certification from a person who is certified as a reverse mortgage counselor by the State that the borrower has received counseling on the advisability of a reverse mortgage loan and the various types of reverse mortgage loans and the availability of other financial options and resources for the borrower, as well as potential tax consequences.
(7) Failing to comply with this Article. (1991, c. 546, s. 1; 1995, c. 115, s. 1; 1998-116, s. 1.)

§ 53-270.1. Contracts for shared appreciation or shared value.

(a) A lender and a borrower may agree, in writing, that in addition to the principal and any interest accruing on the outstanding balance of a reverse mortgage loan, the lender may receive:
(1) Shared appreciation if it is in an amount not exceeding ten percent (10%) of the increase in the value of the property from the date of origination of the reverse mortgage loan to the date of loan repayment; or
(2) Shared value if it is in an amount not exceeding ten percent (10%) of the value of the property at the time of repayment of the reverse mortgage loan; and
(3) The shared appreciation or shared value is paid in conjunction with a loan that:
  a. Is outstanding for 24 months or longer; and
  b. Either (i) is guaranteed or insured by an agency of the federal government, or (ii) has been originated under a reverse mortgage program approved by Fannie Mae, the Government National Mortgage Association, or the Federal Home Loan Mortgage Corporation, provided the loan is sold to one of those agencies or enterprises within 90 days of loan closing, or has been originated under a reverse mortgage program of a person, firm, or corporation approved as an authorized lender by the Commissioner; and
  c. Provides that the borrower receives additional economic benefit in exchange for paying the shared appreciation or shared value, including, but not limited to, larger monthly payments or a larger line of credit. The specific nature of the economic benefit shall be provided to the Commissioner with the other information about the reverse mortgage program required under G.S. 53-264 for dissemination to the reverse mortgage counselors; and
  d. At least 14 days prior to closing, the borrower receives a disclosure that explains the additional costs and benefits of shared appreciation or shared value and compares those costs and benefits with a comparable loan without shared appreciation or shared value. These costs and benefits shall also be included in the information required under G.S. 53-264.

(b) Under subdivisions (a)(1) and (2) of this section, in determining the value of the property at the time of origination of the reverse mortgage loan and at the time of repayment, if repayment is not in conjunction with the sale of the property, the lender and the borrower shall have the right to obtain an appraisal from an appraiser licensed or certified in accordance with G.S. 93E-1-6. If the appraisals differ, and the parties cannot agree on a value, an average of the appraisals shall determine the value. If the borrower does not desire an appraisal, the lender may obtain an appraisal, which shall be controlling. Notwithstanding the foregoing, the parties may agree in writing to waive these requirements and agree upon the value of the property.

(c) If repayment is made in conjunction with the sale of the property, the actual and reasonable costs of sale shall be deducted from the value of the property prior to the calculation of the amount of shared appreciation or shared value. (1998-116, s. 2; 2001-487, s. 14(b).)

§ 53-271. Commissioner's authority to enforce; penalties.

(a) The Commissioner shall adopt rules necessary to implement and enforce the provisions of this Article. Upon finding probable cause to believe that an authorized lender is in violation of this Article, or of any law or any rule or regulation of this State, the United States, or an agency of the State or the United States, the Commissioner shall, after affording reasonable notice and opportunity to be heard to the lender, order the lender to cease and desist from the violation.

(b) If a lender fails to comply with or appeal the Commissioner's cease and desist order, the lender shall be subject to a civil penalty of one thousand dollars ($1,000) for each violation that is the subject of the cease and desist order. The penalty imposed under this section shall be in addition to and not in lieu of penalties available under any other provision of law applicable to a reverse mortgage lender.

(c) Upon a finding that a reverse mortgage lender has violated this Article, the Commissioner may revoke, temporarily or permanently, the authority of the lender to make reverse mortgage loans.

(d) A person damaged by a lender's actions may file an action in civil court to recover actual and punitive damages. Attorneys' fees shall be awarded to a prevailing borrower. Nothing in this Article shall limit any statutory or common law right of a person to bring an action in court for any act, nor shall this Article limit the right of the State to punish a person for the violation of any law. (1991, c. 546, s. 1; 1995, c. 115, s. 1.)

§ 53-272. Appeals.

The Banking Commission may review any rule, regulation, order, or act of the Commissioner done pursuant to or with respect to the provisions of this Article. Any person aggrieved by any such rule, regulation, order, or act may appeal, pursuant to G.S. 53-92(d), to the Commission for review upon giving notice in writing within 20 days after such rule, regulation, order, or act complained of is adopted, issued, or done. Notwithstanding any other provision of law, any aggrieved party to a decision of the Banking Commission shall be entitled to petition for judicial review pursuant to G.S. 53-92(d). (1991, c. 546, s. 1; 1995, c. 115, s. 1; c. 129, s. 42; 2009-57, s. 9.)

Effect of Amendments. — Session Laws 2009-57, s. 9, effective June 5, 2009, in the first sentence, substituted "may review" for "shall have full authority to review", and "Article. Any" for "Article; and any"; in the second sentence, inserted "pursuant to G.S. 53-92(d)"; and in the last sentence, substituted "petition for judicial review pursuant to G.S. 53-92(d)" for "an appeal pursuant to G.S. 53-92."

§§ 53-273, 53-274: Reserved for future codification purposes.

ARTICLE 22.

Check-Cashing Businesses.

§ 53-275. Definitions.

As used in this Article, unless the context clearly requires otherwise, the term:

(1) "Cashing" means providing currency for payment instruments, but does not include the bona fide sale or exchange of travelers checks and foreign denomination payment instruments.

(2) "Check-cashing service" means any person or entity engaged in the business of cashing checks, drafts, or money orders for a fee, service charge, or other consideration.

(3) "Commission" means the State Banking Commission.

(4) "Commissioner" means the Commissioner of Banks.

(5) "Licensee" means a person or entity licensed to engage in a check-cashing business under this Article.

(6) "Person" means an individual, partnership, association, or corporation. (1997-391, s. 1.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 401.

§ 53-276. License required.

No person or other entity may engage in the business of cashing checks, drafts, or money orders for consideration without first obtaining a license under this Article. No person or other entity providing a check-cashing service may avoid the requirements of this Article by providing a check or other currency equivalent instead of currency when cashing payment instruments. (1997-391, s. 1.)

CASE NOTES

Cited in Kucan v. Advance Am., 190 N.C. App. 396, 660 S.E.2d 98, 2008 N.C. App. LEXIS 902 (2008).

§ 53-277. Exemptions.

(a) This Article shall not apply to:

(1) A bank, savings institution, credit union, or farm credit system organized under the laws of the United States or any state; and

(2) Any person or entity principally engaged in the bona fide retail sale of goods or services, who either as an incident to or independently of a retail sale or service and not holding itself out to be a check-cashing service, from time to time cashes checks, drafts, or money orders for a fee or other consideration, where not more than two dollars ($2.00) is charged for the service.

(b) A person licensed under Article 16A of this Chapter (Money Transmitters Act) is exempt from G.S. 53-276, 53-278, 53-279, and 53-284, but is deemed a licensee for purposes of the remaining provisions of this Article. This exemption does not apply to an authorized agent of a person licensed under Article 16A of this Chapter. (1997-391, s. 1; 2001-443, s. 4.)

§ 53-278. Application for license; investigation; application fee.

(a) An application for licensure under this Article shall be in writing, under oath, and on a form prescribed by the Commissioner. The application shall set forth all of the following:

(1) The name and address of the applicant.
(2) If the applicant is a firm or partnership, the name and address of each member of the firm or partnership.
(3) If the applicant is a corporation, the name and address of each officer, director, registered agent, and principal.
(4) The addresses of the locations of the business to be licensed.
(5) Other information concerning the financial responsibility, background experience, and activities of the applicant and its members, officers, directors, and principals as the Commissioner requires.

(b) The Commissioner may make such investigations as the Commissioner deems necessary to determine if the applicant has complied with all applicable provisions of this Article and State and federal law.

(c) The application shall be accompanied by payment of a two hundred fifty dollar ($250.00) application fee and a five hundred dollar ($500.00) investigation fee. These fees are not refundable or abatable, but, if the license is granted, payment of the application fee shall satisfy the fee requirement for the first license year or remaining part thereof.

(d) Licenses shall expire annually and may be renewed upon payment of a license fee of two hundred fifty dollars ($250.00) plus a fifty dollar ($50.00) fee for each branch location certificate issued under a license. (1997-391, s. 1.)

§ 53-279. Liquid assets required; other qualifications; denial of license; hearing.

(a) Every licensee and applicant shall have and maintain liquid assets of at least fifty thousand dollars ($50,000) per licensee.

(b) Upon the filing and investigation of an application, and compliance by the applicant with G.S. 53-278, and this section, the Commissioner shall issue and deliver to the applicant the license applied for to engage in business under this Article at the locations specified in the application, provided that the Commissioner finds that the financial responsibility, character, reputation, experience, and general fitness of the applicant and its members, officers, directors, and principals are such as to warrant belief that the business will be operated efficiently and fairly, in the public interest, and in accordance with law. If the Commissioner fails to make such findings, no license shall be issued, and the Commissioner shall notify the applicant of the denial and the reasons therefor. The applicant shall be entitled to an informal hearing on the denial provided the applicant requests the hearing in writing within 30 days after the Commissioner has mailed the notice required under this subsection to the applicant. In the event of a hearing, which shall be held in the offices of the Commissioner of Banks in Raleigh, the Commissioner shall reconsider the application and, after hearing, issue a written order granting or denying the application. (1997-391, s. 1.)

§ 53-280. Maximum fees for service; fees posted; endorsement of checks cashed.

(a) Notwithstanding any other provision of law, no check-cashing business licensed under this Article shall directly or indirectly charge or collect fees or other consideration for check-cashing services in excess of the following:

(1) Three percent (3%) of the face amount of the check or five dollars ($5.00), whichever is greater, for checks issued by the federal government, State government, or any agency of the State or federal government, or any county or municipality of this State.
(2) Ten percent (10%) of the face amount of the check or five dollars ($5.00), whichever is greater, for personal checks.
(3) Five percent (5%) of the face amount of the check or five dollars ($5.00), whichever is greater, for all other checks, or for money orders.

(b) A licensee may not advance monies on the security of any check unless the account from which the check being presented is drawn is legitimate, open, and active. Except as provided by G.S. 53-281(a), any licensee who cashes a check for a fee shall deposit the check not later than three business days from the date the check is cashed.

(c) A licensee shall ensure that in every location conducting business under a license issued under this Article, there is conspicuously posted and at all times displayed a notice stating the fees charged for cashing checks, drafts, and money orders. A licensee shall further ensure that notice of the fees currently charged at every location shall be filed with the Commissioner.

(d) A licensee shall endorse every check, draft, or money order presented by the licensee for payment in the name of the licensee. (1997-391, s. 1.)

§ 53-281. Expired.

Editor's Note. — Session Laws 1997-391, s. 3, as amended by Session Laws 2001-323, s. 1, provided that the provisions of this section would expire on August 31, 2001.

§ 53-282. Record keeping; receipt requirements.

(a) Every person required to be licensed under this Article shall maintain in its offices such books, accounts, and records as the Commissioner may reasonably require. The books, accounts, and records shall be maintained separate from any other business in which the person is engaged, and shall be retained for a period prescribed by the Commissioner.

(b) The licensee shall ensure that each customer cashing a check shall be provided a receipt showing the name or trade name of the licensee, the transaction date, amount of the check, and the fee charged.

(c) The Commissioner may examine the books, accounts, and records in order to determine whether the person is complying with this Article and rules adopted pursuant thereto. The cost of the examination shall be paid by the licensee and shall be determined by applying the hourly rate for special examinations adopted by the State Banking Commission by regulation. (1997-391, s. 1.)

§ 53-283. Prohibited practices.

No person required to be licensed under this Article shall do any of the following:

(1) Charge fees in excess of those authorized under this Article.
(2) Engage in the business of making loans of money, or extensions of credit, or discounting notes, bills of exchange, items, or other evidences of debt; or accepting deposits or bailments of money or items, except as expressly provided by G.S. 53-281.
(3) Use or cause to be published or disseminated any advertising communication which contains any false, misleading, or deceptive statement or representation.
(4) Conduct business at premises or locations other than locations licensed by the Commissioner.

(5) Engage in unfair, deceptive, or fraudulent practices.
(6) Cash a check, draft, or money order made payable to a payee other than a natural person unless the licensee has previously obtained appropriate documentation from the executive entity of the payee clearly indicating the authority of the natural person or persons cashing the check, draft, or money order on behalf of the payee. (1997-391, s. 1.)

CASE NOTES

Cited in Goleta Nat'l Bank v. Lingerfelt, 211 F. Supp. 2d 711, 2002 U.S. Dist. LEXIS 19350 (E.D.N.C. 2002); Kucan v. Advance Am., 190 N.C. App. 396, 660 S.E.2d 98, 2008 N.C. App. LEXIS 902 (2008).

§ 53-284. Suspension and revocation of license; grounds; procedure.

(a) The Commissioner may suspend or revoke any license or licenses issued pursuant to this Article if, after notice and opportunity for hearing, the Commissioner issues written findings that the licensee has engaged in any of the following conduct:
(1) Violated this Article or applicable State or federal law or rules.
(2) Made a false statement on the application for a license under this Article.
(3) Refused to permit investigation by the Commissioner authorized under this Article.
(4) Failed to comply with an order of the Commissioner.
(5) Demonstrated incompetency or untrustworthiness to engage in the business of check cashing.
(6) Been convicted of a felony or misdemeanor involving fraud, misrepresentation, or deceit.

(b) The Commissioner may not suspend or revoke any license issued under this Article unless the licensee has been given notice and opportunity for hearing in accordance with Article 3A of Chapter 150B of the General Statutes. (1997-391, s. 1.)

§ 53-285. Cease and desist orders.

If the Commissioner determines that a person required to be licensed under this Article has violated this Article or rules adopted pursuant to it, then the Commissioner may, upon notice and opportunity for hearing in accordance with Article 3A of Chapter 150B of the General Statutes, order the person to cease and desist from the violations and to comply with this Article. The Commissioner may enforce compliance with an order issued pursuant to this section by the imposition and collection of civil penalties authorized under this Article. (1997-391, s. 1.)

§ 53-286. Civil penalties and restitution.

The Commissioner may order and impose civil penalties upon any person required to be licensed under this Article for violations of this Article or rules adopted thereunder. Civil penalties shall not exceed one thousand dollars ($1,000) per violation. All civil money penalties collected under this Article shall be paid to the county school fund. The Commissioner may also order repayment of unlawful or excessive fees charged to customers. (1997-391, s. 1.)

§ 53-287. Criminal penalties.

A violation of G.S. 53-276 by a person required to obtain a license under this Article is a Class I felony. Each transaction involving the unlawful cashing of a check, draft, or money order constitutes a separate offense. (1997-391, s. 1.)

§ 53-288. Commissioner to adopt rules.

The Commissioner may adopt rules necessary to carry out the purposes of this Article, to provide for the protection of the public, and to assist licensees in interpreting and complying with this Article. (1997-391, s. 1.)

§ 53-289. Commission may review rules, orders, or acts by Commissioner.

The Commission may review any rule, regulation, order, or act of the Commissioner done pursuant to or with respect to the provisions of this Article. Any person aggrieved by any such rule, regulation, order, or act may appeal, pursuant to G.S. 53-92(d), to the Commission for review upon giving notice in writing within 20 days after such rule, regulation, order, or act complained of is adopted, issued, or done. Notwithstanding any other provision of law, any aggrieved party to a decision of the Banking Commission shall be entitled to petition for judicial review pursuant to G.S. 53-92(d). (1997-391, s. 1; 2009-57, s. 10.)

Effect of Amendments. — Session Laws 2009-57, s. 10, effective June 5, 2009, in the first sentence, substituted "may review" for "shall have full authority to review", and "Article. Any" for "Article; and any"; in the second sentence, inserted "pursuant to G.S. 53-92(d)"; and added the last sentence.

§§ 53-290 through 53-294: Reserved for future codification purposes.

Article 23.

Continuity of Contract Under European Monetary Union.

§ 53-295. Definitions.

The following definitions shall apply in this Article:

(1) Euro. — The currency of participating member states of the European Union that adopt a single currency in accordance with the Treaty on European Union dated February 7, 1992.

(2) European Currency Unit (ECU). — The currency as defined in the European Council regulation number 3320/94.

(3) Introduction of the Euro. — The implementation of economic and monetary union of member states of the European Union in accordance with the Treaty on European Union dated February 7, 1992. (1999-312, s. 1.)

§ 53-296. Continuity of contract.

(a) If a subject of medium of payment of a contract, security, or instrument is a currency that has been substituted or replaced by the euro, the euro shall be a commercially reasonable substitute and substantial equivalent that may either be used in determining the value of that currency, or tendered at the conversion rate specified in and otherwise calculated in accordance with the regulations adopted by the Council of the European Union.

(b) If a subject or medium of payment of a contract, security, or instrument is the ECU, the euro will be a commercially reasonable substitute and substantial equivalent that may be either used in determining the value of that currency, or tendered at the conversion rate specified in and otherwise calculated in accordance with the regulations adopted by the Council of the European Union.

(c) Performance of any of the obligations described in subsection (a) or (b) may be made in the currencies originally designated in the contract, security, or instrument, so long as the currencies remain legal tender, or in euro, but not in any other currency, whether or not the currency has been substituted or replaced by the euro, or is a currency that is considered a denomination of the euro and has a fixed conversion rate with respect to the euro. (1999-312, s. 1.)

§ 53-297. Effect of currency substitution on performance.

None of the following shall have the effect of discharging or excusing performance under any contract, security, or instrument, or give a party the right unilaterally to alter or terminate any contract, security, or instrument:

(1) Introduction of the euro.
(2) Tender of euros in connection with any obligation in compliance with G.S. 53-296.
(3) Determination of the value of any obligation in compliance with G.S. 53-296.
(4) Calculation or determination of the subject or medium of payment of a contract, security, or instrument with reference to an interest rate or other basis that has been substituted or replaced due to the introduction of the euro and that is a commercially reasonable substitute and substantial equivalent. (1999-312, s. 1.)

§ 53-298. References to ECU in contracts.

(a) References to the ECU in a contract, security, or other instrument that also refers in substance to the definition of the ECU as set forth in G.S. 53-295 shall be replaced by references to the euro at a rate of one euro to one ECU.

(b) References to the ECU in a contract, security, or instrument without a definition as set forth in G.S. 53-295 shall be presumed, rebuttable by proof of the contrary intention of the parties, to be references to the currency basket that is from time to time used as the unit of account of the European community. (1999-312, s. 1.)

§ 53-299. Application.

Notwithstanding any other law, this Article shall apply to all contracts, securities, and instruments, including contracts with respect to commercial transactions. (1999-312, s. 1.)

§ 53-300. No application to other currency alteration.

In circumstances of currency alteration other than the introduction of the euro, this Article shall not be interpreted as creating any negative inference or negative presumption regarding the validity or enforceability of contracts, securities, or instruments denominated in whole or in part in a currency affected by that alteration. (1999-312, s. 1.)

ARTICLE 24.

Trust Companies and Interstate Trust Business.

Part 1. Definitions.

§ 53-301. Definitions.

(a) Except as otherwise provided in this Article, or when the context clearly indicates that a different meaning is intended, the following definitions shall apply throughout this Article:

(1) "Account" means the client relationship established with a trust institution involving the transfer of real or personal property to the trust institution or the assumption of duties by the trust institution concerning real or personal property.

(2) "Act as a fiduciary" means:

a. To (i) act as trustee under a written instrument or by judicial appointment or order; (ii) receive money or other property as trustee for investment or reinvestment in real or personal property; (iii) act as custodian or custodial trustee under a gifts to minors act, a transfers to minors act, a custodial trust act, or similar statute; (iv) act as personal representative of the estate of a deceased person; (v) act as trustee, guardian, or conservator for the person or estate of an incompetent such as a minor or incapacitated person, or in other circumstances in which a guardian may be appointed; or (vi) act in a capacity similar to one listed in (i) through (v), however such capacity may be designated under applicable law or governing instrument; or

b. To possess, purchase, sell, safekeep, or otherwise manage or administer property in any other fiduciary capacity.

(3) "Affiliate" means a company that directly or indirectly controls, is controlled by, or is under common control with another company.

(3a) "Affiliate transfer" means a transfer of an account pursuant to Part 7 of this Article by one trust institution affiliate of that trust institution.

(4) "Authorized trust institution" means any State trust company and any trust office or representative trust office of a trust institution located in this State that is not a bank.

(5) "Bank" has the meaning set forth in 12 U.S.C. § 1813(a)(1), except that "bank" does not include a trust company.

(6) "Bank supervisory agency" means:

a. Any agency of another state or a home country with primary responsibility for chartering or supervising a trust institution; and

b. The Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, a Federal Reserve Bank acting in a supervisory capacity over any bank or bank holding company, the Office of Thrift Supervision, and any successor to these agencies.

(7) "Branch" has the meaning set forth in G.S. 53-1(1a).

(8) "Charter" means a charter issued to a State trust company by the Commissioner or a charter, license, or other authority issued by the Commissioner or a bank supervisory agency authorizing a trust institution to act as a fiduciary in its home state or home country, and the issuance of the charter, license, or other authority.

(9) "Client" means a person to whom a trust institution owes a duty or obligation under an account.

(10) "Commission" means the North Carolina State Banking Commission.

(11) "Commissioner" means the Commissioner of Banks for the State of North Carolina.

(12) "Company" includes a bank, trust company, corporation, partnership, association, limited liability company, trust, business trust, joint venture, foundation, pool, syndicate, unincorporated organization, or other form of entity not specifically listed herein.

(13) "Control," with respect to a State trust company, means:
  a. The ownership of or ability or power to vote directly, acting through one or more other persons, or otherwise indirectly, ten percent (10%) or more of the outstanding shares of a class of voting securities of the State trust company;
  b. The ability to control, directly or indirectly, the election of a majority of the board of the State trust company; or
  c. The power to exercise, directly or indirectly, a controlling influence over the management or policies of the State trust company.

(14) "Debt security" means a marketable obligation evidencing indebtedness of a company in the form of a bond, note, debenture, or other debt instrument.

(15) "Depository institution" means any company within any of the definitions of "insured depository institution" set forth in 12 U.S.C. § 1813(c).

(16) "Equity capital" means the amount by which the total assets of a State trust company exceed its total liabilities.

(17) "Equity security" means:
  a. Stock, other than adjustable rate preferred stock and money market (auction rate) preferred stock;
  b. A certificate of interest or participation in a profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, or voting-trust certificate;
  c. A security immediately convertible at the option of the holder without payment of significant additional consideration into a security described by this subdivision;
  d. A security carrying a warrant or right to subscribe to or purchase a security described by this subdivision; and
  e. A certificate of interest or participation in, temporary or interim certificate for, or receipt for a security described by this subdivision that evidences an existing or contingent equity ownership interest.

(18) "Executive officer" means an officer of a company who is named an executive officer by the company or who participates in major policy-making functions of the company.

(19) "Federally chartered savings association" means a company described in 12 U.S.C. § 1813(b)(2).

(20) "Fiduciary record" means a matter written, transcribed, recorded, received, or otherwise in the possession or control of a trust institution, whether in physical, electronic, magnetic, or other form, that preserves information concerning an account or a client.

(21) "Foreign bank" means a foreign bank, as defined in 12 U.S.C. § 1813(s)(1), except for a bank organized under the laws of a territory of the United States.

(22) "Foreign trust institution" means a trust institution, other than a foreign bank, chartered in a foreign country.

(23) "Hazardous condition" with respect to a trust institution means:
  a. A refusal by the trust institution to permit examination of its

books, papers, accounts, records, or affairs by the Commissioner or a duly appointed or authorized examiner of the Commissioner, or a refusal by the officers or directors of a trust institution to be examined under oath regarding its affairs;

b. A material violation by a trust institution of a condition of its chartering or an agreement entered into between the trust institution and the Commissioner; or

c. A circumstance or condition in which an unreasonable risk of loss is threatened to clients, creditors, or shareholders of a trust institution because the trust institution:

1. Has equity capital that is, or is in substantial danger of becoming, inadequate for the safe and sound conduct of its business without regard to whether it is, or is in substantial danger of becoming, insolvent;
2. Has concentrated an excessive or unreasonable portion of its assets in a particular type or character of investment;
3. Violates or fails to comply with this Article, another statute or rule applicable to trust institutions, or any duly issued order of the Commissioner;
4. Is in a condition that renders the continuation of a particular business practice hazardous to its clients, creditors, or shareholders; or
5. Conducts business in an unsafe or unsound manner, which includes conducting business with:
    - I. Materially inexperienced or inattentive management;
    - II. Dangerous operating practices;
    - III. Materially infrequent or inadequate audits;
    - IV. Materially deficient administration of assets in relation to the volume and character of the assets it administers or the trust institution's responsibility for such assets;
    - V. Materially frequent or serious failures to adhere to sound administrative practices;
    - VI. Materially frequent or serious violations of applicable laws, rules, or terms of instruments governing accounts; or
    - VII. Materially serious self-dealing or conflicts of interest.

(24) "Home country" means a foreign country in which a foreign trust institution is chartered.

(25) "Home country regulator" means the bank supervisory agency with primary responsibility for chartering and supervising a foreign trust institution.

(26) "Home state" means:

a. With respect to a federally chartered savings association and a national bank, the state in which the institution maintains its principal office;

b. With respect to a foreign bank, the home state of the foreign bank as determined in accordance with the International Banking Act of 1978, 12 U.S.C. §§ 3101, et seq., and Article 18A of this Chapter or, if there is no such home state, the state in which the foreign bank maintains its principal office in the United States; and

c. With respect to any other trust institution, the state or home country which chartered the institution.

(27) "Home state regulator" means the bank supervisory agency with primary responsibility for chartering and supervising an out-of-state trust institution.

(28) "Host state" means a state other than the home state of a trust institution, or a foreign country, in which the trust institution maintains or seeks to establish or acquire and maintain a trust office or representative trust office.

(29) "Initial capital" means the amount of equity capital required for approval of a charter pursuant to G.S. 53-337.

(30) "Insolvent," with respect to a State trust company, means a circumstance or condition in which a State trust company:

a. Is unable or lacks the means to meet its current obligations as they come due in the regular and ordinary course of business, without regard to whether its assets exceed its liabilities;

b. Has equity capital less than one-fourth of its initial capital, except as otherwise specified by the Commissioner; or

c. Has purported to make a voluntary assignment of its assets for the benefit of creditors or to take any action for protection against creditors under any bankruptcy or insolvency law.

(31) "Jeopardized" means insolvent, in a hazardous condition, or in such other condition as the Commissioner determines warrants the use of procedures set forth in this Article relating to jeopardized State trust companies.

(32) "License", with respect to a State trust company, means the authority granted by the Commissioner pursuant to G.S. 53-160.

(33) "National bank" means a bank chartered under 12 U.S.C. § 21.

(34) "Office" with respect to a trust institution means its principal office, a trust office, or a representative trust office, but not a branch. With respect to an out-of-state trust institution or a foreign trust institution without a physical office in this State, the term "office" also means the registered office.

(35) "Out-of-state trust institution" means a trust institution that is neither a State trust institution nor a foreign trust institution.

(36) "Person" means an individual or a company.

(37) "Principal office" means:

a. With respect to a State trust company, a location, registered with the Commissioner as the State trust company's principal office, at which:

1. The State trust company does business; and

2. At least one executive officer of the State trust company maintains a customary place of work; and

b. With respect to a trust institution other than a State trust company, its principal place of business.

(38) "Principal shareholder" means a person who owns or has the ability or power to vote, directly, acting through one or more other persons, or otherwise indirectly, ten percent (10%) or more of the outstanding shares of any class of voting securities of a company.

(39) "Private trust company" means a State trust company that is organized to engage in business with one or more family members and does not transact business with the general public, as defined in G.S. 53-363.

(39a) "Registered office" means a registered office as described in G.S. 55D-30.

(40) "Representative trust office" means an office at which a trust institution engages in trust marketing, but not trust business.

(41) "Savings association" has the meaning set forth in 12 U.S.C. § 1813(b)(1).

(42) "State" means any state of the United States, the District of Columbia, and any territory of the United States.

(43) "State bank" means:
  a. A bank organized under the provisions of this Chapter and authorized to act as a fiduciary by this State or
  b. A foreign bank lawfully doing business in this State pursuant to Article 18A of this Chapter.

(44) "State savings association" means a savings association organized under the laws of this State and authorized to act as a fiduciary pursuant to Chapter 54B or Chapter 54C of the General Statutes.

(45) "State trust company" means a corporation organized under the provisions of this Article and a trust company previously organized under other provisions of Chapter 53 of the General Statutes to operate only as a trust company and not as a commercial bank.

(46) "State trust company facility" has the meaning set forth in G.S. 53-340.

(47) "State trust institution" means a trust institution organized under the laws of, or having its principal office in, this State.

(48) "Subsidiary" means a company that is controlled by another company, and includes a subsidiary of a subsidiary.

(49) "Territory of the United States" means any geographic area over which the United States exercises sovereignty.

(49a) "Transferring trust institution" means a trust institution that proposes to make, or does make, an affiliate transfer.

(49b) "Transferee trust institution" means a trust institution to which an affiliate transfer is proposed to be made, or is made.

(50) "Trust business" means acting as a fiduciary or in other capacities permissible for a trust institution under G.S. 53-331.

(51) "Trust company" means a trust institution that is neither a depository institution nor a foreign bank.

(52) "Trust institution" means any company lawfully acting as a fiduciary in a state or in a foreign country.

(53) "Trust marketing" means the holding out by a company to the public by advertising, solicitation, or other means that the company is available to act as a fiduciary.

(54) "Trust office" means an office, other than the principal office, through which a trust institution acts as a fiduciary, including, with respect to an out-of-state trust institution or a foreign trust institution without a physical office in this State, the registered office.

(55) "Unauthorized trust activity" means:
  a. Engaging in trust business within this State by a company other than one identified in G.S. 53-303; or
  b. Maintenance of a representative trust office by an out-of-state trust institution without approval from or in violation of an order issued by the Commissioner.

(b) These definitions shall be liberally construed to accomplish the purposes of this Article. The Commission may adopt other definitions to accomplish the purposes of this Article.

(c) References to statutory laws of North Carolina and of the United States of America shall be deemed to refer to recodified, amended, predecessor, or successor statutes. References to agencies of North Carolina and of the United States of America shall be deemed to refer to predecessor or successor agencies. (2001-263, s. 1; 2005-269, ss. 1, 2, 3; 2005-274, s. 1.)

Editor's Note. — Session Laws 2001-263, s. 9, makes this Article effective July 1, 2001, and applicable to acts or omissions occurring and agreements or contracts entered into on or after that date.

Part 2. Multistate Trust Institutions Act.

Subpart A. General.

§ 53-302. Title and purposes.

(a) This Part may be cited as the Multistate Trust Institutions Act.

(b) It is the express intent of this Part to permit trust institutions to engage in trust business on a multistate and international basis subject to the provisions of this Part. (2001-263, s. 1.)

Subpart B. Companies Authorized to Engage in Trust Business.

§ 53-303. Companies authorized to engage in trust business.

(a) No company shall engage in trust business in this State except:

(1) A State trust company;
(2) A State bank;
(3) A State savings association;
(4) A national bank having its principal office in this State;
(5) A federally chartered savings association having its principal office in this State;
(6) An out-of-state trust institution in accordance with and subject to the provisions of Subpart D of this Part;
(7) A foreign trust institution in accordance with and subject to the provisions of Subpart E of this Part; or
(8) A company otherwise authorized to engage in trust business or to act in a particular capacity described in G.S. 53-331(b)(2) under the laws of this State or of the United States.

(b) No company shall engage in unauthorized trust activity, and all companies shall engage in trust business in accordance with and subject to all applicable laws of this State. (2001-263, s. 1.)

§ 53-304. Activities not requiring a charter, license, or approval.

Notwithstanding any other provision of this Article, a company does not act as a fiduciary; engage in trust business or in any other business requiring a charter, license, or approval under the provisions of this Chapter; or engage in unauthorized trust activity by:

(1) Acting in a manner authorized by law as an agent of a trust institution with respect to any activity that is not unauthorized trust activity;
(2) Rendering legal services in a manner authorized by the North Carolina State Bar;
(3) Acting as trustee under a deed of trust delivered only as security for the payment of money or for the performance of another act;
(4) Receiving and distributing rents and proceeds of sales of real property in a manner authorized by the North Carolina Real Estate Commission;
(5) Engaging in securities transactions or providing investment advisory services in accordance with applicable securities laws;

(6) Engaging in the issuance, sale, or administration of an insurance or annuity product in a manner authorized by the North Carolina Department of Insurance;

(7) Engaging in the lawful sale of prepaid funeral benefits in accordance with and subject to Article 13D of Chapter 90 of the General Statutes or engaging in the lawful business of a perpetual care cemetery corporation in accordance with and subject to Chapter 65 of the General Statutes;

(8) Acting as trustee under a voting trust;

(9) Acting as fiduciary by an organization described in paragraphs (1) through (5) of section 170(c) or section 501(c) of the Internal Revenue Code of 1986, as amended, with respect to endowment funds or other funds owned, controlled, provided to, or otherwise made available to the organization with respect to its exempt purposes (including, without limitation, trust funds in which the organization has a beneficial interest).

(10) Engaging in other activities expressly excluded from the application of this Article by rule, order, or declaratory ruling of the Commissioner;

(11) Rendering services as a certified public accountant in a manner authorized by the North Carolina State Board of Certified Public Accountant Examiners;

(12) Provided the company is a trust institution and is not barred by order of the Commissioner from engaging in trust marketing in this State pursuant to G.S. 53-321(b), (i) marketing or soliciting in this State with respect to acting as a fiduciary outside this State; (ii) delivering money or other intangible assets to, and receiving money or other intangible assets for administration outside this State from, a person in this State; or (iii) accepting an account outside this State or otherwise engaging in trust business outside this State; or

(13) Receiving, holding, administering, or distributing real or personal property for or on behalf of another person solely incidental to a lawfully conducted activity or transaction. (2001-263, s. 1.)

§ 53-305. Trust business of State trust institution.

A State trust institution may conduct any activities outside this State that are permissible for a trust institution in the host state, subject to the laws of this State and, in the case of a State bank or a State trust company, subject to rules, orders, or declaratory rulings of the Commissioner. (2001-263, s. 1.)

§ 53-306. Trust business of out-of-state trust institution.

An out-of-state trust institution that establishes or acquires and maintains one or more trust offices or representative trust offices in this State under the provisions of this Part or that maintains one or more branches in this State may, subject to the provisions of this Part, conduct any activity through such a trust office, representative trust office, or branch that a State trust company or a State bank is authorized to conduct through a trust office, representative trust office, or branch under the laws of this State. (2001-263, s. 1; 2005-269, s. 4.)

§ 53-307. Trust business of foreign trust institution.

A foreign trust institution that establishes or acquires and maintains one or more trust offices in this State under the provisions of this Part may, subject to the provisions of this Part, also establish or acquire one or more representative trust offices and conduct any activity through the trust offices or representative trust offices that a State trust company is authorized to conduct through trust offices or representative trust offices under the laws of this State. (2001-263, s. 1; 2005-269, s. 5.)

§ 53-308. Name of trust institution.

Subject to other provisions of applicable law, a person may register or reserve any name with the Secretary of State in connection with engaging or proposing to engage in trust business or trust marketing in this State, except that the Commissioner may determine that a name registered or reserved is potentially misleading to the public and require the use of a name that is not potentially misleading. (2001-263, s. 1.)

§ 53-309. Trust deposits of authorized trust institutions.

(a) Subsection (b) of G.S. 36A-63 shall not apply to an authorized trust institution.

(b) In the absence of a contrary provision in an instrument governing an account, an authorized trust institution may deposit client funds with itself to satisfy its duties under G.S. 36A-63(a) provided:

(1) It maintains, as collateral for the deposits, a separate fund of readily marketable commercial bonds having not less than a recognized "A" rating equal to one hundred and twenty-five percent (125%) of the funds so deposited;

(2) The separate fund is designated as such; and

(3) The separate fund either is maintained under the control of another trust institution, a bank, or a government agency, or is held by the authorized trust institution for the benefit of the accounts with deposits secured by the separate fund; provided, that the Commissioner may require such a separate fund of an authorized trust institution that is insolvent, in a hazardous condition, or jeopardized, to be held by a separate trust institution or bank approved by the Commissioner.

(c) An authorized trust institution may make periodic withdrawals from or additions to the separate fund required by subsection (b) of this section as long as the required value is maintained. Income from the separate fund belongs to the authorized trust institution.

(d) Collateral is not required for a deposit under subsection (b) of this section to the extent the deposit is insured by the Federal Deposit Insurance Corporation. (2001-263, s. 1.)

Subpart C. State Trust Company Trust Offices and Representative Trust Offices.

§ 53-310. Offices of State trust companies.

(a) A State trust company may engage in trust business or trust marketing through its principal office and through each trust office as permitted by this Part.

(b) A State trust company may engage in trust marketing through a representative trust office as permitted by this Part.

(c) A State trust company may engage in trust business and trust marketing through out-of-state trust offices or representative trust offices to the same extent permitted for trust institutions located in the host state through which those out-of-state trust offices or representative trust offices are located, subject to the laws of this State and as provided by rules, orders, or declaratory rulings of the Commissioner. (2001-263, s. 1; 2005-269, s. 6.)

§ 53-311. State trust company principal office.

(a) Each State trust company is required to maintain a principal office in this State and to register that principal office with the Commissioner by setting forth the current street address and telephone number of the principal office.

(b) Each executive officer at a principal office is an agent of the State trust company for service of process.

(c) Before changing the location of its principal office, a State trust company shall file a notice with the Commissioner setting forth the name of the State trust company, the current street address and telephone number of its principal office, the street address, and telephone number if known, of the proposed new principal office, and a copy of the resolution adopted by the board of directors or duly authorized committee of the board of directors of the State trust company authorizing the change. If the State trust company is unable to provide the Commissioner with the telephone number for the proposed new principal office at the time of the notice, it shall do so immediately after beginning to operate at the new principal office location.

(d) The change of principal office shall take effect on the thirty-first day following the date the Commissioner receives the notice described in subsection (c) of this section, unless prior to the thirty-first day following receipt of the notice, the Commissioner (i) establishes an earlier or later date, or (ii) notifies the State trust company that the notice raises issues that require additional information or additional time for analysis, or (iii) disapproves the proposed trust office or representative trust office.

(e) If the Commissioner gives a notification described in subsection (d) of this section, the State trust company may change the location of its principal office only on approval by the Commissioner. The Commissioner may disapprove the change of location if the Commissioner finds that the change will adversely affect the safe and sound operation of the State trust company. (2001-263, s. 1.)

§ 53-312. Trust offices; representative trust offices.

(a) Before establishing or acquiring and maintaining a trust office or representative trust office in this State, a State trust company shall file a notice with the Commissioner, in the form required by the Commissioner, setting forth the name of the State trust company, the location of the proposed trust office or representative trust office, and whether the office will be a trust office or a representative trust office. The State trust company also shall furnish a copy of the resolution adopted by the board of directors or duly authorized committee of the board of directors of the State trust company authorizing the trust office or representative trust office and shall pay the filing fee, if any, set by rule.

(b) The State trust company may commence business at the trust office or representative trust office on the thirty-first day after the date the Commissioner receives the notice, unless the Commissioner (i) establishes an earlier or later date; (ii) notifies the State trust company that the notice raises issues that require additional information or additional time for analysis; or (iii) disapproves the proposed trust office or representative trust office.

(c) If the Commissioner gives a notification described in subsection (b) of this section, the State trust company may establish the trust office or representative trust office only on approval by the Commissioner. The Commissioner may disapprove the proposed trust office or representative trust office if the Commissioner finds that the State trust company lacks sufficient resources to undertake the proposed expansion without adversely affecting its safety or soundness. (2001-263, s. 1.)

§ 53-313. Out-of-state trust offices and representative trust offices.

(a) Before establishing or acquiring and maintaining a trust office or representative trust office in a host state, a State trust company shall file a notice with the Commissioner, in the form required by the Commissioner, that sets forth the name of the State trust company, the location of the proposed trust office or representative trust office, whether the office will be a trust office or a representative trust office, and whether the laws of the host state permit the trust office or representative trust office to be maintained by the State trust company. The State trust company also shall furnish a copy of the resolution adopted by the board of directors or duly authorized committee of the board of directors of the State trust company authorizing the out-of-state trust office or representative trust office and shall pay the filing fee, if any, set by rule.

(b) The State trust company may commence business at the trust office or representative trust office on the thirty-first day following the date the Commissioner receives the notice, unless the Commissioner (i) establishes an earlier or later date; (ii) notifies the State trust company that the notice raises issues that require additional information or additional time for analysis; or (iii) disapproves the proposed trust office or representative trust office.

(c) If the Commissioner gives a notification described in subsection (b) of this section, the State trust company may establish the trust office or representative trust office only on approval by the Commissioner. The Commissioner may disapprove the proposed trust office or representative trust office if the Commissioner finds that the State trust company lacks sufficient resources to undertake the proposed expansion without adversely affecting its safety or soundness. (2001-263, s. 1.)

Subpart D. Out-of-State Trust Institution Trust Offices and Representative Trust Offices.

§ 53-314. Trust business through a branch or trust office.

An out-of-state trust institution may engage in trust business in this State only if it (i) maintains a trust office in this State as permitted by this Subpart, (ii) was allowed to maintain a trust office in this State under laws, or rules or orders of the Commissioner in effect prior to the date of enactment of this Article, but only to the extent allowed and subject to all limitations and conditions imposed under those laws, rules, or orders, or (iii) is a depository institution that maintains a branch in this State. (2001-263, s. 1; 2005-269, s. 7.)

§ 53-315. Establishing an interstate trust office.

An out-of-state trust institution that obtains approval from the Commissioner in accordance with the provisions of this Subpart may establish and maintain a trust office in this State; provided that the Commissioner shall not grant that approval unless the home state of the out-of-state trust institution permits a State trust institution to establish and maintain a trust office in that home state under restrictions not materially greater than those imposed by this Article. (2001-263, s. 1.)

§ 53-316. Acquiring an interstate trust office.

An out-of-state trust institution that obtains approval from the Commissioner in accordance with the provisions of this Subpart may acquire and maintain a trust office in this State; provided that the Commissioner shall not grant that approval unless the home state of the out-of-state trust institution permits a State trust institution to acquire and maintain a trust office in that home state under restrictions not materially greater than those imposed by this Article. (2001-263, s. 1.)

§ 53-317. Requirement of notice.

Before establishing or acquiring and maintaining a trust office in this State, an out-of-state trust institution shall provide, or cause its home state regulator to provide, notice to the Commissioner, in the form required by the Commissioner, along with copies of any applications, notices, or similar filings made with the home state regulator regarding the trust office. The notice shall be preceded or accompanied by:

(1) Evidence satisfactory to the Commissioner of compliance by the out-of-state trust institution with all applicable requirements of Article 15 of Chapter 55 of the General Statutes;
(2) Evidence satisfactory to the Commissioner of compliance by the out-of-state trust institution with any applicable requirements of its home state regulator for maintenance of capital, for expansion within the borders of the home state, and for acquiring or establishing and maintaining each trust office in this State;
(3) Evidence satisfactory to the Commissioner that the out-of-state trust institution is not in a hazardous condition;
(4) Unless waived by the Commissioner, a copy of the resolution adopted by the board of directors of the out-of-state trust institution (or similar governing body or a duly-authorized committee thereof) authorizing the trust office; and
(5) Payment of any fee set by rule. (2001-263, s. 1; 2005-269, s. 8.)

§ 53-318. Action on notice.

(a) The out-of-state trust institution may commence business in this State through the trust office on the sixty-first day following the date the Commissioner receives the notice described in G.S. 53-317 unless the Commissioner, within 60 days of receiving the notice:

(1) Specifies an earlier or later date for commencing business,
(2) Extends the period of review on a determination that the notice raises issues that require additional information or additional time for analysis; or
(3) Disapproves the proposed trust office.

(b) If the Commissioner gives a notification described in subdivision (2) of subsection (a) of this section, the out-of-state trust institution may establish the trust office only on approval by the Commissioner. The Commissioner may disapprove the proposed trust office if the Commissioner finds that the out-of-state trust institution lacks sufficient resources to undertake the proposed expansion without adversely affecting its safety or soundness or that the requirements of G.S. 53-315 or G.S. 53-316 have not been satisfied. (2001-263, s. 1; 2005-269, s. 9.)

§ 53-319. Additional trust offices; representative trust offices.

(a) An out-of-state trust institution that maintains a trust office in this State may establish or acquire and maintain additional trust offices or one or more representative trust offices in this State to the same extent that a State trust institution may establish or acquire and maintain trust offices or representative trust offices in this State and shall follow the procedures for establishing or acquiring and maintaining trust offices or representative trust offices set forth in G.S. 53-312.

(b) An out-of-state trust institution that does not maintain a trust office in this State shall file a notice with the Commissioner, in the form required by the Commissioner, before establishing or acquiring a representative trust office in this State. The notice shall be preceded or accompanied by:

(1) Evidence satisfactory to the Commissioner of compliance by the out-of-state trust institution with all applicable requirements of Article 15 of Chapter 55 of the General Statutes;
(2) Evidence satisfactory to the Commissioner of compliance by the out-of-state trust institution with any applicable requirements of its home state regulator for maintenance of capital, for expansion within the borders of the home state, and for acquiring or establishing and maintaining each representative trust office in this State;
(3) Evidence satisfactory to the Commissioner that the out-of-state trust institution is not in a hazardous condition;
(4) Unless waived by the Commissioner, a copy of the resolution adopted by the board of directors of the out-of-state trust institution (or similar governing body or a duly authorized committee thereof) authorizing the representative trust office;
(5) The proposed location of each proposed representative trust office; and
(6) Payment of any fee set by rule.

(c) The out-of-state trust institution may commence business at the representative trust office on the thirty-first day following the date the Commissioner receives the notice described in subsection (b) of this section, unless the Commissioner, within 30 days of receiving the notice:

(1) Specifies an earlier or later date for commencing business;
(2) Extends the period of review on a determination that the notice raises issues that require additional information or additional time for analysis; or
(3) Disapproves the proposed representative trust office.

(d) If the Commissioner gives a notification described in subdivision (2) of subsection (c) of this section, the out-of-state trust institution may commence business at the representative trust office only on approval by the Commissioner. The Commissioner may disapprove the representative trust office if the Commissioner finds that the out-of-state trust institution lacks sufficient resources to undertake the proposed expansion without adversely affecting its safety or soundness or that the requirements of G.S. 53-315 or G.S. 53-316 have not been satisfied.

(e) An out-of-state trust institution that was allowed to maintain a representative trust office in this State under laws, or rules or orders of the Commissioner in effect prior to the effective date of this Article may continue to do so, but only to the extent allowed and subject to all limitations and conditions imposed under those laws, rules, or orders. (2001-263, s. 1; 2005-269, s. 10.)

§ 53-320. Examinations; periodic reports; cooperative agreements; assessment of fees.

(a) The Commissioner may examine any activity conducted through a trust office or representative trust office maintained in this State by an out-of-state trust institution to determine whether these activities are being conducted in compliance with the laws of this State and in accordance with safe and sound practices. The pertinent provisions of Part 4 of this Article shall apply to these examinations.

(b) The Commissioner may require periodic reports regarding any out-of-state trust institution that maintains a trust office or representative trust office in this State pursuant to this Subpart. The required reports shall be provided by the trust institution or by the home state regulator. Any reporting requirements shall be (i) consistent, to the extent practicable, with the reporting requirements applicable to State trust companies and (ii) appropriate for the purpose of enabling the Commissioner to carry out the Commissioner's responsibilities under the provisions of this Article. The pertinent provisions of Part 4 of this Article shall apply to these reports.

(c) The Commissioner may enter into cooperative, coordinating, and information-sharing agreements with bank supervisory agencies, including agreements arranged by an organization composed of, affiliated with, or representing one or more bank supervisory agencies, with respect to the periodic supervision and examination of any trust office or representative trust office of an out-of-state trust institution in this State, or any trust office or representative trust office of a State trust institution in any host state. The Commissioner may accept and rely upon a report of examination and report of investigation of a bank supervisory agency in lieu of conducting a separate examination or investigation.

(d) The Commissioner may enter into agreements with any bank supervisory agency supervising (i) a State trust institution engaging in trust business outside this State or (ii) an out-of-state trust institution maintaining a trust office or representative trust office in this State to engage the services of the agency's examiners at a reasonable rate of compensation or to provide the services of the Commissioner's examiners to the agency at a reasonable rate of compensation. Article 3 of Chapter 143 of the General Statutes does not apply to agreements authorized by this subsection.

(e) The Commissioner may enter into joint examinations or joint enforcement actions with bank supervisory agencies supervising any trust office or representative trust office maintained in this State by an out-of-state trust institution or any trust office or representative trust office maintained by a State trust institution in any host state; provided, that the Commissioner may at any time take actions independently if the Commissioner considers the actions to be necessary or appropriate to carry out the Commissioner's responsibilities under the provisions of this Article or to ensure compliance with the laws of this State.

(f) Each out-of-state trust institution that maintains one or more trust offices or representative trust offices in this State may be assessed and, if assessed, shall pay supervisory and examination fees as provided by rules of the Commissioner. The fees may be shared with bank supervisory agencies or any organization composed of, affiliated with, or representing one or more bank supervisory agencies as agreed between those bank supervisory agencies and organizations and the Commissioner. (2001-263, s. 1; 2005-269, s. 11.)

§ 53-321. Enforcement.

(a) Consistent with Article 3A of Chapter 150B of the General Statutes, after notice and opportunity for hearing, the Commissioner may determine:

(1) That activities of a trust office maintained by an out-of-state trust institution in this State are being conducted in violation of the laws of this State or any rule, order, or declaratory ruling issued by the Commissioner, or in an unsafe and unsound manner, or that the

out-of-state trust institution does not meet or no longer meets the requirements of this Subpart for maintaining a trust office in this State; or

(2) That an out-of-state trust institution is engaged in unauthorized trust activity.

In either event, the Commissioner may take any enforcement actions the Commissioner would be authorized to take if the trust office or the out-of-state trust institution were a State trust company and may issue an order temporarily or permanently prohibiting the out-of-state trust institution from engaging in trust business in this State.

(b) Consistent with Article 3A of Chapter 150B of the General Statutes, after notice and opportunity for hearing, the Commissioner may determine by order that an out-of-state trust institution maintaining a representative trust office in this State does not meet or no longer meets the requirements of this Subpart for maintaining a representative trust office in this State. The order shall be effective on the date of issuance or any other date the Commissioner determines.

(c) In cases involving extraordinary circumstances requiring immediate action, the Commissioner may take any action permitted by subsection (a) or (b) of this section without notice or opportunity for hearing but shall promptly afford a subsequent hearing upon an application to rescind the action taken.

(d) The Commissioner shall promptly give notice to the home state regulator and any other bank supervisory agency supervising the out-of-state trust institution of each enforcement action taken against an out-of-state trust institution and may consult and cooperate with other bank supervisory agencies in pursuing and resolving the enforcement action. (2001-263, s. 1; 2005-269, s. 12.)

§ 53-322. Notice of transactions that cause a change in control.

Each out-of-state trust institution that maintains a trust office or representative trust office in this State, or the home state regulator of the trust institution, shall give at least 30 days' notice or, in the case of an emergency transaction or the cessation of trust activity in this State by an out-of-state trust institution or foreign trust institution whose only office in this State is a registered office, as much notice as practicable, to the Commissioner of:

(1) Any merger, consolidation, share exchange, or other transaction that would cause a change in control of an out-of-state trust institution (i) that would be subject to Subpart D of Part 3 of this Article if the out-of-state trust institution were a State trust company or (ii) is required to be filed with any bank supervisory agency;

(2) Any transfer of all or substantially all of the accounts or account assets of the out-of-state trust institution to another person; or

(3) The closing, transfer, or discontinuance of any trust office or representative trust office in this State. (2001-263, s. 1; 2005-269, s. 13.)

Subpart E. Foreign Trust Institution Trust Offices and Representative Trust Offices.

§ 53-323. Foreign trust institution application for trust office or representative trust office.

Before establishing or acquiring and maintaining a trust office in this State, a foreign trust institution shall make application to the Commissioner for permission to do so in the English language and in the form required by the Commissioner. The application shall be preceded or accompanied by:

(1) Evidence satisfactory to the Commissioner of compliance with all applicable requirements of Article 15 of Chapter 55 of the General Statutes;

(2) Evidence satisfactory to the Commissioner of compliance by the foreign trust institution with any applicable requirements of its home country regulator for maintenance of capital, for expansion within the borders of its home country or within a political subdivision of its home country, and for acquiring or establishing and maintaining the trust office in this State;

(3) Evidence satisfactory to the Commissioner that the foreign trust institution is not in a hazardous condition;

(4) Unless waived by the Commissioner, a copy of the resolution adopted by the board of directors of the foreign trust institution, or similar governing body or a duly-authorized committee thereof, authorizing the trust office; and

(5) Payment of any fee set by rule.

The Commissioner may require any materials not written in the English language to be translated, and the translation certified in a manner satisfactory to the Commissioner, at the expense of the foreign trust institution. (2001-263, s. 1; 2005-269, s. 14.)

§ 53-324. Conditions for approval.

(a) A foreign trust institution may engage in trust business in this State only on approval by the Commissioner of an application described in G.S. 53-323, which may be given upon conditions required by the Commissioner for prudential reasons consistent with any applicable international agreements to which the United States is a party.

(b) The Commissioner may deny approval of the application if the Commissioner finds that the foreign trust institution lacks sufficient resources to undertake the proposed expansion without adversely affecting its safety or soundness or that the management, integrity, or reputation of the foreign trust institution does not justify approval. The Commissioner also may deny approval if the Commissioner is unable to determine from the application materials whether the foreign trust institution possesses sufficient resources to undertake the proposed expansion without adversely affecting its safety or soundness or whether the management, integrity, or reputation of the foreign trust institution justifies approval. (2001-263, s. 1; 2005-269, s. 15.)

§ 53-325. Additional trust offices and representative trust offices.

A foreign trust institution that maintains a trust office in this State under the provisions of this Subpart may establish or acquire and maintain additional trust offices or representative trust offices in this State in the manner provided by G.S. 53-319 for out-of-state trust institutions, except that the Commissioner may require any additional information and impose any additional conditions as the Commissioner deems necessary for prudential reasons consistent with any applicable international agreements to which the United States is a party. (2001-263, s. 1.)

§ 53-326. Examinations; periodic reports; cooperative agreements; assessment of fees.

(a) The Commissioner may examine any activity conducted through a trust office or representative trust office maintained in this State by a foreign trust institution to determine whether these activities are being conducted in compliance with the laws of this State and in accordance with safe and sound practices. The pertinent provisions of Part 4 of this Article shall apply to these examinations.

(b) The Commissioner may require periodic reports regarding any foreign trust institution that maintains a trust office or representative trust office in this State. The required reports shall be provided in the English language by the trust institution or by its home country regulator. The reporting requirements shall be those the Commissioner considers appropriate for the purpose of enabling the Commissioner to carry out the Commissioner's responsibilities under the provisions of this Article for prudential reasons consistent with any applicable international agreements to which the United States is a party. The pertinent provisions of Part 4 of this Article shall apply to these reports.

(c) The Commissioner may enter into cooperative, coordinating, and information-sharing agreements with bank supervisory agencies supervising foreign trust institutions, including agreements arranged by an organization composed of, affiliated with, or representing one or more bank supervisory agencies, with respect to the periodic supervision and examination of any trust office or representative trust office of a foreign trust institution in this State, or any trust office or representative trust office of a State trust institution engaged in trust business or trust marketing in a foreign country. The Commissioner may accept and rely upon a report of examination and report of investigation of a bank supervisory agency in lieu of conducting a separate examination or investigation of a foreign trust institution.

(d) The Commissioner may enter into agreements with bank supervisory agencies supervising (i) a State trust institution engaging in trust business in a foreign country or (ii) a foreign trust institution maintaining a trust office or representative trust office in this State to engage the services of the bank supervisory agency's examiners at a reasonable rate of compensation or to provide the services of the Commissioner's examiners to the bank supervisory agency at a reasonable rate of compensation. Article 3 of Chapter 143 of the General Statutes does not apply to agreements authorized by this section.

(e) The Commissioner may enter into joint examinations or joint enforcement actions with bank supervisory agencies supervising any trust office or representative trust office maintained in this State by a foreign trust institution or any trust office or representative trust office maintained by a State trust institution in any foreign country; provided, that the Commissioner may at any time take actions independently if the Commissioner considers the actions to be necessary or appropriate to carry out the Commissioner's responsibilities under the provisions of this Article or to ensure compliance with the laws of this State.

(f) Each foreign trust institution that maintains one or more trust offices or representative trust offices in this State may be assessed and, if assessed, shall pay supervisory and examination fees as provided by rules of the Commissioner. The fees may be shared with bank supervisory agencies or with any organization composed of, affiliated with, or representing one or more bank supervisory agencies, as agreed between the bank supervisory agencies and organizations and the Commissioner. (2001-263, s. 1; 2005-269, s. 16.)

§ 53-327. Enforcement.

(a) Consistent with Article 3A of Chapter 150B of the General Statutes, after notice and opportunity for hearing, the Commissioner may determine:

(1) That activities of a trust office or representative trust office maintained by a foreign trust institution in this State are being conducted in violation of the laws of this State or any rule, order, or declaratory

ruling issued by the Commissioner, or in an unsafe and unsound manner, or that the foreign trust institution does not meet or no longer meets the requirements of this Subpart for maintaining a trust office or representative trust office in this State; or

(2) That a foreign trust institution is engaged in unauthorized trust activity.

In either event, the Commissioner may take any enforcement actions the Commissioner would be authorized to take if the foreign trust institution were a State trust company and may issue an order temporarily or permanently prohibiting the foreign trust institution from engaging in trust business or trust marketing in this State.

(b) Consistent with Article 3A of Chapter 150B of the General Statutes, after notice and opportunity for hearing, the Commissioner may determine by order that a foreign trust institution maintaining a representative trust office in this State does not meet or no longer meets the requirements of this Subpart for maintaining a representative trust office in this State. The order shall be effective on the date of issuance or any other date the Commissioner determines.

(c) In cases involving extraordinary circumstances requiring immediate action, the Commissioner may take any action permitted by subsection (a) or (b) of this section without notice or opportunity for hearing but shall promptly afford a subsequent hearing upon request to rescind the action taken.

(d) The Commissioner shall promptly give notice to the home country regulator and any other bank supervisory agency supervising the foreign trust institution of each enforcement action taken against a foreign trust institution and may consult and cooperate with bank supervisory agencies in pursuing and resolving the enforcement action. (2001-263, s. 1; 2005-269, s. 17.)

§ 53-328. Notice of transactions that cause a change in control.

Each foreign trust institution that maintains a trust office or representative trust office in this State, or the home country regulator of the foreign trust institution, shall give at least 30 days' notice (or, in the case of an emergency transaction or the cessation of trust activity in this State by an out-of-state trust institution or foreign trust institution whose only office in this State is a registered office, as much notice as practicable) to the Commissioner, in the form required by the Commissioner, of:

(1) Any merger, consolidation, share exchange, or other transaction that would cause a change of control of a foreign trust institution:
  a. That would be subject to Subpart D of Part 3 of this Article if the foreign trust institution were a State trust company; or
  b. Is required to be filed with any bank supervisory agency;

(2) Any transfer of all or substantially all of the accounts or account assets of the foreign trust institution to another person; or

(3) The closing, transfer, or discontinuance of any trust office or representative trust office in this State. (2001-263, s. 1; 2005-269, s. 18.)

§ 53-329. International agreements.

If any provision of this Article concerning foreign trust institutions, or the application of that provision, is found by any competent adjudicatory body to violate any international agreement to which the United States is a party, the provision shall be deemed modified only to the extent and only in the particular circumstances necessary to make the provision as modified comply with the international agreement, and the remaining provisions of this Article shall not be affected and shall continue to apply to foreign trust institutions. (2001-263, s. 1.)

Part 3. State Trust Company Charter Act.

Subpart A. General.

§ 53-330. Title and purposes.

(a) This Part may be cited as the State Trust Company Charter Act.

(b) It is the express intent of this Part to provide for the chartering of trust companies apart from the provisions of Article 2 of this Chapter and to permit trust companies to engage in trust business subject to the provisions of this Article. (2001-263, s. 1.)

Subpart B. Organization and Powers of State Trust Company.

§ 53-331. Organization and powers of State trust company.

(a) Subject to the other provisions of this Part, one or more persons may organize and charter a State trust company, which may be incorporated in the manner described in this Part and in no other way.

(b) Subject to G.S. 53-313 and G.S. 53-336(b) and other applicable provisions of State and federal law, a State trust company may:

(1) Act as a fiduciary within or outside this State;
(2) Act within or outside this State as agent, advisory agent, assignee, assignee for the benefit of creditors, attorney-in-fact, authenticating agent, bailee, bond or indenture trustee, conservator, conversion agent, curator, custodian, escrow agent, exchange agent, fiscal or paying agent, financial adviser, investment adviser, investment manager, managing agent, purchase agent, receiver, registrar, safekeeping agent, subscription agent, transfer agent, warrant agent, or in similar capacities generally performed by corporate trustees, and in so acting to possess, purchase, sell, invest, reinvest, safekeep, or otherwise manage or administer real or personal property of other persons;
(3) Engage in trust marketing within this State; and
(4) Exercise the powers of a business corporation organized under North Carolina law and any incidental powers that are reasonably necessary to enable it to fully exercise, in accordance with commonly accepted fiduciary customs and usages, a power conferred in this Article. (2001-263, s. 1.)

§ 53-332. Articles of incorporation of State trust company.

The articles of incorporation of a State trust company shall be signed and acknowledged by or on behalf of each organizer and shall contain:

(1) The information required to be set forth in G.S. 55-2-02(a) and, except for telephone information, G.S. 53-311(c); and
(2) Any provision consistent with G.S. 55-2-02(b) and other applicable law that the organizers elect to set forth in the articles of incorporation for the regulation of the internal affairs of the State trust company. (2001-263, s. 1.)

§ 53-333. Application for State trust company charter and permission to incorporate State trust company.

(a) An application for a State trust company charter and permission to incorporate the State trust company shall be made to the Commissioner in the form required by the Commissioner and shall be supported by information, data, and records that the Commissioner requires. The application shall be accompanied by the fee set by the Commissioner by rule.

(b) Upon receipt of the application, the Commissioner shall at once conduct an examination of all relevant facts connected with the formation of the proposed State trust company. The Commissioner may consider the following factors:

(1) The proposed market or markets to be served;

(2) Whether the proposed organizational and capital structure and the amount of initial capital appear adequate in relation to the proposed business and market or markets;

(3) Whether the anticipated volume and nature of business indicate a reasonable probability of success and profitability based on the market or markets proposed to be served;

(4) Whether the proposed officers and directors, as a group, have sufficient experience, ability, standing, competence, trustworthiness, and integrity to justify a belief that the proposed State trust company will be free from improper or unlawful influence and otherwise will operate in compliance with law, and that success of the proposed State trust company is reasonably probable; and

(5) Whether the proposed name of the proposed State trust company is likely to mislead the public as to its character or purpose or is the same as a name already adopted by an existing bank, savings association, or trust institution in this State, or so similar thereto as to be likely to mislead the public.

(c) The failure of an applicant to furnish required information, data, other material, or the required fee within 30 days after a request may be considered an abandonment of the application. (2001-263, s. 1.)

§ 53-334. Notice and investigation of charter application.

(a) The Commissioner shall notify the organizers when the application is complete and accepted for filing and all required fees have been paid.

(b) The Commissioner shall investigate the application and inquire into the identity and character of each proposed director, officer, and principal shareholder. Notwithstanding any laws to the contrary, information in the application bearing on the character, or information about the personal finances, of an existing or proposed organizer, officer, director, or shareholder is confidential and not subject to public disclosure. (2001-263, s. 1.)

§ 53-335. Decision on charter application and hearing.

(a) The Commissioner, based on the application and investigation described in this Subpart, shall enter an order approving or denying approval of the application.

(b) If the Commissioner orders that the proposed State trust company may be formed, the Commissioner shall issue a State trust company charter and a certification to the Secretary of State permitting the incorporation of the State trust company. The Commissioner may make approval of any application conditional and shall include any conditions in the order granting the charter.

(c) Any order entered by the Commissioner with respect to a charter application shall be subject to review by the Commission for entry of final agency decision. (2001-263, s. 1.)

§ 53-336. Issuance of charter.

(a) A proposed State trust company shall not be incorporated or engage in trust business or trust marketing until it receives a charter issued by the Commissioner. The Commissioner shall not issue the charter until the State trust company certifies that it has:

(1) Received cash or United States government securities having a market value on the date of capitalization in at least the full amount of required initial capital from subscriptions for the issuance of shares;

(2) Elected the initial officers and directors named in the application for charter or other officers and directors approved by the Commissioner; and

(3) Complied with all other requirements of this Subpart relative to the organization of a State trust company.

(b) The charter issued by the Commissioner shall set forth the trust powers of the State trust company, which may be stated as:

(1) All powers granted to a State trust company in this State; or

(2) Specific powers that the State trust company chooses and is authorized by the Commissioner to exercise.

(c) If a State trust company does not open and engage in trust business within six months after the date it receives its charter, or within such further period as may be extended by the Commissioner, the Commissioner may cancel the charter. (2001-263, s. 1.)

§ 53-337. Required initial capital.

(a) The Commissioner shall not issue a charter to a proposed State trust company having initial capital of less than two million dollars ($2,000,000), except as provided in subsection (b) of this section.

(b) The Commissioner may require additional initial capital for a proposed State trust company if the Commissioner finds the proposed scope or type of operation of a proposed State trust company requires additional initial capital for the safe and sound operation of the State trust company. The Commissioner may reduce the amount of minimum initial capital required for a proposed State trust company if the Commissioner finds the proposed scope or type of operation of a proposed State trust company may be formed with reduced initial capital consistent with the safe and sound operation of the State trust company. The safety and soundness factors to be considered by the Commissioner in the exercise of the Commissioner's discretion include:

(1) The nature and type of business proposed to be conducted;

(2) The nature and liquidity of assets proposed to be held in a corporate capacity;

(3) The amount of fiduciary assets projected to be under management;

(4) The type of fiduciary assets proposed to be held and the proposed depository of the assets;

(5) The complexity of fiduciary duties and degree of discretion proposed to be undertaken;

(6) The competence and experience of proposed management;

(7) The extent and adequacy of proposed internal controls;

(8) The proposed presence or absence of annual unqualified audits by an independent certified public accountant;

(9) The reasonableness of business plans for retaining or acquiring additional equity capital; and

(10) The existence and adequacy of insurance proposed to be obtained by the trust company for the purpose of protecting its clients, beneficiaries, and grantors. (2001-263, s. 1.)

§ 53-338. Subordinated notes or debentures.

The amount of any outstanding notes or debentures that are subordinated to creditors or classes of creditors of the State trust company may be treated as equity capital of the State trust company for purposes of determining equity capital adequacy, hazardous condition, or insolvency, and for other purposes, as provided by rules, orders, or declaratory rulings of the Commissioner. (2001-263, s. 1.)

§ 53-339. Application of laws relating to general business corporations.

Chapter 55 of the General Statutes applies to a State trust company to the extent not inconsistent with this Article. Except for the filing of annual reports and statement of change of registered agent or registered office, unless expressly authorized by this Article or a rule adopted by the Commission, a State trust company shall not take an action authorized by Chapter 55 of the General Statutes that requires a filing with the Secretary of State without first obtaining the approval of the Commissioner. (2001-263, s. 1.)

Subpart C. Investments and Activities.

§ 53-340. Investment in State trust company facilities.

(a) A State trust company may invest in one or more State trust company facilities consistent with the safe and sound operation of a State trust company.

(b) For the purposes of this Part, "State trust company facility" means real estate owned, or leased to the extent the lease or the leasehold improvements are capitalized, by a State trust company for the purposes of:

(1) Providing space for State trust company employees, officers, and directors to perform their duties and space for appropriate parking;

(2) Conducting trust business, including meeting the reasonable needs and convenience of the State trust company's customers, employees, officers, and directors, and providing for necessary computer operations, data processing, maintenance, and record retention and storage;

(3) Future expansion of the State trust company's facilities; or

(4) Conducting another activity authorized by law or by rules, orders, or declaratory rulings of the Commissioner.

(c) Without the approval of the Commissioner, a State trust company shall not, within the first three years following issuance of its charter, directly or indirectly, invest an amount in excess of one-half of its initial capital in State trust company facilities, furniture, fixtures, and equipment. Except as otherwise provided by rules, orders, or declaratory rulings of the Commissioner, in computing this limitation, a State trust company shall include:

(1) Its direct investment in State trust company facilities;

(2) Any investment in a company with an interest in a State trust company facility;

(3) Any indebtedness incurred on State trust company facilities by an affiliate of the State trust company.

Except as otherwise provided by rules, orders, or declaratory rulings of the Commissioner, in computing this limitation, a State trust company may exclude an amount included under subdivisions (1) through (3) of this subsection to the extent any lease of a facility from the company holding title to the facility is capitalized by the State trust company.

(d) Real estate acquired under subdivision (3) of subsection (b) of this section ceases to be a State trust company facility if it is not used for a purpose listed in subdivision (1), (2), or (4) of subsection (b) of this section on the third anniversary of the date of its acquisition unless the Commissioner grants approval to hold the real estate for a longer period. (2001-263, s. 1.)

§ 53-341. Other real estate.

(a) A State trust company shall not acquire real estate other than a State trust company facility for its own account except:

(1) Securitized interests in real estate and obligations secured by real estate;

(2) As necessary to avoid or minimize a loss on an investment previously made in good faith; or

(3) As provided by rules, orders, or declaratory rulings of the Commissioner.

(b) To the extent reasonably necessary to avoid or minimize loss on real estate acquired as permitted by subsection (a) of this section or under G.S. 53-340, a State trust company may exchange real estate for other real estate or personal property, invest additional funds in or improve such real estate, or acquire additional real estate.

(c) Except as provided in subsection (d) of this section, a State trust company shall dispose of any real estate acquired as permitted by subdivision (2) of subsection (a) of this section or under G.S. 53-340:

(1) In the case of real estate acquired under subdivision (2) of subsection (a) of this section, on or before the fifth anniversary of:
  a. The date it was acquired; or
  b. The date it ceases to be used as a State trust company facility if it began to be so used after its acquisition.

(2) In the case of real estate acquired under G.S. 53-340, on or before the third anniversary of the date it ceases to be a State trust company facility as provided by G.S. 53-340.

(d) The Commissioner may grant one or more extensions of time for disposing of real estate if the Commissioner determines that:

(1) The State trust company has made a good faith effort to dispose of the real estate and has been unable to do so on reasonably advantageous terms; or

(2) Disposal of the real estate otherwise would be detrimental to the State trust company. (2001-263, s. 1.)

§ 53-342. Securities and other investments.

(a) A State trust company may invest its corporate funds in any type or character of equity securities or debt securities subject to the limitations provided by this section.

(b) Unless the Commissioner approves maintenance of a lesser amount, a State trust company shall invest and maintain an amount equal to at least forty percent (40%) of its equity capital in unencumbered cash, cash equivalents, and readily marketable securities.

(c) Subject to subsections (d) and (e) of this section, the total investment in equity and investment securities of any one issuer, obligor, or maker held by a State trust company for its own account shall not exceed an amount equal to fifteen percent (15%) of the State trust company's equity capital. The Commissioner may authorize investments in excess of this limitation if the Commissioner concludes that the safe and sound operation of a State trust company would not be adversely affected by a proposed investment exceeding this limitation.

(d) In calculating compliance with the investment limits set forth in subsection (c) of this section, a State trust company shall not be required to combine:

(1) The State trust company's pro rata share of the securities of an issuer in the portfolio of a collective investment vehicle with the State trust company's pro rata share of the securities of that issuer held by another collective investment vehicle in which the State trust company has invested; or

(2) The State trust company's own direct investment in the securities of an issuer with the State trust company's pro rata share of the securities of that issuer held by collective investment vehicles in which the State trust company has invested under the provisions of this section.

(e) Notwithstanding subsection (c) of this section, a State trust company may purchase for its own account, without limitation and subject only to the exercise of prudent judgment:

(1) Bonds and other general obligations of a state, an agency, or political subdivision of a state, the United States, or an agency or instrumentality of the United States;

(2) A debt security that this State, an agency or political subdivision of this State, the United States, or an agency or instrumentality of the United States has unconditionally agreed to purchase, insure, or guarantee;

(3) Securities that are offered and sold under 15 U.S.C. § 77d(5);

(4) Mortgage-related securities as defined in 15 U.S.C. § 78c(a);

(5) Investment securities issued or guaranteed by the Federal Home Loan Mortgage Corporation, Fannie Mae, the Government National Mortgage Association, the Federal Agricultural Mortgage Association, or the Federal Farm Credit Banks Funding Corporation; and

(6) Investment securities issued or guaranteed by the North American Development Bank.

(f) The Commissioner may allow State trust companies to make other investments of its corporate funds not specified in this Subpart by rules, orders, or declaratory rulings. (2001-263, s. 1.)

§ 53-343. Prohibited distributions, acquisitions, liens, or pledges.

A State trust company shall not make any distribution to its shareholders, acquire its own shares, acquire a lien upon its own shares, or pledge its own assets while an order of the Commissioner prohibiting such distributions, acquisitions, liens, or pledges is in effect. (2001-263, s. 1.)

§ 53-344. Subsidiaries.

(a) Before acquiring, establishing, or performing activities through a subsidiary, a State trust company shall file a notice with the Commissioner, in the form required by the Commissioner, describing in detail the proposed activities of the subsidiary, the amount of the State trust company's proposed investment in the subsidiary, and the State trust company's proposed ownership interest in the subsidiary.

(b) The State trust company may acquire or establish a subsidiary or begin performing activities in an existing subsidiary 30 days following the date the Commissioner receives the notice, unless the Commissioner:

(1) Establishes an earlier or later date;

(2) Notifies the State trust company that the notice raises issues that require additional information or additional time for analysis; or

(3) Disapproves the acquisition, establishment, or performance of activities through the subsidiary.

(c) If the Commissioner gives a notification described in subdivision (2) of subsection (b) of this section, the State trust company may acquire, establish or conduct activities through the subsidiary only on approval by the Commissioner. The Commissioner may disapprove the subsidiary if the Commissioner finds that the State trust company lacks sufficient resources to undertake the proposed expansion or perform the activity without adversely affecting its safety or soundness.

(d) The Commissioner may make the establishment, acquisition, or performance of new activities through a subsidiary conditional and shall include any such conditions in an order.

(e) The provisions of this section, rather than G.S. 53-342, shall apply to the establishment of a subsidiary by a State trust company.

(f) Changes in ownership or control of a subsidiary of a State trust company shall be made only upon the approval of the Commissioner obtained in accordance with the procedures set forth in this section. (2001-263, s. 1.)

§ 53-345. Engaging in commerce prohibited.

Except as otherwise provided by this Part, or by rules, orders, or declaratory rulings of the Commissioner, a State trust company shall not engage in trade or commerce by buying, selling, or otherwise dealing in goods, or by conducting business other than trust business and trust marketing, except as necessary to fulfill a fiduciary obligation to a client. (2001-263, s. 1.)

§ 53-346. Lending and lease financing; conversion to State bank.

(a) Except as may be appropriate for extensions of credit in connection with trust or other account relationships, and as provided in and subject to the provisions of Article 5 of Chapter 36A of the General Statutes and other provisions of applicable law, a State trust company shall not engage in a loan business or in lease financing transactions as the party extending credit.

(b) Notwithstanding any other provision of this Chapter, a State trust company may, with the approval of the Commissioner, convert to a State bank by following the procedures and requirements set forth in Article 2 of this Chapter, subject to any modifications to those procedures and requirements that are necessary and appropriate for the conversion of a State trust company. The Commissioner may make modifications to procedures or requirements of Article 2 of this Chapter by rule, order or declaratory ruling. (2001-263, s. 1.)

Subpart D. Ownership; Governance; Mergers.

§ 53-347. Acquisition of control.

(a) Except as this section otherwise expressly permits, a person shall not, without the approval of the Commissioner, directly or indirectly acquire control of a State trust company.

(b) This Subpart does not prohibit a person from contracting to acquire control of a State trust company subject to required approvals.

(c) This Subpart does not require the approval of the Commissioner for the acquisition of securities in the following circumstances:

(1) The acquisition of securities in connection with securing, collecting, or satisfying a debt previously contracted for in good faith if the acquiring person files notice of acquisition of control with the Commissioner, in the form required by the Commissioner, at least 10 days before the person votes the securities acquired;

(2) The acquisition of additional voting securities in any class or series by a controlling person who previously has complied with and received approval under the provisions of this Article or who was identified as a controlling person in a prior application filed with and approved by the Commissioner if the acquiring person files notice of acquisition of those securities with the Commissioner, in the form required by the Commissioner, at least 10 days before the person votes the securities acquired;

(3) An acquisition or transfer of securities by operation of law, will, or intestate succession if the acquiring person files notice of acquisition of control with the Commissioner, in the form required by the Commissioner, at least 10 days before the person votes the securities acquired;

(4) An acquisition of securities by gift, unless the gift is made for the purpose of circumventing this section, if the acquiring person files notice of acquisition of control with the Commissioner, in the form required by the Commissioner, at least 10 days before the person votes the securities acquired; or

(5) A transaction exempted by the Commissioner by rules, orders, or declaratory rulings because (i) the transaction is not within the purposes of this Article, or (ii) regulation of the transaction is not necessary or appropriate to achieve the objectives of this Article.

(d) Information provided under the provisions of subsection (c) of this section shall be subject to G.S. 53-348(c), and persons providing that information shall be subject to G.S. 53-348(d).

(e) Upon receiving a notice described in subsection (c) of this section, the Commissioner may, on or before the tenth day after the acquiring person files the notice, notify the acquiring person of objection to the voting of securities by the acquiring person or of a request for further information concerning the acquisition of control. If the Commissioner notifies the acquiring person of the objection or request for further information, the acquiring person may vote the shares only on approval by the Commissioner and:

(1) The acquiring person shall follow the procedures prescribed in this Subpart for an application to acquire control of a State trust company;

(2) The Commissioner may request any information that may be requested under the procedures prescribed in this Subpart in connection with an application to acquire control of a State trust company; and

(3) For purposes of determining a quorum of shareholders of a State trust company, the shares shall be treated as authorized but unissued shares unless (i) the Commissioner approves the application to vote the securities or (ii) the acquiring person no longer has the power to vote the shares, either directly or indirectly. (2001-263, s. 1.)

§ 53-348. Application regarding acquisition of control.

(a) A person seeking approval to acquire control of a State trust company shall file with the Commissioner:

(1) An application in the form required by the Commissioner;
(2) Any filing fee required by rule; and
(3) All information required by rule or that the Commissioner requires in connection with a particular application in order to make an informed decision to approve or reject the proposed acquisition of control.

(b) If any group of individuals or entities acting in concert seek approval to acquire control, the information the Commissioner may require under the provisions of this Subpart may be required of each member of the group.

(c) Notwithstanding any laws to the contrary, information bearing on the character or information about the personal finances of an existing or proposed shareholder of a State trust company or other individual is confidential and not subject to public disclosure.

(d) If a person seeking approval to acquire control is not a North Carolina resident, a North Carolina corporation, or an out-of-state corporation qualified to do business in this State, the Commissioner may require the person to appoint a resident agent for service of process. (2001-263, s. 1.)

§ 53-349. Decision on acquisition of control.

(a) Not later than the sixtieth day following receipt of the application, the Commissioner shall either approve or deny the proposed acquisition of control.

(b) The Commissioner may deny an acquisition of control if:
(1) The financial condition of the person seeking approval to acquire control, or any member of a group seeking approval to acquire control, might jeopardize the financial stability of the State trust company or the interests of its clients;
(2) Investigation of the character, competence, general fitness, experience, or integrity of the person seeking approval to acquire control, or any member of a group seeking approval to acquire control, shows that the proposed acquisition of control would not be in the best interests of the clients of the State trust company;
(3) Plans or proposals to operate, liquidate, or sell the State trust company or its assets following the acquisition of control are not in the best interests of the State trust company's clients;
(4) The State trust company would not be solvent, have adequate equity capital, or be in compliance with the laws of this State after the acquisition of control; or
(5) The person seeking approval to acquire control has failed to furnish all information required by the Commissioner.

(c) If an application filed under the provisions of this section is approved by the Commissioner, the transaction may be consummated. Any written commitment from the person seeking approval to acquire control made as a condition for approval of the application is enforceable against the State trust company and the person acquiring control. (2001-263, s. 1.)

§ 53-350. Appeal.

Any order entered by the Commissioner with respect to an application for acquisition or control of a State trust company shall be subject to review by the Commission for entry of a final agency decision. (2001-263, s. 1.)

§ 53-351. Report of changes in chief executive officer or directors.

Each State trust company shall report to the Commissioner within 48 hours, on the forms and with the information required by the Commissioner, any changes in the chief executive officer or the directors of the State trust company, including in its report a statement of the past and current business and professional affiliations of each new chief executive officer or director. (2001-263, s. 1.)

§ 53-352. Board of directors.

(a) All corporate powers of a State trust company shall be exercised under the authority of, and the business and affairs of a State trust company shall be managed under the direction of, its board of directors. Without the approval of the Commissioner, the board shall consist of not less than five directors. The shareholders of a State trust company, at any shareholders' meeting, may authorize not more than two additional directorships which may be left unfilled and to be filled in the discretion of the directors of the State trust company during the interval between shareholders' meetings. Except as specifically provided otherwise in this section, the number, election, term, and classification of the directors of a State trust company shall be governed by the provisions of Chapter 55 of the General Statutes.

(b) Before each term to which a person is elected to serve as a director of a State trust company, the person shall submit an affidavit for filing in the minutes of the State trust company stating that the person:

(1) Accepts the position;
(2) Will not knowingly violate, or knowingly permit an officer, director, or employee of the State trust company to violate, any law applicable to the conduct of business of the State trust company; and
(3) Will diligently perform the duties of a director.

(c) A person designated with a title such as advisory director is not considered a director if that person:

(1) Is not elected by the shareholders of the State trust company; and
(2) Does not vote on matters before the board of directors or any committee of the board and is not counted for purposes of determining a quorum of the board or any committee of the board. (2001-263, s. 1.)

§ 53-353. Required board meetings.

The board of directors of a State trust company shall hold at least one regular meeting each quarter. At each regular meeting, the board shall review and approve, or disapprove and correct, the minutes of the prior meeting and review the operations, activities, and financial condition of the State trust company. The board may designate committees from among its members to perform these duties and approve or disapprove the committees' reports at each regular meeting. All material actions of the board shall be recorded in its minutes. (2001-263, s. 1.)

§ 53-354. Officers.

The board of directors shall annually appoint the officers of the State trust company who shall serve at the pleasure of the board. The contract rights of officers, if any, shall be governed by applicable provisions of Chapter 55 of the General Statutes and general law. The State trust company shall have a chief executive officer primarily responsible for the execution of board policies and operation of the State trust company. The State trust company also shall have an officer responsible for the maintenance and storage of all corporate books and records of the State trust company and for required attestation of signatures. These positions shall not be held by the same person. The board may appoint any other officers of the State trust company, including assistants to the officers required by this section, the board considers necessary or appropriate. (2001-263, s. 1.)

§ 53-355. Certain criminal offenses.

(a) An officer, director, employee, or shareholder of a State trust company commits an offense if the person knowingly:

(1) Conceals information or a fact, or removes, destroys, or conceals a book or record of the State trust company for the purpose of concealing information or a fact, from the Commissioner or an agent of the Commissioner; or

(2) For the purpose of concealing information or a fact, removes or destroys any book or record of the State trust company that is material to a pending or anticipated legal or administrative proceeding.

(b) An officer, director, or employee of a State trust company commits an offense if the person knowingly makes a false entry in the books or records or in any report or statement of the State trust company.

(c) An offense under the provisions of this section shall be a Class H felony. (2001-263, s. 1.)

§ 53-356. Responsibility of directors.

(a) The standard of conduct for directors shall be as set forth in G.S. 55-8-30.

(b) Any director of a State trust company who shall knowingly violate, or who shall knowingly permit to be violated by any officers, agents, or employees of such State trust company, any of the provisions of this Article shall be held personally and individually liable for all damages which the State trust company, its shareholders, or any other person has sustained in consequence of the violation. Any aggrieved shareholder of any State trust company in liquidation may prosecute an action for the enforcement of the provisions of this section. Only one such action may be brought. The procedure shall follow, as much as possible, that prescribed by Article 3 of Chapter 44A of the General Statutes, relative to suits on bonds of contractors with municipal corporations. (2001-263, s. 1.)

§ 53-357. Record keeping.

A State trust company shall keep its fiduciary records separate and distinct from its other records. The fiduciary records shall contain all material information relative to each account as appropriate under the circumstances. (2001-263, s. 1.)

§ 53-358. Bonding requirements; reports of apparent crime.

(a) The board of directors of a State trust company shall require protection and indemnity for the State trust company and its clients in amounts established by rules, orders, or declaratory rulings of the Commissioner, or otherwise in reasonable amounts, against dishonesty, fraud, defalcation, forgery, theft, and other similar insurable losses, with corporate insurance or surety companies:

(1) Authorized to do business in this State; or

(2) Acceptable to the Commissioner and otherwise lawfully permitted to issue coverage against those losses in this State.

(b) Except as otherwise provided by rules, orders, or declaratory rulings of the Commissioner, coverage required under subsection (a) of this section shall include each director, officer, and employee of the State trust company without regard to whether the person receives salary or other compensation.

(c) A State trust company that is the victim of a robbery, has a shortage of corporate or account assets in excess of five thousand dollars ($5,000), or is the victim of an apparent or suspected misapplication of its corporate property or account assets in any amount shall report the robbery, shortage, or apparent or suspected misapplication to the Commissioner within 48 hours after the time it is discovered. The initial report may be oral if a written report is made promptly following the oral report. Neither the State trust company nor any director, officer, employee, or agent of the State trust company is subject to any liability for providing any information in any such report in good faith. (2001-263, s. 1.)

§ 53-359. Merger, share exchange, or asset transfer authority.

(a) With the approval of the Commissioner, a State trust company may merge or exchange its shares with, or acquire or be acquired through a merger or share exchange with, another company, or may transfer to another company all or substantially all of its assets and liabilities, or may acquire from another company all or substantially all of its assets and liabilities.

(b) A merger or share exchange authorized by subsection (a) of this section, shall be governed by Article 11 of Chapter 55 of the General Statutes and G.S. 53-17. An acquisition or transfer of assets authorized by subsection (a) of this section shall be governed by Article 12 of Chapter 55 of the General Statutes and G.S. 53-17. (2001-263, s. 1.)

§ 53-360. Merger, share exchange, or asset transfer application.

(a) A copy of the proposed articles of merger or share exchange, or asset transfer agreement, and an application in the form required by the Commissioner, shall be filed with the Commissioner. The Commissioner shall investigate the condition of the parties proposing to engage in the merger, share exchange, or asset transfer and may require the submission of additional information.

(b) The Commissioner may approve the merger or share exchange if:

(1) Each resulting trust institution will be solvent and have adequate capitalization;

(2) Each resulting trust institution appears able and ready to comply substantially with the statutes and rules relative to its organization;

(3) Each resulting State trust company will be a "domestic corporation" as that term is defined in G.S. 55-1-40(4);

(4) All fiduciary obligations and liabilities of each trust institution that is a party to the merger, share exchange, or asset transfer have been discharged properly or otherwise have been or will be assumed or retained properly by a person;

(5) Each surviving, new, acquiring, or transferring party that is not authorized to engage in trust business will not engage in trust business and appears able and ready to comply substantially with applicable laws and rules; and

(6) All conditions imposed by the Commissioner have been satisfied or otherwise resolved. (2001-263, s. 1.)

§ 53-361. Notice and investigation of merger, share exchange, or asset transfer; decision, hearing, and appeal.

(a) The Commissioner shall notify the parties to the proposed merger, share exchange, or asset transfer when the application is complete and all required fees have been paid. Promptly following this notification, the parties shall provide notice to clients who may be affected by the proposed merger, share exchange, or asset transfer in the form and manner specified by the Commissioner.

(b) At the expense of the parties to the proposed merger, share exchange, or asset transfer, the Commissioner may investigate the proposed transaction, including the character of the proposed directors, officers, and principal shareholders of each resulting trust institution and of any other person proposed to succeed to the accounts of the applying institutions. Notwithstanding any laws to the contrary, information bearing on the character or information about the personal finances of an existing or proposed organizer, officer, director, or shareholder is confidential and not subject to public disclosure.

(c) Based on the application and investigation, the Commissioner shall enter an order approving or denying approval of the proposed merger, share exchange, or asset transfer not later than the sixtieth day following the date the Commissioner notifies the parties that the application is complete, unless extraordinary circumstances require a longer period of review.

(d) Any written commitment made by a person proposing to engage in the merger, share exchange, or asset transfer as a condition for approval of the application is enforceable against that person.

(e) Any order entered by the Commissioner under the provisions of this section shall be subject to review by the Commission for entry of a final agency decision. (2001-263, s. 1.)

§ 53-362. Rights of dissenters to mergers, share exchanges, or asset transfers.

A shareholder of a State trust company may dissent from the proposed merger, share exchange, or asset transfer to the extent allowed under, and by following the procedures prescribed by, Article 13 of Chapter 55 of the General Statutes. (2001-263, s. 1.)

Subpart E. Private Trust Companies.

§ 53-363. Private trust companies.

(a) The following definitions apply in this Subpart:

(1) "Designated relative" means the individual required to be named in the application under G.S. 53-364(a)(5) requesting an exemption from certain provisions of this Act pursuant to G.S. 53-364.

(2) "Family member" means the designated relative and

a. Any individual within the fifth degree of lineal kinship to the designated relative computed in accordance with G.S. 104A-1;

b. Any individual within the ninth degree of collateral kinship to the designated relative computed in accordance with G.S. 104A-1;

c. The spouse of the designated relative and of any individual qualifying as a family member under sub-subdivision a. and b. of this subdivision;

d. A company controlled by one or more family members;

e. A trust established by (i) a family member or (ii) an individual who is not a family member if income or principal of the trust could be distributed currently to or for the benefit of a family member;

f. The estate of a family member; or

g. A charitable foundation or other charitable entity created by a family member.

For purposes of this subdivision, a legally adopted individual shall be treated as a natural child of the adoptive parents.

(3) "Transact business with the general public" means to engage in any sales, solicitations, arrangements, agreements, or transactions to provide trust business services, whether or not for a fee, commission, or other type of remuneration, to more than 35 persons who are not family members, except that rules, orders, or declaratory rulings of the Commissioner may provide for other circumstances in which a State trust company either does or does not transact business with the general public. For the purposes of this subdivision, an estate, a trust, or any other legal entity having multiple beneficiaries or owners shall be deemed to constitute one person.

(b) A private trust company engaging in trust business in this State shall comply with all provisions of this Article applicable to a State trust company unless expressly exempted from this Article by the Commissioner pursuant to this section or prior to the enactment of this Article.

(c) A private trust company or proposed private trust company may request in writing that it be exempted from specified provisions of G.S. 53-333(b), 53-337(a), 53-340, 53-341, 53-342, 53-345, 53-346, and 53-394(b). The Commissioner may grant the exemption request in whole or in part. The Commissioner also may issue rules, orders, or declaratory rulings granting exemptions to all private trust companies, or to private trust companies that meet specified conditions.

(d) The Commissioner may examine or investigate the private trust company or proposed private trust company in connection with the application for exemption. Unless the application presents novel or unusual questions, the Commissioner shall approve or deny the application for exemption no later than the sixty-first day after the date the Commissioner considers the application complete and accepted for filing. The Commissioner may require the submission of additional information in order to make an informed decision to approve or reject the proposed exemption.

(e) Any exemption granted under the provisions of this section may be made subject to conditions or limitations imposed by the Commissioner consistent with this Subpart, and those conditions or limitations shall be included in an order.

(f) Rules, orders, or declaratory rulings of the Commissioner may provide for other circumstances that justify exemption from specific provisions of this Article, specifying the provisions of this Act that are subject to the exemption request, and establishing procedures and requirements for obtaining, maintaining, or revoking exemptions. (2001-263, s. 1.)

§ 53-364. Requirements to apply for and maintain status as a private trust company.

(a) A private trust company or a proposed private trust company requesting an exemption from the provisions of this Article pursuant to G.S. 53-363 shall file an application with the Commissioner, in the form required by the Commissioner, containing, preceded, or accompanied by:

(1) An application fee as set by rules of the Commissioner;

(2) A statement under oath of the reasons for requesting the exemption;
(3) A statement under oath showing that the private trust company is not currently transacting business with the general public and that the company will not transact business with the general public without the approval of the Commissioner;
(4) A listing of the specific provisions of the Act from which exemption is requested; and
(5) The name of the designated relative whose relationship to other individuals determines whether the individuals are family members under G.S. 53-363(a)(2). The designated relative must be living and 18 years of age or older at the time the application is made.

(b) The Commissioner may make further inquiry and investigation as the Commissioner deems appropriate. Notwithstanding any other law to the contrary, information bearing on actual or proposed accounts of the private trust company or proposed private trust company applying for the exemption is confidential and not subject to public disclosure.

(c) To maintain its status as a private trust company and to maintain any exemptions from the provisions of this Article granted by the Commissioner, a private trust company shall file with the Commissioner an annual certification that it is in compliance with the provisions of this Subpart and the conditions and limitations of all exemptions granted. This annual certification shall be filed in the form required by the Commissioner and accompanied by any fee required by the Commissioner by rule. The annual certification shall be filed on or before December 31 of each year. The Commissioner may examine or investigate the private trust company periodically as necessary to verify the certification.

(d) In any transaction involving a private trust company for which an application is required under G.S. 53-360, any exemption from the provisions of this Article granted to the private trust company shall automatically terminate upon the consummation of the transaction unless the Commissioner approves the continuation of the exemption.

(e) The Commissioner may revoke any exemption from the provisions of this Article granted to a private trust company in the following circumstances:
(1) An officer or director of the private trust company makes a false statement under oath on any document required to be filed by this Article or by any rules or orders of the Commissioner;
(2) The private trust company fails to submit to an examination as required by G.S. 53-367;
(3) An officer or director of the private trust company withholds requested information from the Commissioner; or
(4) The private trust company violates any provision of this Subpart or fails to meet any condition on which the exemption is based.

(f) If the Commissioner determines from examination or other credible evidence that a private trust company has violated any of the requirements of this Subpart or fails to meet any condition or limitation on which an exemption from the provisions of this Article is based, the Commissioner may by personal delivery or registered or certified mail, return receipt requested, notify the private trust company that the private trust company's exemptions from the provisions of this Article will be revoked unless the private trust company corrects the violation or failure or shows cause why any exemptions should not be revoked. The notification shall state grounds for the revocation with reasonable certainty and shall advise of an opportunity for a hearing. The notice shall state the date upon which the revocation shall become effective absent a correction or showing of cause why the exemption should not be revoked, which shall not be before the thirtieth day after the date the notification is mailed or delivered, except as provided in subsection (g) of this section. The revocation shall take effect for the private trust company on the date stated in the notice if the private trust company does not request a hearing in writing before the effective date. After the revocation takes effect, the private trust company shall be subject to all of the requirements and provisions of this Article applicable to a State trust company.

(g) If the Commissioner determines from examination or other credible evidence that a private trust company appears to be engaging or attempting to engage in acts intended, designed, or likely to deceive or defraud the public, the Commissioner may shorten or eliminate the 30-day notice period specified in subsection (f) of this section, but shall promptly afford a subsequent hearing upon request to rescind the action taken.

(h) If the private trust company does not comply with all of the provisions of this Article or correct any failure to meet any condition or limitation on which an exemption is based within the notice period specified in subsection (f) of this section, the Commissioner may institute any action or remedy prescribed by this Article or any applicable rule. (2001-263, s. 1.)

§ 53-365. Conversion to public trust company.

(a) Before transacting business with the general public, a private trust company shall file a notice on a form prescribed by the Commissioner, which shall set forth the name of the private trust company and an acknowledgment that any exemption granted or otherwise applicable to the private trust company pursuant to G.S. 53-363 shall cease to apply once the Commissioner terminates private trust company status. The private trust company shall furnish a copy of the resolution adopted by its board of directors authorizing the private trust company to commence transacting business with the general public, and shall pay the filing fee, if any, prescribed by rule of the Commissioner.

(b) The private trust company may commence transacting business with the general public on the thirty-first day after the date the Commissioner receives the notice, unless the Commissioner:

(1) Establishes an earlier or later date;
(2) Notifies the private trust company that the notice raises issues that require additional information or additional time for analysis; or
(3) Disapproves the termination of private trust company status.

(c) If the Commissioner gives a notification described in subdivision (2) of subsection (b) of this section, the private trust company status may be terminated only on approval by the Commissioner.

(d) The Commissioner may deny approval of the proposed termination of private trust company status if the Commissioner finds that the private trust company lacks sufficient resources to undertake the proposed conversion without adversely affecting its safety or soundness or if the Commissioner determines that the private trust company could not within a reasonable period be in compliance with any provision of this Article from which it previously had been exempted pursuant to G.S. 53-363. (2001-263, s. 1.)

Part 4. Applicable Law; Enforcement Actions.

Subpart A. Supervision and Examination.

§ 53-366. Applicability of other laws to authorized trust institutions; status of State trust company.

(a) Except as otherwise provided in this Article, the following provisions of this Chapter shall apply to authorized trust institutions:

(1) G.S. 53-14;
(2) G.S. 53-16;
(3) G.S. 53-17;
(4) G.S. 53-68;
(5) G.S. 53-77.3;
(6) G.S. 53-85;
(7) Article 8 of this Chapter, except where it clearly appears from the context that a particular provision is not applicable to trust business or trust marketing, and except that the provisions of this Article shall apply in lieu of:
  a. G.S. 53-95;
  b. G.S. 53-104;
  c. G.S. 53-105;
  d. G.S. 53-106; and
  e. G.S. 53-107.1(a), (b) and (d).
(8) Article 9 of this Chapter, except where it clearly appears from the context that a particular provision is not applicable to trust business or trust marketing, and except that the provisions of this Article shall apply in lieu of G.S. 53-119.
(9) Article 10 of this Chapter, except where it clearly appears from the context that a particular provision is not applicable to trust business or trust marketing, and except that the provisions of this Article shall apply in lieu of G.S. 53-135, and except that G.S. 53-131 and G.S. 53-132 shall not apply to authorized trust institutions.
(10) Article 14 of this Chapter.

(b) Rules adopted by the Commissioner to implement those provisions of this Chapter made applicable to authorized trust institutions by subsection (a) of this section also shall apply to authorized trust institutions unless the rules are inconsistent with this Article or it clearly appears from the context that a particular provision is inapplicable to trust business or trust marketing.

(c) Activities of authorized trust institutions for clients shall not be considered the sale or issuance of checks under G.S. 53-194.

(d) Until the Commissioner has issued new rules governing State trust companies, State trust companies shall be governed by rules issued by the Commissioner for banks acting in a fiduciary capacity, except to the extent the rules are inconsistent with this Article or it clearly appears from the context that a particular provision is inapplicable to the business of a State trust company.

(e) Notwithstanding any other provision of this Chapter, a State trust company:
(1) Is a "banking entity" for purposes of G.S. 53-127;
(2) Is a "bank" for purposes of laws made applicable to authorized trust institutions in this section and for purposes of G.S. 53-277.
(3) Is a trust company organized and doing business under the laws of the State of North Carolina, a substantial part of the business of which is exercising fiduciary powers similar to those permitted national banks under authority of the Comptroller of the Currency, and which is subject by law to supervision and examination by the Commissioner as a banking institution; and
(4) Is a financial institution similar to a bank.

(f) In the case of a State trust company controlled by a company that has declared itself to be a "financial holding company" under 12 U.S.C. § 1843(l)(1)(C)(i), deposits held for an account shall be deemed to be "trust funds" within the meaning of 12 U.S.C. § 1813(p) unless all fiduciary duties with respect to the account are explicitly disclaimed. This subsection does not prescribe the nature or extend the scope of any fiduciary duties; the nature and extent of any fiduciary duties with respect to deposits held for accounts shall be as provided by the instruments and laws applicable to those accounts.

(g) Subject to any limitations contained in this Article, an authorized trust institution is a "trust company", a "corporate trustee", a "corporate fiduciary", and a "corporation acting in a fiduciary capacity", as such and similar terms are used in the General Statutes, except where it clearly appears from the context in which those terms are used that a different meaning is intended. (2001-263, s. 1.)

§ 53-367. Commissioner shall have supervision over authorized trust institutions and shall examine.

Every authorized trust institution shall be under the supervision of the Commissioner. The Commissioner may periodically examine and require reports from authorized trust institutions, and shall execute and enforce, through examiners and any other agents as are now or may hereafter be created or appointed, all laws and all rules, orders, and declaratory rulings relating to authorized trust institutions. All authorized trust institutions shall conduct their business in a manner consistent with all laws and all rules, orders, and declaratory rulings that may be adopted or issued by the Commissioner relating to authorized trust institutions. (2001-263, s. 1.)

§ 53-368. Assessment of State trust companies.

(a) For the purpose of operating and maintaining the office of the Commissioner, each State trust company shall pay into the office of the Commissioner, within 10 days after notice, an annual assessment of ten thousand dollars ($10,000) plus one dollar ($1.00) per one hundred thousand dollars ($100,000) of assets held for its accounts, exclusive of nonsecuritized real estate interests. For purposes of this assessment, the amount of assets held for accounts shall be determined as of the close of business on December 31 of each year.

(b) If an application for merger, share exchange, sale of assets, change of control, conversion, or a similar transaction occasions an examination or if the Commissioner determines that the financial condition or manner of operation of a State trust company warrants further examination or an increased level of supervision, a State trust company may be subject to an additional assessment not to exceed the amount required of all State trust companies by subsection (a) of this section.

(c) Except as set forth in this section, fees and assessments of a State trust company shall be governed by G.S. 53-122. Fees and assessments collected under the provisions of this section shall be considered to be part of the total fees collected under G.S. 53-122(d). (2001-263, s. 1; 2007-55, s. 2.)

Editor's Note. — Subsection (a), as amended by Session Laws 2007-55, s. 2, effective May 23, 2007, is applicable to assessments made on or after that date.

Subpart B. Enforcement Orders; Trust Company Management.

§ 53-369. Administrative orders; penalties for violation; increase of equity capital.

(a) In addition to any other powers conferred by this Chapter, the Commissioner may:

(1) Order any authorized trust institution, or affiliate thereof, or any director, officer, or employee of an authorized trust institution, to cease and desist violating any provision of this Article or any rule issued thereunder.
(2) Order any authorized trust institution, or affiliate thereof, or any director, officer, or employee of an authorized trust institution, to cease and desist from a course of conduct that is unsafe or unsound and which is likely to cause insolvency or dissipation of the assets of an authorized trust institution, or is likely to jeopardize or otherwise seriously prejudice the interests of the clients, creditors, shareholders, or the public in their relationships with the authorized trust institution.
(3) Order any company to cease engaging in unauthorized trust activity.
(4) Enter orders described in G.S. 53-321, 53-327, and 53-343.

(b) The Commissioner may impose a civil money penalty of not more than one thousand dollars ($1,000) for each violation of an order issued under subdivision (1) of subsection (a) of this section. The Commissioner may impose a civil money penalty of not more than five hundred dollars ($500.00) per day for each violation of a cease and desist order issued under subdivision (2) or (3) of subsection (a) or this section. The clear proceeds of civil money penalties imposed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(c) The Commissioner may order that a State trust company in a hazardous condition increase its equity capital to a level that is adequate for the safe and sound conduct of its business. The order shall specify the period of time for meeting the requirement to increase equity capital, which period of time may be extended by further order of the Commissioner. (2001-263, s. 1.)

§ 53-370. Notice and opportunity for hearing.

Consistent with Chapter 150B of the General Statutes, notice and opportunity for hearing shall be provided before the Commissioner may act under the provisions of this Subpart. In cases involving extraordinary circumstances requiring immediate action, however, the Commissioner may take action without a hearing, but shall promptly afford a subsequent hearing upon request to rescind the action taken. (2001-263, s. 1.)

§ 53-371. Removal of directors, officers, and employees.

The Commissioner may require the immediate removal from office of any officer, director, or employee of any State trust company, who shall be found to be dishonest, incompetent, or reckless in the management of the affairs of the State trust company, or who persistently violates the laws of this State or the rules, orders, and declaratory rulings issued by the Commissioner. (2001-263, s. 1.)

Part 5. Dissolution and Receivership; Conservatorship; Jeopardized State Trust Companies.

Subpart A. Voluntary Dissolution and Liquidation.

§ 53-372. Required vote of shareholders.

With the approval of the Commissioner, a State trust company may go into voluntary liquidation, be closed, and surrender its charter and franchise as a corporation of this State by the affirmative vote of its shareholders owning two-thirds of its stock. (2001-263, s. 1.)

§ 53-373. Corporate procedure.

Shareholder action to liquidate a State trust company shall be taken at a meeting of the shareholders duly called by resolution of the board of directors. Notice of the meeting, stating the purpose of the meeting, shall be mailed to each shareholder, addressed to the shareholder's last known residence at least 10 days prior to the date of the meeting. If the shareholders, by the required vote, elect to liquidate a trust company, a certified copy of all proceedings of the meeting at which the action was taken, verified by the oath of the president and secretary, shall be transmitted to the Commissioner for approval. (2001-263, s. 1.)

§ 53-374. Authority to liquidate; publication.

If the Commissioner approves the liquidation, the Commissioner shall issue to the State trust company, under the Commissioner's seal, a permit for liquidation. No permit shall be issued by the Commissioner until the Commissioner is satisfied that provision has been made by the State trust company to satisfy and pay off all creditors and to transfer all client accounts and fiduciary records to successor fiduciaries in the manner provided by G.S. 53-383(c). If not so satisfied, the Commissioner shall refuse to issue a permit, and shall be authorized to take possession of the State trust company and its assets and business and to hold and liquidate the State trust company in the manner provided in this Part. When the Commissioner approves the voluntary liquidation of a State trust company, the directors of the State trust company shall notify clients of the State trust company in the manner prescribed by the Commissioner and shall cause to be published in a newspaper in the county in which the principal office of the trust company is located, or if no newspaper is published in that county, then in a newspaper having a general circulation in that county, a notice that the State trust company is closing down its affairs and going into liquidation and that creditors of the State trust company shall present their claims for payment. The notice shall be published once a week for four consecutive weeks. (2001-263, s. 1.)

§ 53-375. Examination and reports.

When any State trust company is in the process of voluntary liquidation, it shall be subject to examination by the Commissioner and shall furnish any reports required by the Commissioner. (2001-263, s. 1.)

§ 53-376. Unclaimed property.

All unclaimed property remaining with a State trust company voluntarily liquidated under the provisions of this Subpart shall be subject to the provisions of Chapter 116B of the General Statutes. (2001-263, s. 1.)

Subpart B. Seizure by Commissioner; Involuntary Dissolution and Liquidation.

§ 53-377. When Commissioner may take charge.

The Commissioner may take possession of the business and property of any State trust company whenever it appears that the trust company:

(1) Is in a hazardous condition;
(2) Has become insolvent or is in substantial danger of becoming insolvent;
(3) Has sold or attempted to sell substantially all of its assets or has merged or attempted to merge its business with another entity without meeting the requirements of this Article;
(4) Has dissolved or liquidated or attempted to dissolve or liquidate without meeting the requirements of this Article; or
(5) Has suspended operations. (2001-263, s. 1.)

§ 53-378. Directors may act.

A State trust company may place its assets and business under the control of the Commissioner by a resolution of a majority of its directors upon notice to the Commissioner, and, upon taking possession of the State trust company, the Commissioner shall retain possession thereof until the State trust company is authorized by the Commissioner to resume business or until the affairs of the State trust company are fully liquidated as provided in this Subpart. No State trust company shall make any general assignment for the benefit of its creditors except by surrendering possession of its assets to the Commissioner as provided in this Subpart; and any other purported general assignment for the benefit of creditors by a State trust company shall be void. (2001-263, s. 1.)

§ 53-379. Notice of seizure; bar to attachment of liens.

When the Commissioner takes possession of any State trust company under G.S. 53-377 or G.S. 53-378, the Commissioner shall, within 48 hours, file with the clerk of the superior court in the county where the principal office of the State trust company is located a notice of the action which shall state the reason for the action, and which shall be deemed the equivalent of a summons and complaint against the State trust company in an action in the superior court except that it shall not be necessary to serve the notice. The taking possession of any State trust company shall be effective on the date when the authority is first exercised and from and after that time all assets and property of the State trust company, of whatever nature, shall be deemed to be in possession of the Commissioner, and the exercise of the authority shall operate as a bar to any attachment or other legal proceeding against the State trust company or its assets. After the Commissioner's exercise of authority, no lien shall attach in any manner binding or affecting any of the assets of the State trust company, and every purported transfer or assignment made thereafter by the State trust company, or by its authority, of the whole or any part of its assets, shall be null and void; and the Commissioner shall be substituted in place of the State trust company in any civil actions or proceedings pending at the time of the exercise of the authority. (2001-263, s. 1.)

§ 53-380. Notice to trust institutions, corporations, and others holding assets; existing liens.

Upon taking possession of the assets and business of any State trust company, the Commissioner shall forthwith give notice, by mail or otherwise, of the action to all banks, clearing corporations, brokers, trust institutions, or other persons or corporations holding, or having in possession, any assets of the State trust company. No lien against any assets of the State trust company shall be enforced in any manner other than as provided in this Article after the Commissioner has taken possession of the State trust company. (2001-263, s. 1.)

§ 53-381. Permission to resume business.

(a) After the Commissioner has taken possession of a State trust company under the provisions of this Subpart, the State trust company may resume business only upon approval and subject to terms and conditions specified by the Commissioner.

(b) When possession of a State trust company has been taken pursuant to either G.S. 53-377 or G.S. 53-378, the terms and conditions under which it may resume business shall be fully stated in writing, and a copy thereof shall be filed with the clerk of superior court of the county in which the action is pending.

(c) Notwithstanding subsections (a) and (b) of this section, no State trust company possessed by the Commissioner under the provisions of this Article shall resume trust business unless and until the State trust company has been completely restored to solvency and it clearly appears to the Commissioner that the State trust company may be reopened with safety to the clients, creditors, and shareholders of the State trust company and to the public.

(d) If the Commissioner determines that the State trust company shall not resume business, the State trust company shall be liquidated in accordance with the provisions of this Part and shall cancel the charter and revoke the license of the State trust company as provided in G.S. 53-414. (2001-263, s. 1.)

§ 53-382. Remedy for seizure; answer to notice; injunction; appeal; and motions.

(a) Whenever any State trust company of which the Commissioner has taken possession under G.S. 53-377 shall deem itself aggrieved thereby, it may file an answer to the notice as in other civil actions and may also, upon notice to the Commissioner, apply to the resident or presiding judge of the superior court for an injunction to enjoin further proceedings by the Commissioner. The judge of the superior court may cite the Commissioner to show cause why further proceedings should not be enjoined and, after hearing the allegations and proof of the parties with respect to the condition of the State trust company, may dismiss an application for injunction or may enjoin further proceedings under the provisions of this section by the Commissioner. If the judge enjoins further action of the Commissioner and permits the reopening of the State trust company, the judge may require of the State trust company a surety bond as the judge deems necessary, payable to the Commissioner for the sole benefit of the creditors and clients of the State trust company and upon any terms the judge deems proper. Either party has the right to appeal a decision as in other civil actions.

(b) The State trust company or any person interested may be heard by motion as to actions taken or proposed to be taken by the Commissioner, but the judge hearing the motion shall enter an order as in the judge's discretion will best serve the parties interested. (2001-263, s. 1.)

§ 53-383. Collection of debts and claims; Commissioner succeeds to all property of the State trust company.

(a) Upon taking possession of the assets and business of any State trust company, the Commissioner is authorized to collect all money due the State trust company and to do any other acts necessary to conserve its assets and property. The Commissioner shall collect all debts due and claims belonging to the State trust company, and by order of the court may sell, compromise, or compound any bad or doubtful debt or claim or sell the real and personal property of the State trust company on any terms provided by the order. Where the sale is made under power contained in any mortgage or lien bond or other paper wherein the title is retained for sale and the terms of sale set out, sale may be made under that authority.

(b) Upon taking possession of any State trust company under the provisions of this section, the Commissioner shall have the possession and the right to the possession of all the property, assets, choses in action, rights, and privileges of the State trust company. The property rights and privileges shall vest in the Commissioner absolutely for the purpose of liquidating, selling, or conveying the property rights and privileges, together with all other incidental rights, privileges, and powers necessary for the right of conveyance and sale.

(c) Upon taking possession of any State trust company under the provisions of this section, the Commissioner shall administer each account of the State trust company on a temporary basis until either (i) a successor to the State trust company is appointed or the account is terminated in the manner provided by the terms of its governing instrument consistent with applicable law, or by applicable law in the absence of a provision in the governing instrument, or (ii) the Commissioner has granted the State trust company permission to resume business under the provisions of G.S. 53-381. The Commissioner may take appropriate steps for the appointment of successors or termination of accounts as the Commissioner deems necessary as to some or all of the accounts of the State trust company. If the governing instrument or other applicable law do not prescribe methods for appointing successors, or if the methods prescribed are unfeasible, the applicable law for appointment of a successor shall be as set forth in G.S. 53-399.

(d) The officers and directors of any State trust company that is in the possession of the Commissioner under this Part shall not exercise any powers declared by this Subpart to be vested in the Commissioner. (2001-263, s. 1.)

§ 53-384. Bond of the Commissioner; surety; condition; minimum penalty.

Upon taking possession of any State trust company, the Commissioner shall execute and file a bond payable to this State for the benefit of creditors, clients, and shareholders of the State trust company, with some surety company as surety thereon, with the clerk of the superior court of the county in which the action is pending, conditioned upon the faithful performance of all duties imposed upon the Commissioner under the provisions of this Subpart with respect to the State trust company, the penal sum of the bond to be fixed by order of the Commissioner, which in no case shall be less than two hundred fifty thousand dollars ($250,000). Any person interested, by motion in the pending action, shall be heard by the resident or presiding judge of the superior court as to the sufficiency of the bond. The judge hearing the motion may fix the bond. (2001-263, s. 1.)

§ 53-385. Inventory.

Within 90 days after the filing of a notice described in G.S. 53-279, the Commissioner shall file an inventory of the assets and liabilities, not including assets and liabilities held in accounts of the State trust company, of the State trust company. A copy of the inventory shall be filed with the clerk of the superior court of the county in which the action is pending, and a copy shall be kept on file with the State trust company. The inventory shall be open for inspection during usual business hours, provided that nothing herein shall require the State trust company to remain open unnecessarily. (2001-263, s. 1.)

§ 53-386. Notice and time for filing claims.

Notice shall be given by advertisement once a week for four consecutive weeks in a newspaper published in the county where the principal office of the State trust company is located, or if no newspaper is published in the county, then in some newspaper having a general circulation in the county, calling on all persons who may have claims against the State trust company to present them to the Commissioner at the principal office of the State trust company, and within the time to be specified in the notice which time shall not be less than 90 days from the date of the first publication. A copy of this notice shall be mailed to all persons whose names appear as creditors upon the books of the State trust company. Affidavit by the Commissioner to the effect that the notice was mailed shall be conclusive evidence thereof. For purposes of this section, clients and accounts of the State trust company shall not be considered creditors of the State trust company as to the assets held by the State trust company for the benefit of its accounts. (2001-263, s. 1.)

§ 53-387. Power to reject claims; notice; affidavit of service; action on claims.

If the Commissioner doubts the validity of any claim, the Commissioner may reject the claim, in whole or in part, and serve notice of the rejection upon the claimant, either personally or by certified mail, and an affidavit of the service of the notice shall be filed in the office of the clerk of the superior court of the county in which the action is pending and shall be conclusive evidence of the notice. Any action or suit upon a rejected claim shall be brought by the claimant against the Commissioner in the superior court of the county in which the action is pending within 90 days after service, or the action or suit shall be barred. Objections to any claim not rejected by the Commissioner may be made by any person interested by filing the objection in the pending action and by serving a copy thereof on the Commissioner. The Commissioner, after investigation, shall either allow the objection and reject the claim, or disallow the objection. If the objection is not allowed and the claim is not rejected, the Commissioner shall file a notice in the pending action and serve the notice upon the person making the claim and the person objecting to the claim. Within 10 days after the notice is filed, the person filing objection by motion in the pending action may question the validity of the claim, and the questions of law and issues of fact shall thereupon be determined as in other civil actions. (2001-263, s. 1.)

§ 53-388. List of claims presented, copies, and proviso.

Upon the expiration of the time fixed for presentation of claims, the Commissioner shall make a full and complete list of the claims presented, including and specifying any claims that have been rejected. One copy shall be filed in the office of the clerk of the superior court of the county in which the action is pending, and one copy shall be kept on file with the inventory in the principal office of the State trust company for examination. Any indebtedness against any State trust company which has been established or recognized as a valid liability of the State trust company before it went into liquidation, for which no claimant has filed claim, or any liability for which a claim has been filed and rejected, shall be listed by the Commissioner in the office of the clerk of the superior court of the county in which the action is pending. Any claim that may be presented after the expiration of the time fixed for the presentation of claims in the notice provided in G.S. 53-386 shall, if allowed, share pro rata in the distribution but only as to those assets of the State trust company in the hands of the Commissioner that are undistributed at the time the claim is presented. (2001-263, s. 1.)

§ 53-389. Declaration of dividends; order of preference in distribution.

(a) At any time after the expiration of the date fixed by the Commissioner for the presentation of claims against the State trust company, and from time to time thereafter, the Commissioner may declare and pay dividends to the creditors and shareholders of the State trust company. In paying and calculating dividends, all disputed claims shall be taken into account, but no dividend shall be paid upon the disputed claims until the claims have been finally determined. The following shall be the order of preference in the distribution of the assets of any State trust company liquidated hereunder:

(1) State, county, and federal taxes owed and fees due the Commissioner other than those due under the provisions of this Subpart;

(2) Wages and salaries due officers and employees of the State trust company for a period of not more than four months;

(3) Expenses of liquidation, including those described in G.S. 53-391 and G.S. 53-395;

(4) Amounts due creditors, honoring the priorities of valid security interests and subject to orders of the court concerning disputes among creditors;

(5) Amounts due shareholders.

(b) A statement of all dividends paid shall be filed in the office of the clerk of the superior court of the county in which the action is pending, and the statements shall show the expenses deducted and the disputed claims in determining dividends. (2001-263, s. 1.)

§ 53-390. Deposit of funds collected.

All funds collected by the Commissioner, in liquidating any State trust company, shall be deposited from time to time in a bank as may be selected by the Commissioner and shall be subject to withdrawal by check of the Commissioner. (2001-263, s. 1.)

§ 53-391. Employment of counsel, accountants, and other experts; compensation.

The Commissioner, for the purpose of exercising any power under the provisions of this Subpart, may (i) employ any liquidating agents, attorneys, accountants, consultants, and clerks necessary to properly conduct the business of or liquidate and distribute the assets of a State trust company; (ii) fix the compensation for the agents, attorneys, accountants, consultants, and clerks; and (iii) pay the compensation of those persons out of the assets of the State trust company. Provided, that all expenditures described in this section shall be approved by the resident or presiding judge in the county in which the action is pending. Payments made by the Commissioner pursuant to this section shall not be subject to the requirements of Article 3 of Chapter 143 of the General Statutes. As used in this Subpart, the term "Commissioner" includes the Commissioner's duly appointed agents. (2001-263, s. 1.)

§ 53-392. Unclaimed dividends held in trust.

Unclaimed dividends for claims described in subdivisions (a)(1) through (a)(4) of G.S. 53-389 shall be held by the Commissioner in trust for the claimants to whom the dividends are owed; and the dividends so held by the Commissioner shall be paid over to the persons entitled to the dividends when they furnish satisfactory evidence of their right to the dividends. In case of doubtful or conflicting claims, the Commissioner may apply to the superior court, by motion in the pending action, for an order from the resident or presiding judge of the superior court directing the payment of the dividends so claimed. Issues of fact raised by motion may, upon request of any claimant, be determined as in other civil actions. Interest earned on any unclaimed dividends so held shall be applied toward defraying the expenses incurred in the distribution of the unclaimed dividends. The balance of interest, if any, shall be deposited and held as other funds to the credit of the Commissioner. After the Commissioner has held any unclaimed dividends in trust under the provisions of this statute for the creditors of the liquidated State trust company for a period of three years following the resumption of business by or cancellation of the charter of the State trust company, the unclaimed dividends shall be subject to the provisions of Chapter 116B of the General Statutes. Upon payment of unclaimed dividends to the State Treasurer, the Commissioner shall be fully discharged from all further liability therefor. (2001-263, s. 1.)

§ 53-393. Action by the Commissioner following full settlement.

Whenever the Commissioner has paid all duly proven and allowed claims described in subdivisions (a)(1) through (a)(4) of G.S. 53-389, has made proper provision for unclaimed and unpaid and disputed claims, and has other assets of the State trust company, the Commissioner shall, unless the State trust company is granted permission to resume business in accordance with G.S. 53-381, call a meeting of the shareholders of the State trust company by giving notice thereof by publication once a week for four consecutive weeks in a newspaper published in the county, or if no newspaper is published in the county, then in a newspaper having general circulation in the county, and by mailing a copy of the notice to each shareholder's address as it appears on the books of the State trust company. Affidavit of the mailing of the notice herein required and of the newspaper as to the publication shall be conclusive evidence of notice hereunder. At the meeting, any shareholders may be represented by proxy and the shareholders shall elect, by a majority vote of the shares present, an agent or agents who shall be authorized to receive from the Commissioner all the remaining assets of the State trust company. The shareholders also may specify the means of resolving disputes between multiple agents and appointing successors to the agent or agents. The Commissioner shall cause to be transferred and delivered to the agent, or agents, all the remaining assets of the State trust company. The Commissioner shall thereupon cause to be filed in the office of the clerk of the superior court of the county in which the action is pending a full and complete report of all transactions showing the assets of the State trust company so transferred together with the name of the agent or agents giving receipt for the assets; and the filing of the report shall act as a full and complete discharge of the Commissioner from all further liabilities to the shareholders of the State trust company by reason of the liquidation of the State trust company. The agent shall convert the assets coming into the agent's hands into cash, except as otherwise provided by the court upon motion in the cause made by a shareholder of the State trust company, and shall make distribution to the shareholders of the State trust company as herein provided. The agent shall file semiannually a report of all transactions with the superior court of the county in which the State trust company is located, and with the Commissioner, and shall be allowed for the services such fees, not in excess of five percent (5%) of receipts and disbursements, as may be fixed by the court. In case of death, removal, or refusal to act of any agent or agents elected by the shareholders, the Commissioner or any interested person may seek an order from the resident or presiding judge in the county in which the action is pending appointing a successor to the agent or agents as determined by the shareholders or, if no method was set forth by the shareholders, as determined by the court to be in the best interests of the shareholders. The court in its discretion may either appoint a successor or order the call of a further meeting of shareholders for the election of a successor and make any orders that are appropriate. (2001-263, s. 1.)

§ 53-394. Annual report of the Commissioner; items included; reports of condition of State trust companies.

(a) The Commissioner shall file, as a part of an annual report to the Governor, a list of the names of any State trust companies of which possession was taken and liquidated in the preceding year, the sum of unclaimed assets with respect to each State trust company, and all depositories of all sums coming into the hands of the Commissioner under the provisions of this Part.

(b) The Commissioner shall, from time to time, compile and make available for public inspection reports showing the condition of State trust companies. (2001-263, s. 1.)

§ 53-395. Compensation of the Commissioner's office.

The office of the Commissioner, for services rendered in connection with the duties described in this Subpart, shall be entitled to actual expenses incurred in connection with the liquidation of each State trust company, including a reasonable sum for the time of the examiners and other agents of the Commissioner. The Commissioner may adopt rules or orders for fixing these expenses. (2001-263, s. 1.)

§ 53-396. Exclusive method of liquidation.

No State trust company shall be liquidated other than as provided in this Part. (2001-263, s. 1.)

§ 53-397. Disposition of books and records.

All fiduciary records relating to the administration of particular accounts shall be turned over to the successors in charge of administration of the accounts. All other books, papers, and records of a State trust company that has been finally liquidated shall be deposited by the receiver in the office of the clerk of the superior court of the county in which the action is pending, or in any other place as in the clerk's judgment, after consultation with the Commissioner, will provide for the proper safekeeping and protection of those books, papers, and records. Such books, papers, and records shall be held subject to the orders of the clerk of the superior court of the county in which the action is pending, including orders necessary for preserving the confidentiality of any information relating to accounts contained in those books, papers, and records. (2001-263, s. 1.)

§ 53-398. Destruction of books and records.

(a) After the expiration of five years from the date of filing, in the office of the clerk of the superior court of the county in which the action is pending, of a final order approving the liquidation of a State trust company and the delivery to the clerk or into the clerk's custody of books, papers, records of the State trust company, the books, papers, and records may be destroyed by the clerk of the superior court of the county in which the action is pending.

(b) After five years from the filing by the Commissioner of a final report of liquidation of any insolvent State trust company, the Commissioner, by and with the consent of the Commission, may destroy the records of any State trust company held in the office of the Commissioner in connection with the liquidation of the State trust company. However, in connection with any unpaid dividends, the Commissioner shall preserve the records or other evidence of indebtedness of the State trust company with reference to the unpaid dividends until the dividends have been paid.

(c) Nothing in this section shall be construed to authorize the destruction by the clerk of superior court of any county or by the Commissioner of any of the formal records of liquidation or the records made in the office of the Commissioner with reference to the liquidation. (2001-263, s. 1.)

§ 53-399. Petition for new trustee.

Any person interested in any account, either as trustee, beneficiary, client, or otherwise, may petition the clerk of superior court of the county in which court accountings are filed or, if there is no such county, the county in which the account is being administered, for a new trustee or other successor to a State trust company in all cases in which use of the procedures set forth in this Part are employed. The petition and the order appointing a new trustee or other successor may relate to any number of accounts administered by the State trust company. Except as specified in this section, the procedure shall be as provided in Chapter 36A of the General Statutes for the appointment of successor trustees. (2001-263, s. 1.)

§ 53-400. Report to the Secretary of State.

The Commissioner shall, on or before the first day of each year, file with the Secretary of State a report showing any State trust companies under liquidation in this State and the names of any auditors or attorneys employed in connection with the liquidation of these State trust companies, together with the amounts paid or contracted to be paid to each of the auditors or attorneys. If any attorney has been employed on a fee contingent upon recovery, the report shall set forth the material terms of the fee arrangements. (2001-263, s. 1.)

Subpart C. Conservatorship.

§ 53-401. Provisions for conservator; duties and powers.

Whenever the Commissioner deems it necessary in order to conserve the assets of a State trust company for the benefit of clients or creditors, the Commissioner may appoint a conservator for the State trust company and require of the conservator a bond with any surety the Commissioner deems necessary and proper in an amount deemed sufficient by the Commissioner. The conservator, under the direction of the Commissioner, shall take possession of the fiduciary records and other books, records, and assets of every description of the State trust company placed under conservatorship and take actions necessary to conserve those assets pending further disposition of its business as provided by law. Except as provided in G.S. 53-405, the conservator shall have all rights, powers, and privileges, subject to the approval of the

Commissioner, now possessed by or given to the Commissioner under the provisions of Subpart B and Subpart D of this Part. All expenses of the conservator shall be paid out of the assets of the State trust company under conservatorship and shall be a lien thereon which shall be prior to any other lien provided by law. The compensation of the conservator shall be determined by the Commissioner and shall be based on the time and experience of the conservator and the complexity of the conservatorship. Compensation of the conservator shall not be subject to the requirements of Article 3 of Chapter 143 of the General Statutes. (2001-263, s. 1.)

§ 53-402. Examination.

The Commissioner shall examine the affairs of a State trust company placed under conservatorship in the manner deemed necessary by the Commissioner to oversee the conservatorship. (2001-263, s. 1.)

§ 53-403. Termination of conservatorship.

If the Commissioner is satisfied that the conservatorship may be terminated with safety to the clients, creditors, and shareholders of the State trust company, and to the public, the Commissioner may terminate the conservatorship of a State trust company and permit the company to resume the transaction of its business, subject to such terms, conditions, restrictions, and limitations as the Commissioner prescribes. (2001-263, s. 1.)

§ 53-404. Rights and liabilities of conservator.

A conservator appointed pursuant to the provisions of this Subpart is subject to the provisions of G.S. 53-331 and to the penalties prescribed by G.S. 53-129 and G.S. 53-355. (2001-263, s. 1.)

§ 53-405. Naming of conservator not liquidation.

No power conferred in this Subpart upon the Commissioner, when exercised, shall be deemed as an act of possession for the purposes of liquidation; and whenever the Commissioner shall, with reference to any State trust company for which a conservator is appointed, deem that liquidation is necessary, the Commissioner shall exercise the powers for the purposes of liquidation as provided in Subpart B of Part 5 of this Article. (2001-263, s. 1.)

Subpart D. Sale of Assets; Issuance of Preferred Stock by Jeopardized State Trust Company.

§ 53-406. Sale of assets by board of jeopardized State trust company.

(a) With the Commissioner's approval, the board of directors of a jeopardized State trust company, acting without shareholder approval and notwithstanding any other provision of this Article or any other law, or any of the provisions of the articles of incorporation or bylaws of the State trust company, may cause the State trust company to sell to one or more buyers all or substantially all of its assets, including the right to control and act as fiduciary for accounts established with the trust company, if the Commissioner finds:

(1) The interests of the State trust company's clients, creditors, and shareholders are jeopardized by the continued operation of the State trust company; and

(2) The sale is in the best interests of the State trust company's clients and creditors.

(b) Sales under the provisions of this section shall include assumptions and promises by one or more buyers to pay or otherwise discharge, except as provided in G.S. 53-407:

(1) All of the State trust company's liabilities to clients and creditors;

(2) All of the State trust company's liabilities for salaries of the State trust company's employees incurred before the date of the sale;

(3) Expenses incurred by the Commissioner arising out of the supervision or sale of the State trust company; and

(4) Taxes owed and fees and assessments due the Commissioner's office.

(c) This section does not limit the power of a State trust company to buy and sell assets in the ordinary course of business.

(d) This section does not affect the Commissioner's right to take action under another law or sale under other provisions of this Article. (2001-263, s. 1.)

§ 53-407. Authority to act as disbursing agent.

If a purchasing trust institution acts under a written agency contract that (i) is approved by the Commissioner; (ii) specifically names each creditor and the amount to be paid each; and (iii) limits the agency to the purely ministerial act of paying creditors the amounts due them as determined by the selling institution and does not involve discretionary duties or authority other than the identification of the creditors named, then the purchasing trust institution:

(1) May rely on the contract of agency and the instructions included in it; and

(2) Is not responsible for:

  a. Any error made by the selling institution in determining its liabilities, the creditors to whom the liabilities are due, or the amounts due the creditors; or

  b. Any preference that results from the payments made under the contract of agency and the instructions included in it. (2001-263, s. 1.)

§ 53-408. Payment to creditors.

Payment to a creditor of the selling institution of the amount to be paid under the terms of a contract of agency described in G.S. 53-407 may be made by the purchasing trust company by (i) opening an agency account in the name of the creditor; (ii) crediting the account with the amount to be paid the creditor under the terms of the agency contract; and (iii) mailing or personally delivering a duplicate ticket evidencing the credit to the creditor at the creditor's address shown in the records of the selling institution. (2001-263, s. 1.)

§ 53-409. Issuance of preferred shares by jeopardized trust company.

Notwithstanding any other provisions of this Article or any other laws, and notwithstanding any of the provisions of its articles of incorporation or bylaws, any jeopardized State trust company may, with the approval of the Commissioner, and by vote of shareholders owning a majority of the shares of such State trust company, upon not less than two days' notice given by registered mail pursuant to action taken at a meeting of its board of directors (which may be held upon not less than one day's notice) issue shares of preferred stock in such amount, with such voting rights, with such preferences, at such dividend rate, and with such other rights and limitations as shall be approved by the Commissioner. A copy of the minutes of such directors' and shareholders' meetings, certified by the proper officer and under the corporate seal of the State trust company, and accompanied by the written approval of the Commissioner, shall be immediately filed in the office of the Secretary of State, and when so filed, shall be deemed and treated as an amendment to the articles of incorporation of such State trust company. For purposes of this section, a State trust company shall be considered jeopardized when it is critical that the State trust company obtain additional equity capital to avoid, or to cease to be in, a hazardous condition, and other means of raising additional equity capital do not appear to be feasible. No issue of preferred shares shall be valid until the amount of all shares so issued shall have been paid for in full in cash, except as may otherwise be specifically approved by the Commissioner. The provisions of this section do not limit the authority of a State trust company to issue shares as provided under other applicable law. (2001-263, s. 1.)

Part 6. Authority, Hearings, Enforcement, and Severability.

§ 53-410. Commissioner to act under authority of the Commission.

All the powers, duties, and functions granted to or imposed upon the Commissioner by law shall be exercised under the direction and supervision of the Commission. Wherever provision is made in this Article authorizing and permitting the Commissioner to make rules, the words "the Commissioner" shall be construed to mean the Commission. (2001-263, s. 1.)

§ 53-411. Rules.

The Commission may adopt rules in accordance with Chapter 150B of the General Statutes to carry out the provisions of this Article relating to authorized trust institutions and to ensure safe and conservative management of authorized trust institutions under its supervision, taking into consideration the appropriate interests of the clients, creditors, shareholders, and the public in their relations with the authorized trust institutions. (2001-263, s. 1.)

§ 53-412. Commissioner hearings; appeals.

(a) This section does not grant a right to a hearing to a person that is not otherwise granted by governing law.

(b) The Commissioner may convene a hearing to receive evidence and argument regarding any matter before the Commissioner for decision or review under the provisions of this Article. The hearing shall be conducted in accordance with Article 3A of Chapter 150B of the General Statutes.

(c) Disputes over decisions and actions of the Commissioner under the provisions of this Article shall be "contested cases" as defined in G.S. 150B-2(2).

(d) Except as expressly provided otherwise by this Chapter, an order of the Commissioner may be appealed, in writing, to the Commission for review, pursuant to G.S. 53-92(d). The Commission may affirm, modify, or reverse a decision of the Commissioner.

(e) Petitions for judicial review from the Commission shall be made to the Wake County Superior Court and shall proceed as provided in G.S. 53-92(d). (2001-263, s. 1; 2009-57, s. 11.)

Effect of Amendments. — Session Laws 2009-57, s. 11, effective June 5, 2009, in subsection (d), substituted "appealed, in writing, to the Commission for review, pursuant to G.S. 53-92(d)" for "appealed to the Commission for review"; and in subsection (e), at the beginning, substituted "Petitions for judicial review from the Commission shall be made to" for "Appeals from the Commission shall be to", and added "(d)" at the end.

§ 53-413. Civil enforcement.

The Commissioner may bring any appropriate civil action against any person the Commissioner believes has committed or is about to commit a violation of this Article or a rule, order, or declaratory ruling of the Commissioner pertaining to this Article. (2001-263, s. 1.)

§ 53-414. Cancellation of charter.

Whenever a merger, share exchange, sale of assets, liquidation, or other transaction occurs by which a State trust company ceases to exist or ceases to be eligible for a charter, the Commissioner shall cancel the State trust company's charter, revoke its license, and provide notice of the revocation in the manner provided in G.S. 53-163. The filing, in the office of the Secretary of State, of a certified copy of the cancellation under seal of the Commissioner shall authorize the cancellation of the charter of the State trust company, subject, however, to its continued existence, as provided by this Article and the general law relative to corporations, for the purpose of winding up and liquidating its business and affairs. (2001-263, s. 1.)

§ 53-415. Severability.

If any provision of this Article, or its application, is found by any court of competent jurisdiction in the United States to be invalid as to any trust institution or other person or circumstance, or to be superseded by federal law, the provision shall be deemed modified only to the extent and only in the particular circumstances necessary to render the provision valid, and the remaining provisions of this Article shall not be affected and shall continue to apply to any trust institution or other person or circumstance. (2001-263, s. 1.)

§§ 53-416 through 53-419: Reserved for future codification purposes.

Part 7. Affiliate Transfers; Agent Appointments.

§ 53-420. Affiliate transfers authorized; procedure.

(a) A trust institution may make an affiliate transfer of one or more accounts subject to the provisions of this Part unless the provisions governing the account explicitly provide that an affiliate transfer shall not be made.

(b) The affiliate transfer shall be made pursuant to a written agreement between the transferring trust institution and the transferee trust institution.

(c) Between 90 and 30 days prior to the proposed date of the affiliate transfer, the transferring trust institution shall give written notice of the proposed affiliate transfer to all clients and other persons to whom the transferring trust institution last sent reports or statements for the account or to whom the next regular report or statement would be sent. The notice shall include the following information:

(1) A brief description of the proposed affiliate transfer.
(2) The client's right to object in writing to the affiliate transfer, and the physical and mailing addresses to which the written objection may be

sent; the transferring trust institution also may provide electronic mail or facsimile addresses, or both, as additional methods for giving written notice of objection.

(3) The date upon which the affiliate transfer is proposed to be effective.

(4) The identity, mailing address, and telephone number of one or more employees of the transferee trust institution who can respond to inquiries if the affiliate transfer is complete.

(5) The identity, mailing address, and telephone number of one or more employees of the transferring trust institution who can respond to inquiries about the proposed affiliate transfer.

(d) Notices shall be sent to the addresses for clients or their representatives on record with the transferring trust institution and shall be effective upon receipt. Notices shall be deemed received three days after they have been posted for mailing with the United States Postal Service or deposited for delivery with a reputable courier service, with all postage or delivery charges prepaid. (2005-274, s. 2.)

§ 53-421. Objection to affiliate transfer.

If a client, or a person acting on behalf of the client, delivers a written objection to the affiliate transfer to the transferring trust institution at anytime prior to the date of the affiliate transfer, the transferring trust institution shall exclude that account from the affiliate transfer unless the objection is withdrawn. An objection to an affiliate transfer shall not affect the right of the transferring trust institution to continue to administer the account or to seek to transfer the account pursuant to the documents and law governing the account. (2005-274, s. 2.)

§ 53-422. Effect of affiliate transfer.

(a) Following an affiliate transfer, the transferee trust institution shall have all of the rights, powers, privileges, appointments, accounts, and designations of the transferring trust institution and shall be deemed successor to the transferring trust institution in any deed, trust, agreement, filing, instrument, notice, certificate, pleading, or other document related to the account.

(b) Following an affiliate transfer, the transferee trust institution is responsible for the performance of all duties, responsibilities, and obligations related to an account subject to the affiliate transfer.

(c) The affiliate transfer does not limit the transferring trust institution's liability for any of its acts as fiduciary.

(d) Unless the affiliate transfer is authorized by the documents governing the account, the transferring trust institution remains liable and responsible, while affiliated with the transferee trust institution, for the transferee trust institution's administration of accounts subject to an affiliate transfer. For purposes of this subsection, an affiliate transfer of an account made in reliance on subsection (e) of this section shall not be deemed to be authorized by the documents governing the account.

(e) Except as explicitly provided in provisions or laws governing accounts:

(1) Qualifications for administration such as capital, assets, assets under management, or similar standards set forth in documents or laws governing the account may be satisfied by the combined financial resources of the transferring trust institution and the transferee trust institution.

(2) Standards relating to the location or charter of the trust institution administering the account may be satisfied by the transferring trust institution or the transferee trust institution.

(f) Nothing in this Part shall be construed to impair any right of a trust institution to resign from administration of an account, or the right of a trust institution or a person interested in the account to seek the appointment of a replacement.

(g) Neither the rights of creditors to nor any liens upon the property held in an account shall be impaired by an affiliate transfer.

(h) Any claim or proceeding by or against the transferring trust institution pending at the time of the affiliate transfer may proceed as if the affiliate transfer had not taken place. (2005-274, s. 2.)

§ 53-423. Trust institution as agent.

A trust institution may appoint another trust institution that is its affiliate as its agent for the performance of acts, obligations, and responsibilities with respect to any account. In that event, the trust institution shall remain fully responsible and liable with respect to all actions of the affiliated trust institution as if those actions were performed by the trust institution. Except as explicitly provided in documents or laws governing an account, appointment of an affiliate agent is not:

(1) An impermissible delegation of responsibility or duty by the appointing trust institution.

(2) A transfer or relinquishment of account powers by the appointing institution.

(3) A resignation or disqualification from the account by the appointing trust institution. (2005-274, s. 2.)

§ 53-424. Construction.

(a) Except as expressly provided in this Part, nothing in this Part shall be construed to amend or modify the laws of this State governing the establishment or administration of accounts or the actions of trust institutions.

(b) An affiliate transfer is not, in itself, a transfer of substantially all of the transferring trust institution's assets and liabilities.

(c) Except as explicitly provided by the documents governing the account, neither an affiliate transfer nor an agency appointment under G.S. 53-423 shall be subject to any provision of law requiring court approval for removal of fiduciary funds from this State.

(d) Except as explicitly provided by the documents governing the account, an affiliate transfer, but not an agency appointment, shall be subject to any provision of law requiring notice of a transfer of the principal place of administration of the account. The manner or timing of a notice required under G.S. 53-420(c) may be altered to comport with any provision of law requiring notice of a transfer of the principal place of administration of the account. (2005-274, ss. 2, 3.)

ARTICLE 25.

Asset-Backed Securities Facilitation.

§ 53-425. Definitions.

The following definitions apply in this Article:

(1) Beneficial interest. — Debt or equity interests or obligations of any type that are issued by a special purpose entity and entitle the holder of the interest or obligation to receive payments that depend primarily

on the cash flow from financial assets owned by the special purpose entity.

(2) Financial asset. — Cash or a contract or instrument that conveys to an entity a contractual right to receive cash or another financial instrument from another entity.

(3) Securitization. — The issuance by a special purpose entity of evidences of beneficial interest that meets one of the following criteria:

a. Its most senior class at the time of issuance is rated in one of the four highest categories assigned to long-term debt or in an equivalent short-term category (within either of which there may be sub-categories or graduations indicating relative standing) by one or more nationally recognized rating organizations.

b. It is sold in transactions by an issuer not involving any public offering under section 4 of the Securities Act of 1933 (15 U.S.C. 77d), as amended, or in transactions exempt from registration under the Securities Act of 1933 pursuant to Regulation S issued in accordance with the Act, or any successor regulations issued under the Act.

(4) Special purpose entity. — A trust, corporation, limited liability company, or other entity demonstrably distinct from the transferor that is primarily engaged in acquiring and holding (or transferring to another special purpose entity) financial assets, and in activities related or incidental thereto, in connection with the issuance by the special purpose entity (or by another special purpose entity that acquires financial assets directly or indirectly from the special purpose entity) of evidences of beneficial interests.

(5) Transferor. — A financial institution insured by the Federal Deposit Insurance Corporation. (2002-88, s. 1; 2002-159, s. 33.)

Editor's Note. — Session Laws 2002-159, s. 33, effective October 11, 2002, recodified Article 9A of Chapter 25 (G.S. 25-9A-101 through G.S. 25-9A-102), enacted by Session Laws 2002-88, s. 1, as Article 25 of Chapter 53 (G.S. 53-425 through G.S. 53-426).

§ 53-426. Waiver of equity of redemption.

(a) Notwithstanding any other provision of law, except to the extent otherwise set forth in the transaction documents relating to a securitization, all of the following apply:

(1) Any property, assets, or rights purported to be transferred, in whole or in part, in a securitization or in connection with a securitization are considered no longer the property, assets, or rights of the transferor, to the extent purported to be transferred.

(2) A transferor in the securitization, its creditors, and, in any insolvency proceeding with respect to the transferor or the transferor's property, a bankruptcy trustee, receiver, debtor, debtor in possession, or similar person, to the extent the transfer is governed by State law, has no rights, legal or equitable, to reacquire, reclaim, recover, repudiate, disaffirm, redeem, or recharacterize as property of the transferor any property, assets, or rights purported to be transferred to the special purpose entity, in whole or in part, by the transferor.

(3) In the event of a bankruptcy, receivership, or other insolvency proceeding with respect to the transferor or the transferor's property, to the extent the transfer of property, assets, and rights are governed by State law, the property, assets, and rights are not considered part of the transferor's property, assets, rights, or estate.

(b) Nothing in this Article:

(1) Requires any securitization to be treated as a sale for federal or state tax purposes;
(2) Precludes the treatment of any securitization as debt for federal or state tax purposes; or
(3) Changes any applicable laws relating to the perfection and priority of security or ownership interests of persons other than the transferor, any hypothetical lien creditor of the transferor, or, in the event of a bankruptcy, receivership, or other insolvency proceeding with respect to the transferor or its property, a bankruptcy trustee, receiver, debtor, debtor in possession, or other similar person. (2002-88, s. 1; 2002-159, s. 33.)

entity.

[illegible] entity a contractual right to receive cash [illegible]

[illegible]

on sub-categories or gradations indicating relative standing [illegible] one or more nationally recognized rating organizations.

b. It is sold in transactions by an issuer not involving any publi[illegible] offering under section 4 of the Securities Act of 1933 (15 U.S.[illegible] 77d), as amended, or in transactions exempt from registration under the Securities Act of 1933 pursuant to Regulation S issued in accordance with the Act, or any successor regulations issued under the Act.

(4) Special purpose entity. — A trust, corporation, limited liability company, or other entity demonstrably distinct from the transferor that is primarily engaged in acquiring and holding (or transferring to another special purpose entity) financial assets, and in activities related or incidental thereto, in connection with the issuance by the special purpose entity (or by another special purpose entity that acquires financial assets directly or indirectly from the special purpose entity) of evidences of beneficial interests.

(5) Transferor. — A financial institution insured by the Federal Deposit Insurance Corporation. (2002-38, s. 1; 2002-159, s. 33.)

Editor's Note. — Session Laws 2002-159, s. [illegible] effective December 31, 2003, recodified Article [illegible] of Chapter 98 (G.S. 98A-101 through G.S. [illegible] [illegible] enacted by Session Laws 2002-[illegible] s. 1, as Article 25 of Chapter 53 (G.S. 53-4[illegible] through G.S. 53-430).

§ 53-426. Waiver of equity of redemption.

(a) Notwithstanding any other provision of law, except to the extent otherwise set forth in the transaction documents relating to a securitization, all of the following apply:

(1) Any property, assets, or rights purported to be transferred, in whole or in part, in a securitization or in connection with a securitization are considered no longer the property, assets, or rights of the transferor, to the extent purported to be transferred.

(2) A transferor in the securitization, its creditors, and, in any insolvency proceeding with respect to the transferor or the transferor's property, a bankruptcy trustee, receiver, debtor, debtor in possession, or similar person, to the extent the transfer is governed by State law, has no rights, legal or equitable, to reacquire, reclaim, recover, repudiate, disaffirm, redeem, or recharacterize as property of the transferor any property, assets, or rights purported to be transferred to the special purpose entity, in whole or in part, by the transferor.

(3) In the event of a bankruptcy, receivership, or other insolvency proceeding with respect to the transferor or the transferor's property, to the extent the transfer of property, assets, and rights are governed by State law, the property, assets, and rights are not considered part of the transferor's property, assets, rights, or estate.

(b) Nothing in this Article

Chapter 53A.

Business Development Corporations and North Carolina Capital Resource Corporations.

Article 1.

Business Development Corporations.

Sec.

53A-1 through 53A-19. [Repealed.]

Article 2.

North Carolina Capital Resource Corporations.

53A-20 through 53A-34. [Expired.]

Article 3.

North Carolina Enterprise Corporations.

53A-35. Short title.
53A-36. Legislative findings and purpose.

Sec.
53A-37. Definitions.
53A-38. Incorporation authorized.
53A-39. Purpose.
53A-40. Corporate name.
53A-41. Governing law.
53A-42. Powers.
53A-43. Primary investments.
53A-44. Prohibited investments.
53A-45. Board of directors.
53A-46. [Repealed.]
53A-47. Charter void unless business begun; Article void unless corporation organized.

ARTICLE 1.

Business Development Corporations.

§§ 53A-1 through 53A-19: Repealed by Session Laws 1995, c. 46, s. 1.

Editor's Note. — Section 53A-19 had been reserved for future codification purposes.

ARTICLE 2.

North Carolina Capital Resource Corporations.

§§ 53A-20 through 53A-34: Expired.

Editor's Note. — Section 53A-34 of this Article provided, inter alia, that if no corporation was organized pursuant to this Article at the expiration of three years after July 1, 1987, the Article would expire on that date. According to information from the Secretary of State's office and the Commissioner of Banks, no corporation was formed under this Article as of July 1, 1990; therefore, the Revisor of Statutes has directed that this Article be set out as expired, effective July 1, 1990.

ARTICLE 3.

North Carolina Enterprise Corporations.

§ 53A-35. Short title.

This Article shall be known and may be cited as the North Carolina Enterprise Corporation Act. (1987 (Reg. Sess., 1988), c. 882, s. 1.)

§ 53A-36. Legislative findings and purpose.

(a) The General Assembly finds and declares that there exists in the State of North Carolina a serious shortage of mezzanine finance capital and credit available for investment in rural areas in the State. This shortage of mezzanine finance capital and credit is severe throughout the rural areas of the State, has persisted for a number of years, and constitutes a grave threat to the welfare and prosperity of all residents of the State.

(b) The General Assembly finds and declares further that private enterprise and existing federal and State governmental programs have not adequately alleviated the severe shortage of mezzanine finance capital and credit available for investments in rural areas in the State.

(c) The General Assembly finds and declares that it is a matter of grave public necessity that North Carolina Enterprise Corporations be authorized to be created and to be empowered to alleviate these severe shortages of mezzanine finance capital and credit for investment in rural areas of the State. North Carolina Enterprise Corporations shall help eliminate barriers to rural economic development by providing mezzanine finance capital and credit, and other types of financing as appropriate, to businesses in rural areas that have been unable to obtain sufficient financing through traditional financial institutions. (1987 (Reg. Sess., 1988), c. 882, s. 1.)

§ 53A-37. Definitions.

The following definitions apply in this Article:

(1) Business. A corporation, partnership, association, or sole proprietorship operated for profit.

(2) Equity security. Common stock, preferred stock, an interest in a partnership, subordinated debt, or a warrant that is convertible into, or entitles the holder to receive upon its exercise, common stock, preferred stock, or an interest in a partnership.

(3) Mezzanine finance. An investment in the equity securities or subordinated debt of a Qualified North Carolina Business.

(4) Qualified North Carolina Business. A business whose headquarters and principal business operations are located in North Carolina and which, together with its affiliates on a consolidated basis, had gross income during the immediately preceding fiscal year, determined in accordance with generally accepted accounting principles without taking into account extraordinary items, of less than forty million dollars ($40,000,000).

(5) Rural areas. Any county in North Carolina which does not include within its boundaries a city, as defined by G.S. 160A-1(2), with a population greater than one percent (1%) of the population of North Carolina.

(6) Security. A security as defined in G.S. 78A-2(11).

(7) Subordinated debt. Indebtedness that is or will be subordinated to other indebtedness of the issuer. Subordinated debt may be convertible into common stock, preferred stock, or an interest in a partnership.

(8) Traditional Financial Institutions. Corporations or associations chartered under Chapters 53 or 54B of the General Statutes. (1987 (Reg. Sess., 1988), c. 882, s. 1.)

§ 53A-38. Incorporation authorized.

(a) One or more persons, a majority of whom are residents of this State, may, by filing a certificate of incorporation as provided in subsection (b), incorporate a North Carolina Enterprise Corporation under the provisions of this Article.

(b) Persons who wish to associate themselves for the purpose of establishing a North Carolina Enterprise Corporation shall file a certificate of incorporation with the Secretary of State. The certificate shall be in accordance with G.S. 55-7. (1987 (Reg. Sess., 1988), c. 882, s. 1.)

Editor's Note. — Chapter 55, including G.S. 55-7, referred to herein, was rewritten effective July 1, 1990, by Session Laws 1989, c. 265, s. 1. As to articles of incorporation, see now G.S. 55-2-02.

§ 53A-39. Purpose.

The purpose of a North Carolina Enterprise Corporation shall be to promote, stimulate, develop, and advance economic prosperity and stimulate job creation in North Carolina's rural areas primarily through mezzanine finance investments in Qualified North Carolina Businesses. To stimulate development broadly across the State, a North Carolina Enterprise Corporation, to the maximum extent feasible consistent with sound business practices, will make mezzanine financing and other types of financing available to small businesses and to businesses located throughout all the rural areas of North Carolina. (1987 (Reg. Sess., 1988), c. 882, s. 1.)

§ 53A-40. Corporate name.

The name of the corporation shall include the words "North Carolina Enterprise Corporation". (1987 (Reg. Sess., 1988), c. 882, s. 1.)

§ 53A-41. Governing law.

Except as otherwise provided in this Article, a North Carolina Enterprise Corporation shall be governed by Chapter 55 of the General Statutes. (1987 (Reg. Sess., 1988), c. 882, s. 1.)

§ 53A-42. Powers.

A North Carolina Enterprise Corporation created under this Article shall have all the powers conferred on business corporations by Chapter 55 of the General Statutes. (1987 (Reg. Sess., 1988), c. 882, s. 1.)

§ 53A-43. Primary investments.

The primary investments of a North Carolina Enterprise Corporation shall be in Qualified North Carolina Businesses that have significant potential to create jobs and diversify and stabilize the economy of rural areas of this State. (1987 (Reg. Sess., 1988), c. 882, s. 1.)

§ 53A-44. Prohibited investments.

Investments by a North Carolina Enterprise Corporation shall not be made in any business unless the business can demonstrate to the satisfaction of the North Carolina Enterprise Corporation that the business cannot obtain sufficient financing through traditional financial institutions. (1987 (Reg. Sess., 1988), c. 882, s. 1.)

§ 53A-45. Board of directors.

The business and affairs of a North Carolina Enterprise Corporation shall be managed and conducted by a board of directors and by such officers and agents as the corporation by it bylaws shall authorize. The initial board of directors shall be those listed in the Articles of Incorporation. At the initial shareholders meeting, and thereafter annually, the voting common stock shareholders shall elect a board of directors comprised of not less than thirteen (13) members in accordance with the following conditions:

(1) Not less than five (5) members who are employed by the North Carolina banks that invest in the common stock of the North Carolina Enterprise Corporation;

(2) Not less than five (5) members who are representatives of North Carolina savings and loans, insurance companies, utility companies, endowment funds, public investors, private businesses, private individuals, or others that invest in the common stock of the North Carolina Enterprise Corporation;

(3) Not less than two (2) members who are the representatives of appropriate public interests, which persons shall not be employed by any bank, entity, or person that owns common stock of the North Carolina Enterprise Corporation;

(4) One member who is the President or the Chief Executive Officer of the North Carolina Enterprise Corporation. (1987 (Reg. Sess., 1988), c. 882, s. 1.)

§ 53A-46: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 8.

§ 53A-47. Charter void unless business begun; Article void unless corporation organized.

If a corporation organized pursuant to this Article fails to begin business within three years after the effective date of its charter then its charter is void. If, at the expiration of three years after July 1, 1988, no corporation has been organized pursuant to this Article, then on that date this Article shall expire. (1987 (Reg. Sess., 1988), c. 882, s. 1.)

Chapter 53B.

Financial Privacy Act.

Sec.
53B-1. Short title.
53B-2. Definitions.
53B-3. Public policy.
53B-4. Access to financial records.
53B-5. Service on customer certification.
53B-6. Delayed notice.
53B-7. Customer challenge.
53B-8. Disclosure of financial records.
53B-9. Duty of financial institutions; fee; limitation of liability.
53B-10. Penalty.

§ 53B-1. Short title.

This act may be cited as the North Carolina Financial Privacy Act. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

§ 53B-2. Definitions.

As used in this Chapter, unless the context otherwise requires, the term:

(1) "Customer" means a person who has transacted business with a financial institution or has used the services offered by a financial institution.

(2) "Financial institution" means a banking corporation, trust company, savings and loan association, credit union, or other entity principally engaged in the business of lending money or receiving or soliciting money on deposit.

(3) "Financial record" means an original of, a copy of, or information derived from, a record held by a financial institution pertaining to a customer's relationship with the financial institution and identified with or identifiable with the customer. Financial record shall not include forged or counterfeit financial instruments or records relating to an account established under a fictitious name or another person's name without proper authorization.

(4) "Government authority" means an agency or department of the State or of any of its political subdivisions, including any officer, employee, or agent thereof.

(5) "Government inquiry" means a lawful investigation by a government agency or official proceeding inquiring into a violation of, or failure to comply with, any criminal or civil statute, law, or rule.

(6) "Supervisory agency" means a State agency or department having the statutory authority to examine the financial condition or business operation of a financial institution. (1985 (Reg. Sess., 1986), c. 1002, s. 1; 2006-259, s. 14(a).)

Effect of Amendments. — Subsection (3), as amended by Session Laws 2006-259, s. 14(a), effective October 1, 2006, is applicable to acts committed on or after that date.

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"Customer." — A person whose name has been used without his knowledge or consent in opening an account for unlawful purposes, who has transacted no business through the account, and who has not used the services of the financial institution in connection with the account is not a "customer" of the institution within the meaning of this chapter. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

A person who has opened an account at a financial institution in a fictitious name or the name of another person is a "customer" within the meaning of the Financial Privacy Act. See opinion of Attorney General to Ms. Mary C. McNaught, Public Safety Attorney, City of Winston-Salem, 59 N.C.A.G. 4 (1989).

§ 53B-3. Public policy.

It is the policy of this State that financial records should be treated as confidential and that no financial institution may provide to any government authority and no government authority may have access to any financial records except in accordance with the provisions of this Chapter. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

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There are no exceptions to the public policy expressed in this section. Any agency or institution which gains or provides access to records except in conformity with this Chapter is subject to the substantial penalties provided for in G.S. 53B-10. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

The provisions of the Financial Privacy Act apply when worthless checks are issued on an account opened in a false or fictitious name and result in a loss to the financial institution in which the account was opened. See opinion of Attorney General to Ms. Mary C. McNaught, Public Safety Attorney, City of Winston-Salem, 59 N.C.A.G. 4 (1989).

The notice procedures of the Financial Privacy Act are to be followed when there is strong reason to believe that the account in question has been opened in a false or fictitious name. See opinion of Attorney General to Ms. Mary C. McNaught, Public Safety Attorney, City of Winston-Salem, 59 N.C.A.G. 4 (1989).

The fact that a financial institution is the victim of a crime or sustains a loss through an account held in a false or fictitious name by one of its customers does not waive the provisions of this Chapter. The Chapter provides the exclusive means by which a financial institution may give a government authority access to a customer's financial records or by which a government authority may obtain access to such records. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

§ 53B-4. Access to financial records.

Notwithstanding any other provision of law, no government authority may have access to a customer's financial record held by a financial institution unless the financial record is described with reasonable specificity and access is sought pursuant to any of the following:

(1) Customer authorization that meets the requirements of the Right to Financial Privacy Act § 1104, 12 U.S.C. § 3404, provided, however, a customer authorization received by a State agency or a county department of social services for the purpose of determining eligibility for the programs of public assistance under Chapter 108A of the General Statutes, or for purposes of a government inquiry concerning these same programs of public assistance, cannot be revoked and shall remain valid for 12 months unless a shorter period is specified in the authorization, or a customer authorization that is given by a licensed attorney with respect to an account in which the attorney holds funds as a fiduciary.

(2) Authorization under G.S. 105-251 or G.S. 105-258.

(3) Search warrant as provided in Article 11 of Chapter 15A of the General Statutes.

(4) Statutory authority of a supervisory agency to examine or have access to financial records in the exercise of its supervisory, regulatory, or monetary functions with respect to a financial institution.

(5) The authority granted under G.S. 116B-72 and G.S. 116B-75.

(6) Examination and review by the State Auditor or his authorized representative under G.S. 147-64.6(c)(9) or G.S. 147-64.7(a).

(7) Request by a government authority authorized to buy and sell student loan notes under Article 23 of Chapter 116 of the General Statutes for financial records relating to insured student loans.
(8) Pending litigation to which the government authority and the customer are parties.
(9) Subpoena or court order in connection with a grand jury proceeding.
(10) A writ of execution under Article 28 of Chapter 1 of the General Statutes.
(11) Other court order or administrative or judicial subpoena authorized by law if the requirements of G.S. 53B-5 are met.
(12) The authority granted to the Attorney General under Chapter 75 of the General Statutes.

As used in this section, the term "reasonable specificity" means that degree of specificity reasonable under all the circumstances, and, with respect to requests under G.S. 116B-72 and G.S. 116B-75, may include designation by general type or class. (1985 (Reg. Sess., 1986), c. 1002, s. 1; 1999-460, s. 11; 2006-259, s. 14(b); 2007-527, s. 1.)

Editor's Note. — This section, as amended by Session Laws 2006-259, s. 14(b), effective October 1, 2006, is applicable to acts committed on or after that date.

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The provisions of the Financial Privacy Act apply when worthless checks are issued on an account opened in a false or fictitious name and result in a loss to the financial institution in which the account was opened. See opinion of Attorney General to Ms. Mary C. McNaught, Public Safety Attorney, City of Winston-Salem, 59 N.C.A.G. 4 (1989).

The notice procedures of the Financial Privacy Act are to be followed when there is strong reason to believe that the account in question has been opened in a false or fictitious name. See opinion of Attorney General to Ms. Mary C. McNaught, Public Safety Attorney, City of Winston-Salem, 59 N.C.A.G. 4 (1989).

"Customer." — A person who has opened an account at a financial institution in a fictitious name or the name of another person is a "customer" within the meaning of the Financial Privacy Act. See opinion of Attorney General to Ms. Mary C. McNaught, Public Safety Attorney, City of Winston-Salem, 59 N.C.A.G. 4 (1989).

The notice specified in § 53B-5(3) must be served pursuant to the provisions of that section or of G.S. 53B-6 on every customer whose financial records are sought to be accessed by an agency or department of the State or any of its political subdivisions through a court order or administrative or judicial subpoena authorized under subdivision (11) of this section. This Chapter creates no exception for a customer who has opened an account in a false or fictitious name. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

The fact that a financial institution is the victim of a crime or sustains a loss through an account held in a false or fictitious name by one of its customers does not waive the provisions of this Chapter. The Chapter provides the exclusive means by which a financial institution may give a government authority access to a customer's financial records or by which a government authority may obtain access to such records. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

§ 53B-5. Service on customer certification.

A government authority may have access to a customer's financial record pursuant to G.S. 53B-4(11) only if:

(1) The court order or subpoena describes with reasonable specificity the financial record to which access is sought;
(2) A copy of the court order or subpoena has been served on the customer pursuant to G.S. 1A-1, Rule 4 (j) of the N.C. Rules of Civil Procedure or by certified mail to the customer's last known address and the court order or subpoena states the name of the government authority

seeking access to the financial record and the purpose for which access is sought;

(3) The following notice has been served on the customer pursuant to G.S. 1A-1, Rule 4 (j) of the N.C. Rules of Civil Procedure or by certified mail to the customer's last known address together with the court order or subpoena:

"Records or information held by the financial institution named in the attached process are being sought by government authority in accordance with the North Carolina Financial Privacy Act. You may have rights under the act to challenge access to the records or information. You must, however, act within 10 days from the date this notice was served on you to make a challenge in court or the records or information will be made available. You may wish to employ an attorney to represent you and protect your rights.";

(4) The customer has not challenged the court order or subpoena within 10 days after service by certified mail which is presumed to be received three days from mailing;

(5) The government authority has certified in writing to the financial institution that it has complied with the applicable provisions of this Chapter. (1985 (Reg. Sess., 1986), c. 1002, s. 1; 1995, c. 222, s. 1.)

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The provisions of the Financial Privacy Act apply when worthless checks are issued on an account opened in a false or fictitious name and result in a loss to the financial institution in which the account was opened. See opinion of Attorney General to Ms. Mary C. McNaught, Public Safety Attorney, City of Winston-Salem, 59 N.C.A.G. 4 (1989).

The notice procedures of the Financial Privacy Act are to be followed when there is strong reason to believe that the account in question has been opened in a false or fictitious name. See opinion of Attorney General to Ms. Mary C. McNaught, Public Safety Attorney, City of Winston-Salem, 59 N.C.A.G. 4 (1989).

"Customer." — A person who has opened an account at a financial institution in a fictitious name or the name of another person is a "customer" within the meaning of the Financial Privacy Act. See opinion of Attorney General to Ms. Mary C. McNaught, Public Safety Attorney, City of Winston-Salem, 59 N.C.A.G. 4 (1989).

The notice specified in subdivision (3) of this section must be served pursuant to the provisions thereof or of G.S. 53B-6 on every customer whose financial records are sought to be accessed by an agency or department of the State or any of its political subdivisions through a court order or administrative or judicial subpoena authorized under G.S. 53B-4(11). This Chapter creates no exception for a customer who has opened an account in a false or fictitious name. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

The fact that a financial institution is the victim of a crime or sustains a loss through an account held in a false or fictitious name by one of its customers does not waive the provisions of this Chapter. The Chapter provides the exclusive means by which a financial institution may give a government authority access to a customer's financial records or by which a government authority may obtain access to such records. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

§ 53B-6. Delayed notice.

Upon application of a government authority, a superior court judge may order that the customer notice required by G.S. 53B-5 be delayed if the court finds there is reason to believe that:

(1) The financial record to which access is sought is relevant to a legitimate government inquiry; and

(2) Notice to the customer will:
  a. Endanger life or physical safety of any person;
  b. Result in flight from prosecution;
  c. Lead to intimidation of a witness;

d. Result in destruction of or tampering with evidence; or
e. Otherwise seriously jeopardize the government inquiry or an official proceeding or investigation.

A court order granting delay of notice to a customer under this section shall set out the specific facts supporting its findings, specify the period of delay, and direct that the government authority shall serve on the customer at the end of that period a copy of the court order or subpoena and a notice that the records have been furnished. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

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The notice specified in § 53B-5(3) must be served pursuant to the provisions of that section or of this section on every customer whose financial records are sought to be accessed by an agency or department of the State or any of its political subdivisions through a court order or administrative or judicial subpoena authorized under G.S. 53B-4(11). This Chapter creates no exception for a customer who has opened an account in a false or fictitious name. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

The fact that a financial institution is the victim of a crime or sustains a loss through an account held in a false or fictitious name by one of its customers does not waive the provisions of this Chapter. The Chapter provides the exclusive means by which a financial institution may give a government authority access to a customer's financial records or by which a government authority may obtain access to such records. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

§ 53B-7. Customer challenge.

(a) Within 10 days after service of a court order or subpoena under this Chapter a customer may apply to the superior court of the county in which he resides for an order quashing or modifying the court order or subpoena. The customer shall deliver or mail a copy of the application to the government authority and the financial institution named in the court order or subpoena. The superior court shall grant or deny the application within 10 days after it is filed.

(b) Nothing in this Chapter affects the right of a financial institution to challenge a request for financial records by a government authority under existing law. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

§ 53B-8. Disclosure of financial records.

No financial institution or its officer, employee, or agent may disclose a customer's financial record to a government authority except as provided in this Chapter. This section does not prohibit a financial institution from giving notice of or disclosing a financial record to a government authority, as defined in G.S. 53B-2(4), to the same extent as is authorized with respect to federal government authorities in the Right to Financial Privacy Act § 1103(d), 12 U.S.C. § 3403(d). Nothing in this section shall prohibit a financial institution or its officer, employee or agent from disclosing, or require the disclosure of, the name, address, and existence of an account of any customer to a government authority that makes a written request stating the reason for the request. Nothing in this Chapter shall prohibit a financial institution or its officer, employee, or agent from notifying a government authority that the financial institution or its officer, employee, or agent has information that may be relevant to a possible violation of law or regulation. The information shall be limited to a description of the suspected illegal activity and the name or other identifying information concerning any individual, corporation, or account involved in the activity. Any financial institution or its officer, employee, or agent making a disclosure of information pursuant to this section shall not be liable to the customer under the laws and rules of the State of North Carolina or any political subdivision of the State for disclosure or for failure to notify the customer of the disclosure. (1985 (Reg. Sess., 1986), c. 1002, s. 1; 1995, c. 222, s. 2; 1998-119, s. 3.)

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The fact that a financial institution is the victim of a crime or sustains a loss through an account held in a false or fictitious name by one of its customers does not waive the provisions of this Chapter. The Chapter provides the exclusive means by which a financial institution may give a government authority access to a customer's financial records or by which a government authority may obtain access to such records. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

§ 53B-9. Duty of financial institutions; fee; limitation of liability.

(a) Upon service of a subpoena or court order pursuant to G.S. 53B-4(1), (3), (9), or (11) and receipt of certification pursuant to G.S. 53B-5(5), a financial institution shall locate the financial records requested and prepare to make them available to the government authority seeking access to them. Upon receipt of notice that a customer has challenged the court order or subpoena, the financial institution may suspend its efforts to make the records available until after final disposition of the challenge.

(b) Upon receipt of access to financial records pursuant to G.S. 53B-4(1), (3), (9), or (11), a government authority shall pay the financial institution that provided the financial records a fee for costs directly incurred in assembling and delivering the financial records. The fee shall be at the rate established pursuant to the Right to Financial Privacy Act § 1115(a), 12 U.S.C. § 3415, and 12 C.F.R. 219.

(c) A financial institution that discloses a financial record pursuant to this Chapter in good faith reliance upon certification by a government authority pursuant to G.S. 53B-5(5) is not liable for damages resulting from the disclosure. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

§ 53B-10. Penalty.

(a) Any financial institution disclosing financial records or information contained therein in violation of this Chapter shall be liable to the customer to whom the records relate in an amount equal to the sum of:

(1) One thousand dollars ($1,000);

(2) Any actual damages sustained by the customer as a result of the disclosure; and

(3) Such punitive damages as the court may allow, where the violation is found to have been willful or intentional.

(b) Any government authority that participates in or induces or solicits a violation of this Chapter shall be liable to the customer to whom the violation relates in the amount set out in subsection (a) above. It shall be a defense to an action under this subsection that the government authority acted in good faith in obtaining and relying upon process issued pursuant to G.S. 53B-4. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

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The provisions of the Financial Privacy Act apply when worthless checks are issued on an account opened in a false or fictitious name and result in a loss to the financial institution in which the account was opened. See opinion of Attorney General to Ms. Mary C. McNaught, Public Safety Attorney, City of Winston-Salem, 59 N.C.A.G. 4 (1989).

The notice procedures of the Financial Privacy Act are to be followed when there is strong reason to believe that the account in question has been opened in a false or fictitious name. See opinion of Attorney General to Ms. Mary C. McNaught, Public Safety Attorney, City of Winston-Salem, 59 N.C.A.G. 4 (1989).

"Customer." — A person who has opened an account at a financial institution in a fictitious name or the name of another person is a "customer" within the meaning of the Financial Privacy Act. See opinion of Attorney General to Ms. Mary C. McNaught, Public Safety Attorney, City of Winston-Salem, 59 N.C.A.G. 4 (1989).

There are no exceptions to the public policy expressed in § 53B-3. Any agency or institution which gains or provides access to records except in conformity with this Chapter is subject to the substantial penalties provided for in this section. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

The fact that a financial institution is the victim of a crime or sustains a loss through an account held in a false or fictitious name by one of its customers does not waive the provisions of this Chapter. The Chapter provides the exclusive means by which a financial institution may give a government authority access to a customer's financial records or by which a government authority may obtain access to such records. See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, 59 N.C.A.G. 4 (1989).

(a) Upon service of a subpoena or court order pursuant to G.S. 53B-4(1), (6), (9), or (11) and receipt of certification pursuant to G.S. 53B-5(5), a financial institution shall locate the financial records requested and prepare to make them available to the government authority seeking access to them. Upon receipt of notice that a customer has challenged the court order or subpoena, the financial institution may suspend its efforts to make the records available until after final disposition of the challenge.

(b) Upon receipt of access to financial records pursuant to G.S. 53B-4(1), (6), (9), or (11), a government authority shall pay the financial institution that provided the financial records a fee for costs directly incurred in assembling and delivering the financial records. The fee shall be at the rate established pursuant to the Right to Financial Privacy Act § 1115(a), 12 U.S.C. § 3415, and 12 C.F.R. 219.

(c) A financial institution that discloses a financial record pursuant to this Chapter in good faith reliance upon certification by a government authority pursuant to G.S. 53B-5(5) is not liable for damages resulting from the disclosure. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

§ 53B-10. Penalty.

(a) Any financial institution disclosing financial records or information contained therein in violation of this Chapter shall be liable to the customer to whom the records relate in an amount equal to the sum of:

(1) One thousand dollars ($1,000);

(2) Any actual damages sustained by the customer as a result of the disclosure; and

(3) Such punitive damages as the court may allow, where the violation is found to have been willful or intentional.

(b) Any government authority that participates in or induces or solicits a violation of this Chapter shall be liable to the customer to whom the violation relates in the amount set out in subsection (a) above. It shall be a defense to any action under this subsection that the government authority acted in good faith in obtaining and relying upon process issued pursuant to G.S. 53B-4. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

OPINIONS OF ATTORNEY GENERAL

The provisions of the Financial Privacy Act apply when worthless checks are issued on an account opened in a false or fictitious name and result in a loss to the

Chapter 54.
Cooperative Organizations.

SUBCHAPTER I. BUILDING AND LOAN ASSOCIATIONS, BUILDING ASSOCIATIONS AND SAVINGS AND LOAN ASSOCIATIONS.

Article 1.
Organization.

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54-1 through 54-12.1. [Repealed.]

Article 2.
Shares and Shareholders.

54-13 through 54-18.2. [Repealed.]

Article 2A.
Savings Accounts.

54-18.3 through 54-18.6. [Repealed.]

Article 3.
Loans.

54-19 through 54-23. [Repealed.]

Article 4.
Under Control of Administrator of the Savings and Loan Division.

54-24 through 54-33.3. [Repealed.]

Article 5.
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54-34 through 54-41. [Repealed.]

Article 5A.
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54-41.1. [Repealed.]

Article 6.
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54-42, 54-43. [Repealed.]

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Statements of Financial Condition of Associations.

54-44. [Repealed.]

Article 7A.
Mutual Deposit Guaranty Associations.

54-44.1 through 54-44.14. [Repealed.]

SUBCHAPTER II. LAND AND LOAN ASSOCIATIONS.

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SUBCHAPTER I. BUILDING AND LOAN ASSOCIATIONS, BUILDING ASSOCIATIONS AND SAVINGS AND LOAN ASSOCIATIONS.

ARTICLE 1.

Organization.

§§ 54-1 through 54-12.1: Repealed by Session Laws 1981, c. 282, s. 1.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

ARTICLE 2.

Shares and Shareholders.

§§ 54-13 through 54-18.2: Repealed by Session Laws 1981, c. 282, s. 1.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

ARTICLE 2A.

Savings Accounts.

§§ 54-18.3 through 54-18.6: Repealed by Session Laws 1981, c. 282, s. 1.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

ARTICLE 3.

Loans.

§§ 54-19 through 54-23: Repealed by Session Laws 1981, c. 282, s. 1.

Cross References. — For present provisions as to savings and loans associations, see Chapter 54B.

ARTICLE 4.

Under Control of Administrator of the Savings and Loan Division.

§§ 54-24 through 54-33.3: Repealed by Session Laws 1981, c. 282, s. 1.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

ARTICLE 5.

Foreign Associations.

§§ 54-34 through 54-41: Repealed by Session Laws 1981, c. 282, s. 1.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

ARTICLE 5A.

Reserves.

§ 54-41.1: Repealed by Session Laws 1981, c. 282, s. 1.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

ARTICLE 6.

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§§ 54-42, 54-43: Repealed by Session Laws 1981, c. 282, s. 1.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

ARTICLE 7.

Statements of Financial Condition of Associations.

§ 54-44: Repealed by Session Laws 1981, c. 282, s. 1.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

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Mutual Deposit Guaranty Associations.

§§ 54-44.1 through 54-44.14: Repealed by Session Laws 1981, c. 282, s. 1.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

SUBCHAPTER II. LAND AND LOAN ASSOCIATIONS.

ARTICLE 8.

Organization and Powers.

§ 54-45. Application of term.

The term "land and loan associations" shall apply to and include all corporations, companies, societies or associations organized for the purpose of making loans to their members only, and of enabling their members to acquire real estate, make improvements thereon, and remove encumbrances therefrom by the payment of money in periodical installments or principal sums, and for the accumulation of a fund to be returned to members who do not obtain advances for such purposes, where the principles of building and loan associations and their work are adapted to the use of the farmers and the rural population.

It shall be unlawful for any corporation, company, society, or association doing business in this State not so conducted to use in its corporate name the term "land and loan association," or in any manner or device to hold itself out to the public as a land and loan association. (1915, c. 172, s. 1; C.S., s. 5204.)

§ 54-46. Incorporation and powers.

Land and loan associations shall be incorporated, supervised, and be subject to such regulations and have such privileges as are prescribed for building and loan associations under the laws of this State as they now are or may be hereafter enacted, except as prescribed in this Article. (1915, c. 172, s. 2; C.S., s. 5205.)

§ 54-47. Loans.

The board of directors of land and loan associations may contract for loans to the amount of seventy-five percent (75%) of the securities used by them as collateral, where the loans are on long time (three or more years), and for at least one percent (1%) less than is charged by such associations on their loans to shareholders; and they may make short loans to their shareholders on their shares and personal endorsement or personal property. (1915, c. 172, s. 3; C.S., s. 5206.)

Cross References. — As to loans on mortgages, etc., issued under the National Housing Act, 12 U.S.C. § 1701 et seq., see G.S. 53-45.

§ 54-48. Reserve associations.

Associations to be known as "reserve land and loan associations" may be chartered and licensed as provided in this Article, when they are organized and the stock therein is held by local land and loan associations, and shall have such powers, rights, and privileges as are accorded to other domestic associations, and they may conform to such laws, rules, and regulations as may be prescribed by the laws of the United States, or of this State, to enable them to receive moneys, bonds, or securities to be used in loans and to secure the same. Such reserve associations shall be under the supervision of the Commissioner of Banks as are building and loan associations. (1915, c. 172, s. 4; C.S., s. 5207; 1971, c. 864, s. 17; 1989, c. 76, s. 14; 2001-193, s. 16.)

§ 54-49. Land Conservation and Development Bureau; land mortgage associations.

Recognizing that agriculture is the most fundamental wealth-producing occupation of the State and that land is the basis of agriculture, the General Assembly of North Carolina does hereby authorize and direct the State Department of Agriculture and Consumer Services to establish as a major division of its organization a Land Conservation and Land Development Bureau. The function of this Bureau shall be to promote conservation, rural home ownership, and the development of the land resources of the State through land mortgage associations under the following provisions. (1925, c. 223, s. 1; 1997-261, s. 109.)

§ 54-50. Number of incorporators; capital stock.

Any number of persons, resident freeholders of the State, not less than 15, may associate to establish an association on the terms and conditions and subject to the liabilities hereinafter prescribed. The aggregate amount of the capital stock of any such association shall not be less than twenty thousand dollars ($20,000). Such association shall mean a corporation organized under the laws of the State for the purpose of making loans upon agricultural lands, forest lands and dwelling houses within this State and known as a land mortgage association. (1925, c. 223, s. 2.)

§ 54-51. Incorporation.

The articles of incorporation shall be in writing, signed and acknowledged by the incorporators and shall contain the following:

(1) The declaration that they are associating for the purpose of forming a land mortgage association under the provisions of this Article.

(2) The name of such association, which shall be in no material respect similar to any other association in the same county.

(3) The name of the village, town or city, and the county where such association is to be located.

(4) The amount of capital stock, which shall be divided into shares of one hundred dollars ($100.00) each.

(5) The period for which such association is organized. (1925, c. 223, s. 3.)

§ 54-52. Organization.

The incorporators at their first annual meeting shall elect by ballot from their number a board of trustees of not less than six members who shall adopt a code of bylaws and a plan of organization approved by the Commissioner of Agriculture and the Commissioner of Banks. (1925, c. 223, s. 4; 1931, c. 243, s. 5.)

§ 54-53. Corporate powers.

Said land mortgage association shall have power:

(1) To make loans, the conditions of which shall be approved by the Commissioner of Banks if the security taken therefor is to be used as the basis for a bond issue under subdivision (3) hereof, and to accept as security for any such loan a first mortgage upon improved or partially improved agricultural lands within this State. Such loan shall not exceed, however, sixty-five percent (65%) of the value of such real estate so conveyed, according to the appraisal made as herein provided.

(2) To purchase first mortgages, heretofore or hereafter issued against North Carolina agricultural lands, either improved or partially improved, from persons or firms resident of this State or corporations organized under the laws of this State engaged in the colonization or settlement of North Carolina lands and to whom such mortgages were issued, if, after investigation, the plan of settlement or colonization followed by such person, firm or corporation is approved by the Commissioner of Agriculture as beneficial to the settler or colonist, and if the lands against which such mortgages are issued are found by the said Commissioner to be in fact agricultural lands suitable for agricultural purposes and the terms and conditions of the loans made by such person, firm or corporation are just and reasonable, or from banks or trust companies organized under the laws of this State, or of the United States, to do business in this State, to which such mortgages were issued direct by the borrowers. Each such mortgage shall be payable on the amortization plan maturing in not less than 20 years. The request for an investigation leading to such a purchase of mortgages from persons, firms or corporations engaged in the settlement or colonization of North Carolina lands shall be accompanied by a deposit, the amount of such deposit to be determined by the

Commissioner of Agriculture. Upon completion of the investigation the Commissioner of Agriculture shall render a statement of expense accompanied by a remittance of any unused balance of such deposit, but no mortgage shall be purchased until the lands against which the same is issued have been appraised as hereinafter provided for the appraisal of land for a loan by the land mortgage association and such mortgage is approved by all members of the loan committee.

(3) To issue bonds secured by the pledge of the mortgage so taken or purchased.

(4) To pledge the note and mortgages so taken or purchased under the provisions of subdivisions (1) and (2) hereof as security for the bonds of the land mortgage association referred to in subdivision (3) hereof. (1925, c. 223, s. 5; 1931, c. 243, s. 5.)

Cross References. — As to investment in bonds guaranteed by the United States, see G.S. 53-44. As to loan on mortgages, etc., issued under the National Housing Act, 12 U.S.C. § 1701 et seq., see G.S. 53-45.

§ 54-54. Restrictions.

All mortgage obligations acquired by the company shall be subject to the following restrictions:

(1) Each such mortgage shall be a first and valid lien upon improved or partially improved agricultural lands within the State of North Carolina;

(2) Each such mortgage shall be a first and valid lien upon the whole and undivided fee and upon no lesser estate;

(3) Each such mortgage shall be given to secure a principal indebtedness not exceeding in amount fifteen percent (15%) of the capital and surplus of the company;

(4) All such mortgages shall contain provisions for soil conservation;

(5) All such mortgages shall contain provisions for the time of commencing payments for annual or semiannual reduction of the indebtedness secured thereby, subject to the requirements as to repayment of loans and interest hereinafter provided;

(6) The company shall make no loan secured by mortgage of any real estate in which any officer or trustee of the company is interested either directly or indirectly, except upon the approval of two thirds of all the trustees;

(7) A sufficient amount of the proceeds of any loan made upon lands upon which are buildings in course of construction or upon which land clearing or other improvements are being made shall be retained by the association and paid out only upon construction or improvement vouchers, countersigned by a duly authorized agent of the association. (1925, c. 223, s. 6.)

§ 54-55. Mortgage forms; approval.

The mortgages to be given to the association, the bonds to be issued and the trust deed executed to secure the bonds shall be in such form and shall contain such conditions as will adequately protect all parties thereto. The trustees shall provide the forms subject to the joint approval of the Commissioner of Banks and the Attorney General. (1925, c. 223, s. 7; 1931, c. 243, s. 5.)

§ 54-56. Repayment of loan and interest.

The prospective borrower may be required to pay all expenses incidental to the examination of title and appraisal of the property. The total amount shall include (i) the rate of interest agreed upon; and (ii) a payment. (1925, c. 223, s. 8.)

§ 54-57. Terms of payment.

A borrower may repay his loan by installments of such frequency and amounts as may be agreed upon: Provided, that not less than one percent (1%) of the original amount of the mortgage shall be paid upon the principal thereof annually, and commencing not later than the sixth year succeeding the year in which the loan was made the borrower may pay a larger installment upon the principal, or the whole of it, at any interest date, such payments to be in amounts equal to additions of one or more principal amortization payments. Such payment may be made in cash, or by tendering at par bonds of the association. For failure to pay the interest or any installment required by the terms of the loan, the borrower may be fined as the bylaws may prescribe. But the borrower shall never be required to pay more than the specified installment, nor to pay the principal before it is due except as prescribed herein for partial repayment on account of depreciation and for foreclosure by the association. The borrower may on 60 days' notice repay the association his total indebtedness, or, without such notice, upon payment of 60 days' interest upon the principal unpaid. The borrower shall be entitled to a receipt for all installments as paid, and where the repayment is complete to a satisfaction of his note and mortgage. (1925, c. 223, s. 9.)

Cross References. — As to satisfaction of mortgages, see G.S. 45-37 et seq.

§ 54-58. Transfer of mortgaged lands.

The acquirer of any lands mortgaged to a land mortgage association shall enter at once, on the acquisition of the land, into a written agreement with the association, attested by a notary, or a justice, and assume the personal responsibility for the indebtedness to the association attaching to such lands. This document must be presented to the trustees within 14 days after demand. (1925, c. 223, s. 10.)

§ 54-59. Calling in loans before due.

Every land mortgage association shall have the power to call in loans upon 60 days' notice:

(1) When the person acquiring the lands upon which money has been loaned does not comply with the provisions of G.S. 54-58 and fulfill the obligations incumbent upon him;
(2) When the debtor does not meet the obligation imposed upon him by his contract and the bylaws of the land mortgage association;
(3) When the mortgaged premises become subject to forced sale;
(4) When the mortgaged premises are depreciating in value because of lack of care, of failure to maintain and conserve or from other cause.

The trustees of the association, whenever necessary, shall provide for an inspection of the mortgaged premises by the State Department of Agriculture and Consumer Services for an investigation of the care which is being given said premises, and may employ an expert to inspect the soil with a view of determining whether or not the same is being depleted. (1925, c. 223, s. 11; 1997-261, s. 109.)

§ 54-60. Partial recall of debt.

The association may require a suitable partial repayment of the debt if the mortgaged premises may have at any time become depreciated in value from any cause whatsoever. (1925, c. 223, s. 12.)

§ 54-61. Foreclosure.

Whenever any loan is called in and the borrower shall fail to pay the principal and interest due to the association as required by law and the notices given him, the land mortgage association may then foreclose upon the mortgaged premises as for a past-due loan. But in no case shall a borrower be liable for a sum greater than the amount of the unpaid portion of the loan with any accretions of interest thereon and expenses incidental to the collection thereof. (1925, c. 223, s. 13.)

§ 54-62. Appraisal of lands.

Upon application for a loan the land mortgage association shall cause the lands which it is proposed to mortgage to the association to be appraised by a competent appraiser furnished it by the State Department of Agriculture and Consumer Services. (1925, c. 223, s. 14; 1997-261, s. 109.)

§ 54-63. Preference prohibited; association borrowing money.

No land mortgage association, and no officer or agent thereof, shall give any preference to any creditor by pledging any of the assets of such association as collateral security, except that any such association may borrow money for temporary purposes, and may pledge assets of the association as collateral security therefor. Whenever it shall appear that any land mortgage association has borrowed habitually for the purpose of reloaning, the Commissioner of Banks may require such association to pay off such amount so borrowed. (1925, c. 223, s. 15; 1931, c. 243, s. 5.)

§ 54-64. Bond issues.

(a) The bonds to be issued by any land mortgage association may be issued for such amounts, bearing such serial number, and date or dates, and be payable at such time and times, bear such rate of interest, and be redeemable at maturity or upon notice at such times and in such manner, as the land mortgage association may, subject to the approval of the Banking Commission, deem advisable.

(b) Each land mortgage association shall keep a register for the registration and transfer of bonds issued by it in which it shall register, or cause to be registered, all bonds upon presentation thereof for such purpose; and such register shall contain the post-office address of all registered holders of bonds and shall, at all reasonable times, be open to the inspection of the Banking Commission, or any of its deputies, and to the State Treasurer. (1925, c. 223, s. 16.)

§ 54-65. Deed of trust.

(a) To secure the payment of such bonds, the land mortgage association shall issue a collateral deed of trust to the State Treasurer, pledging as security for such bonds the notes and mortgages taken or purchased, as provided herein, in an amount equal to or exceeding the aggregate amount of bonds issued or to be issued.

(b) The total amount of bonds actually outstanding shall not at any time exceed the total amount unpaid upon the notes secured by the mortgages belonging to the association and pledged for the payment of the bonds, plus such securities and moneys as may be on deposit with the State Treasurer under the provisions hereof.

(c) The aggregate amount of the principal of all bonds issued by land mortgage associations and outstanding at any one time shall not exceed 20 times the amount of the capital and surplus of the company. (1925, c. 223, s. 17.)

§ 54-66. Collaterals deposited with State Treasurer.

All mortgages pledged to secure the payment of the bonds issued hereunder shall be deposited and left with the State Treasurer. The land mortgage association may, with the approval of the State Treasurer, remove such mortgages from the custody of the State Treasurer, substituting in place thereof other of its mortgages, or money or State of North Carolina bonds or certificates of deposit, endorsed in blank, issued by State or national banks located in North Carolina, farm mortgage bonds issued under the provisions of the Federal Farm Loan Act approved July 17, 1916, or obligations of the United States government, in an amount equal to or greater than the amount unpaid upon the notes secured by the mortgages withdrawn. (1925, c. 223, s. 18.)

§ 54-67. Redemption of bonds.

(a) Notice of redemption of bonds may on no account be given on the part of the holder thereof, but may be given by the association only for the purpose of effecting redemption in accordance with the conditions of the bonds and as provided by law and the bylaws.

(b) If the land mortgage association shall elect to redeem any bond prior to maturity, six months' notice of redemption shall be given and shall be effected by personal service upon the owner and holder of the bond, by notice mailed to his address as registered or by advertising the same three times in a newspaper selected by the State Treasurer.

(c) The numbers of the bonds of which notice of redemption is to be given shall be determined by lot, to be drawn by the president or the vice-president at a meeting of the trustees. (1925, c. 223, s. 19; 1993, c. 553, s. 15.)

§ 54-68. Validity of bonds after maturity.

In case the holder of any bond outstanding shall not have presented the same for payment within the period of two years after its maturity or within two years after the date fixed for the redemption, as the case may be, then such bonds shall cease to be a lien upon the mortgages, moneys, and securities pledged to the State Treasurer and deposited with him as security therefor, but such bond shall still constitute, until the statute of limitation running against such bonds shall have expired, a single legal money claim or demand against the land mortgage association issuing the same, and be recoverable from it in a suit at law, and in no event shall any interest be collectible upon such bond after the maturity thereof or after the date fixed for its redemption. (1925, c. 223, s. 20.)

§ 54-69. Bonds as payment.

If the association gives notice to a debtor for repayment of the mortgage loan the latter must pay to the association in cash or in its bonds at par the face of the same so far as it has not yet been covered by his assets in the amortization and payments. (1925, c. 223, s. 21.)

§ 54-70. Bonds as investments.

The bonds of a land mortgage association shall be a legal investment for savings associations, trust companies, or other financial institutions chartered under the laws of this State and shall also be a legal investment for trustees, executors, administrators, or custodians of public or private funds, or corporations, partnerships or associations. (1925, c. 223, s. 22.)

§ 54-71. Application of earnings; reserve fund.

The gross earnings of the association shall be ascertained annually, and there shall first be deducted therefrom the expenses incurred by the association for the preceding year and the balance thereof shall be set aside as a reserve fund for the payment of contingent losses, to an amount equal to two percent (2%) of the capital stock outstanding, and until such reserve fund equals twenty percent (20%) of the capital stock of such association. (1925, c. 223, s. 23.)

§ 54-72. Restriction on holding real estate.

No land mortgage association shall acquire real estate (other than for the occupation of its offices) except to protect its interest in case any of the mortgages owned by it are foreclosed and the property therein described sold to pay the indebtedness secured thereby. All real estate so acquired shall be promptly sold. (1925, c. 223, s. 24.)

§ 54-73. Banking laws applicable.

The statutes relating to banks and banking in this State, that is, G.S. 53-1 to 53-158 [G.S. 53-1 to 53-242], insofar as applicable and not in conflict with the provisions hereof shall apply to land mortgage associations. (1925, c. 223, s. 25.)

SUBCHAPTER III. CREDIT UNIONS.

Article 9.

Credit Union Division; Administrator of Credit Unions.

§§ 54-74 through 54-75.1: Repealed by Session Laws 1975, c. 538, s. 1.

Cross References. — For present provisions as to supervision and regulation of credit unions, see G.S. 54-109.10 to 54-109.19.

Article 10.

Incorporation of Credit Unions.

§§ 54-76 through 54-81: Repealed by Session Laws 1975, c. 538, s. 1.

Cross References. — For present provisions as to formation of credit unions, see G.S. 54-109.1 to 54-109.6.

ARTICLE 11.

Powers of Credit Unions.

§§ 54-82 through 54-93: Repealed by Session Laws 1975, c. 538, s. 1.

Cross References. — For present provisions as to supervision and regulation of credit unions, see G.S. 54-109.10 to 54-109.19.

ARTICLE 12.

Shares in the Corporation.

§§ 54-94 through 54-97: Repealed by Session Laws 1975, c. 538, s. 1.

Cross References. — For present provisions as to direction of the affairs of credit unions, see G.S. 54-109.35 to 54-109.49.

ARTICLE 13.

Members and Officers.

§§ 54-98 through 54-104: Repealed by Session Laws 1975, c. 538, s. 1.

Cross References. — For present provisions as to shares and accounts in credit unions, see G.S. 54-109.53 to 54-109.63.

ARTICLE 14.

Supervision and Control.

§§ 54-105 through 54-109: Repealed by Session Laws 1975, c. 538, s. 1.

Cross References. — For present provisions as to powers of credit unions, see G.S. 54-109.21 et seq.

ARTICLE 14A.

Formation of Credit Union.

§ 54-109.1. Definition and purposes.

A credit union is a cooperative, nonprofit association, incorporated under Articles 14A to 14L of this Chapter, for the purposes of encouraging thrift among its members, creating a source of credit at a fair and reasonable rate of interest, and providing an opportunity for its members to use and control their own money in order to improve their economic and social condition. (1975, c. 538, s. 1.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, which have been codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

§ 54-109.2. Organization procedure.

(a) Any 12 or more residents of this State, of legal age, who have a common bond referred to in G.S. 54-109.26 may make application to organize a credit union and become charter members thereof by complying with this section.

(b) The subscribers shall execute in duplicate articles of incorporation and agree to the terms thereof, which articles shall state:

(1) The name, which shall include the words "credit union" and which shall not be the same as that of any other existing credit union in this State, and the location where the proposed credit union is to have its principal place of business;

(2) That the existence of the credit union shall be perpetual;

(3) The initial par value of the shares of the credit union.

(4) The names and addresses of the subscribers to the articles of incorporation, and the value of shares subscribed to by each, which shall be not less than five dollars ($5.00); and

(5) That the credit union may exercise such incidental powers as are necessary or requisite to enable it to carry on effectively the business for which it is incorporated, and those powers which are inherent in the credit union as a legal entity.

(c) The subscribers shall prepare and adopt bylaws for the general government of the credit union, consistent with Articles 14A to 14L of this Chapter, and execute the same in duplicate.

(d) They shall select at least five qualified persons who agree to serve on the board of directors, and at least three qualified persons who agree to serve on the supervisory committee. A signed agreement to serve in these capacities until the first annual meeting or until the election of their successors, whichever is later, shall be executed by those who so agree. This agreement shall be submitted to the administrator of credit unions.

(e) The subscribers shall forward the required charter fee and an investigation fee, as prescribed by the Credit Union Commission, and the articles of incorporation and the bylaws to the Administrator of the Credit Union Division. The Administrator may issue a certificate of approval if the articles and the bylaws are in conformity with Articles 14A to 14L of this Chapter and he is satisfied that the proposed field of operation is favorable to the success of such credit union and that the standing of the proposed organizers is such as to give assurance that its affairs will be properly administered. He shall issue to the corporation a certificate of approval, annexed to a duplicate certificate of incorporation and of the bylaws, which certificate of approval, together with the attached duplicate certificate of incorporation, shall be recorded in the office of the register of deeds of the county in which the office of such credit union is situated, and upon recordation of the incorporators shall become and be a corporation for the purposes set forth in this Article. The register of deeds of the county in which such recordation is made shall charge the same fee for such recordation as he is now allowed to charge for handling and recording a certificate of incorporation of a corporation organized under the business corporation laws of this State. The application shall be acted upon within 30 days. (1915, c. 115, ss. 2, 9; C.S., ss. 5210, 5211, 5233; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, ss. 1, 4, 19; 1973, c. 199, s. 8; 1975, c. 538, s. 1; 1983, c. 568, s. 1.)

§ 54-109.3. Form of articles and bylaws.

In order to simplify the organization of credit unions, the Administrator of Credit Unions shall cause to be prepared a form of articles of incorporation and a form of bylaws, consistent with Articles 14A to 14L of this Chapter, which may be used by credit union incorporators for their guidance. Such articles of incorporation and bylaws shall provide:

(1) The name of corporation.
(2) The purposes for which it is formed.
(3) Qualifications for membership.
(4) The date of the annual meeting; the manner in which members shall be notified of meetings; the manner of conducting the meetings; the number of members which constitute a quorum at the meetings, and the regulations as to voting.
(5) The number of members of the board of directors, their powers and duties, and the compensation and duties of officers elected by the board of directors, and frequency of meetings.
(6) The number of members of the credit committee, if any, their powers and duties.
(7) The number of members of the supervisory committee, if any, their powers and duties.
(8) The par value of shares of capital stock.
(9) The conditions upon which shares may be issued, paid in, transferred, and withdrawn.
(10) The fines, if any, which shall be charged for failure to meet obligations to the corporation punctually.
(11) The conditions upon which deposits may be received and withdrawn. Whether the proposed corporation shall, in addition, have power to borrow funds.
(12) The manner in which the funds of the corporation shall be invested.
(13) The conditions upon which loans may be made and repaid.
(14) The maximum rate of interest that may be charged upon loans, not to exceed, however, the legal rate.
(15) The method of receipting for money paid on account of shares, deposits, or loans.
(16) The manner in which the reserve fund shall be accumulated.
(17) The manner in which dividends shall be determined and paid to members.
(18) The manner in which a voluntary dissolution of the corporation shall be effected.
(19) The manner in which the bylaws and articles of incorporation may be amended. (1915, c. 115, s. 2; C.S., s. 5211; 1975, c. 538, s. 1.)

§ 54-109.4. Amendments.

(a) The articles of incorporation or the bylaws may be amended as provided in the bylaws. Amendments to the articles of incorporation or bylaws shall be submitted to the Administrator of Credit Unions who shall approve or disapprove the amendments within 60 days.

(b) Amendments shall become effective upon approval in writing by the Administrator and no fee shall be charged for such approval. (1915, c. 115, s. 3; C.S., s. 5213; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, s. 6; 1973, c. 1331, s. 3; 1975, c. 538, s. 1.)

§ 54-109.5. Use of name exclusive.

With the exception of a credit union organized under the provisions of Articles 14A to 14L of this Chapter or of any other credit union act, or an association of credit unions or a recognized chapter thereof, any person, corporation, copartnership or association using a name or title containing the words "credit union" or any derivation thereof or representing themselves in their advertising or otherwise as conducting business as a credit union shall be guilty of a Class 1 misdemeanor, and may be permanently enjoined from using such words in its name. (1915, c. 115, s. 4; C.S., s. 5214; 1925, c. 73, s. 3; 1935, c. 87; 1941, c. 236; 1975, c. 538, s. 1; 1993, c. 539, s. 428; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 54-109.6. Office facilities.

(a) A credit union may maintain service facilities at locations other than its main office if the maintenance of such offices is reasonably necessary to furnish service to its members, subject to the approval of the Administrator of Credit Unions.

(b) A credit union may change its place of business within this State upon written notice to the Credit Union Division. Such a change shall be recorded in the office of the register of deeds where its office was located, and a second duplicate in the office of the register of deeds of the county in which the new office is to be located, if same is changed to another county. If the change is from one location to another in the same county, then only the Administrator of Credit Unions need be notified.

(c) A credit union may share office space with one or more credit unions and contract with any person or corporation to provide facilities or personnel. (1915, c. 115, ss. 9, 25; C.S., ss. 5215, 5233; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, ss. 1, 7, 19; 1967, c. 823, s. 10; 1973, c. 199, s. 8; c. 1331, s. 3; 1975, c. 538, s. 1.)

§ 54-109.7. Conducting business outside this State.

A credit union incorporated under this Subchapter may conduct business outside of this State in any state where it is permitted to conduct business as a credit union. (1991, c. 651, s. 1.)

§§ 54-109.8, 54-109.9: Reserved for future codification purposes.

Article 14B.

Supervision and Regulation.

§ 54-109.10. Creation and supervision of Division.

There shall be established in the North Carolina Department of Commerce a Credit Union Division which shall be under the supervision of the Administrator of Credit Unions appointed by the Secretary of Commerce. The Credit Union Division and the Administrator of Credit Unions shall be under the general direction and supervision of the Secretary of Commerce, and there shall be such assistants to the Administrator of Credit Unions as may be necessary and the salaries of the Administrator and assistants shall be fixed by the State Personnel Council. (1915, c. 115, s. 1; C.S., s. 5208; 1925, c. 73, s. 4; 1935, c. 87; 1965, c. 956, s. 1; 1971, c. 864, s. 17; 1975, c. 538, s. 1; 1989, c. 751, s. 9(c); 1991 (Reg. Sess., 1992), c. 959, s. 3.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, which have been codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

CASE NOTES

Cited in North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.E.2d 404 (1981).

§ 54-109.11. Duties of Administrator.

The duties of the Administrator of Credit Unions shall be as follows:

(1) To organize and conduct in the State Department of Commerce, a bureau of information in regard to cooperative associations and rural and industrial credits.

(2) Upon request, to furnish, without cost, such printed information and blank forms as, in his discretion, may be necessary for the formation and establishment of any local credit union in the State.

(3) To maintain an educational campaign in the State looking to the promotion and organization of credit unions. Upon the written request of 12 bona fide residents of any particular locality in this State expressing a desire to form a local credit union at or in such locality, the Administrator of Credit Unions, or one of his assistants, shall proceed as promptly as may be convenient to such locality and make an investigation in order that the Administrator may determine whether or not a local credit union should be established according to the standards set forth and provided in this Article. The Administrator shall notify the applicants of his decision within 30 days after receipt of the written request. Before refusing the establishment of a credit union, the Administrator shall afford the applicants an opportunity to be heard therewith in person or by counsel and at least 60 days prior to the date set for a hearing on any such matter shall notify in writing the applicants of the date of said hearing and assign therein the grounds for the action contemplated to be taken and as to which inquiry shall be made on the date of such hearing. The determination of the Administrator shall be subject to judicial review in all respects according to the provisions and procedures set forth in Chapter 150B of the General Statutes of North Carolina, as amended.

(4) To examine at least once a year, and oftener if such examination be deemed necessary by the Administrator or his assistant, the credit unions formed under this Article. A report of such examination shall be filed with the State Department of Commerce, and a copy mailed to the credit union at its proper address.

(5) The Administrator of Credit Unions is authorized, empowered, and directed to fix the amount of a blanket surety bond which shall be required of each credit union official, committee member and employee, irrespective of whether such official, committee member and employee receives, pays or has custody of money or other personal property owned by a credit union or in the custody or control of the credit union as collateral or otherwise. The surety on the bond shall be a surety company authorized to do business in North Carolina. Any such bond or bonds shall be in a form approved by the Administrator of Credit Unions with a view to providing surety coverage to the credit union with reference to loss by reason of acts of fraud or dishonesty including forgery, theft, embezzlement, wrongful abstraction or mis-

application on the part of the person, directly or through connivance with others, and such other surety coverages as the Administrator of Credit Unions may determine to be reasonably appropriate or as elsewhere required by the Chapter. Any such bond or bonds shall be in an amount in relation to the money or other personal property involved or in relation to the assets of the credit union as the Administrator may from time to time prescribe by regulation for the purpose of requiring reasonable coverage. The Administrator may also approve the use of a form of excess coverage bond whereby a credit union may obtain an amount of coverage in excess of the basic surety coverage. No agreement, compromise or settlement of any claim or claims filed by a credit union with any surety or any surety company for less than the full amount of said claim or claims shall be entered into or made by the board of directors of any credit union unless and until the said claim or claims shall have been submitted to the Administrator of Credit Unions and his advice thereon given or transmitted to the board of directors of said credit union. The following schedule shall be deemed as the minimum fidelity and faithful performance bond requirements only:

Assets		*Minimum Coverage*
$ 0,000 to	$ 5,000	$ 1,000
5,001 to	10,000	2,000
10,001 to	20,000	4,000
20,001 to	30,000	6,000
30,001 to	40,000	8,000
40,001 to	50,000	10,000
50,001 to	75,000	15,000
75,001 to	100,000	20,000
100,001 to	200,000	30,000
200,001 to	300,000	40,000
300,001 to	400,000	50,000
400,001 to	500,000	70,000
500,001 to	750,000	85,000
750,001 to	1,000,000	100,000
1,000,001 to	50,000,000	$100,000 plus $50,000 for each million or fraction thereof of assets over $1,000,000
$50,000,001 to	$150,000,000	$2,500,000 plus $25,000 for each million or fraction thereof of assets over $50,000,000
Over	$150,000,000	$5,000,000

It shall be the duty of the board of directors of each credit union to provide proper protection to meet any circumstances by obtaining adequate bond (an insurance) coverage in excess of the above minimum schedule. The treasurer and all other persons handling credit union funds or records before entering upon his or their duties shall give a proper bond with good and sufficient surety, in an amount and character to be determined by the board in compliance with regulations conditioned upon the faithful performance of his or their trust.

The Administrator may require additional coverage for any credit union when, in his opinion, the surety bonds in force are insufficient to provide adequate surety coverage, and it shall be the duty of the board of directors of any credit union to obtain such additional coverage within 60 days after the date of written notice by the Administrator to such board of directors. For good cause shown, the Administrator may extend the time to obtain additional coverage. (1915, c. 115, s. 1; C.S., s. 5209; 1925, c. 73, ss. 2, 3, 5, 6; 1935, c. 87; 1957, c. 989, s. 1; 1965, c. 956, ss. 1-3; 1971, c. 864, s. 17; 1973, c. 199, ss. 1-3; c. 1331, s. 3; 1975, c. 538, s. 1; 1977, c. 559, s. 1; 1987, c. 827, s. 1; 1989, c. 751, s. 7(2); 1991 (Reg. Sess., 1992), c. 959, ss. 4, 4.1.)

OPINIONS OF ATTORNEY GENERAL

Performance Bonds. — A State-chartered credit union, acting pursuant to 4 N.C.A.C. 06C.0311, must provide a performance bond for not only its chief executive officer but for other officers, employees, or agents. See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Div., Department of Commerce, 59 N.C.A.G. 8 (1989).

The language of subdivision (5) of this section and of § 54-109.44(2) relating to blanket surety bonds is mandatory and extends to all state-chartered credit union officers, employees, agents, and others in a position of trust. See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

And Conflicting Administrative Rule Was Void. — To the extent that an administrative rule purported to permit an individual's bond to be substituted for the blanket bond or to permit an individual's bond to cover persons other than those specified in subdivision (5) of this section, it was in conflict with controlling law and was void. See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

Discretion of Administrator and Board. — The provision of subdivision (5) of this section requiring a surety bond of the "treasurer and all other persons handling credit union funds or records" means that the board of directors may require, consistent with administrative rules promulgated by the administrator, an additional surety bond for those having actual possession of or control over credit union funds or financial records. Since the administrator has broad discretion and authority under G.S. 54-109.12 to prescribe rules "relating to financial records, business practices and the conduct and management of credit unions," the administrator can promulgate reasonable guidelines for boards of directors to follow in determining the "amount and character" of the bond to be required. However, it is not within the discretion of a board of directors or the administrator to determine who shall be covered by the bond, other than to identify "persons handling credit union funds or records." See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

The additional bond provided for in subdivision (5) of this section, must cover "the treasurer and all other persons handling credit union funds or records." Nothing in the statutes permits the chief financial officer or the chief executive officer of a state-chartered credit union to be substituted for the persons specified. See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

§ 54-109.12. Corporations organized hereunder subject to Administrator of Credit Unions; rules and regulations.

In addition to any and all other powers, duties and functions vested in the Administrator of Credit Unions under the provisions of this Article, the Administrator of Credit Unions shall have general control, management and supervision over all corporations organized under the provisions of Article 14A. All corporations organized under the provisions of Article 14A shall be subject to the management, control and supervision of the Administrator of Credit Unions as to their conduct, organization, management, business practices and their financial and fiscal matters. The Administrator of Credit Unions may prescribe rules and regulations for the administration of this Article, as well as rules and regulations relating to financial records, business practices and the conduct and management of credit unions, and it shall be the duty of the board of directors and of the various officers of the credit union to put into effect and to carry out such regulations. (1915, c. 115, s. 7; C.S., s. 5237; 1925, c. 73, s. 3; 1935, c. 87; 1957, c. 989, s. 6; 1965, c. 956, ss. 1, 22; 1975, c. 538, s. 1; 1979, c. 198.)

OPINIONS OF ATTORNEY GENERAL

The provision of § 54-109.11(5) requiring a surety bond of the "treasurer and all other persons handling credit union funds or records" means that the board of directors may require, consistent with administrative rules promulgated by the administrator, an additional surety bond for those having actual possession of or control over credit union funds or financial records. Since the administrator has broad discretion and authority under this section to prescribe rules "relating to financial records, business practices and the conduct and management of credit unions," the administrator can promulgate reasonable guidelines for boards of directors to follow in determining the "amount and character" of the bond to be required. However, it is not within the discretion of a board of directors or the administrator to determine who shall be covered by the bond, other than to identify "persons handling credit union funds or records." See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

§ 54-109.13. Revocation of certificate; liquidation.

If any such corporation shall neglect to make its annual report, as provided in this Article, or any other report required by the Administrator of Credit Unions for more than 15 days, or shall fail to pay the charges required, including the fines for delay in filing reports, the Administrator of Credit Unions shall give notice to such corporation of his intention to revoke the certificate of approval of the corporation for such neglect or failure, and if such neglect or failure continues for 15 days after such notice, the said Administrator shall, at his discretion, personally or by an agent appointed by him, take possession of the property and business of the corporation and retain possession until such time as he may permit it to resume business, or until its affairs be finally liquidated as provided for in G.S. 54-109.93. (1915, c. 115, s. 7; C.S., s. 5240; 1925, c. 73, ss. 3, 8; 1935, c. 87; 1957, c. 989, s. 8; 1965, c. 956, s. 1; 1975, c. 538, s. 1.)

§ 54-109.14. Fees.

(a) Each credit union subject to supervision and examination by the Administrator of Credit Unions, including credit unions in process of voluntary liquidation, shall pay into the office of the Administrator of Credit Unions twice each year, in the months of January and July, supervision fees, except those credit unions which liquidate or convert its charter shall pay into the office of the Administrator of Credit Unions, to the date of dissolution, pro rata supervision fees. Examination fees shall be paid promptly upon receipt of the examination report and invoice.

The Administrator of Credit Unions, subject to the advice and consent of the Credit Union Commission, shall, on or before December 1 of each year, determine and fix the scale of supervisory and examination fees to be assessed during the next calendar year.

No credit union shall be required to pay any supervisory fee until the expiration of 12 months from the date of the issuance of a certificate of incorporation to such credit union.

(b) Moneys collected under this section shall be deposited with the State Treasurer of North Carolina and expended, under the terms of the Executive Budget Act, to defray expenses incurred by the office of the Administrator of Credit Unions in carrying out its supervisory and auditing functions.

(c) All revenue derived from fees will be placed into a special account to be administered solely for the operation of the Credit Union Division. (1915, c. 115, s. 7; C.S., s. 5238; 1925, c. 73, ss. 3, 7; 1935, c. 87; 1941, c. 235; 1955, c. 1135, ss. 3, 4; 1957, c. 989, s. 7; 1965, c. 956, ss. 1, 23, 24; 1969, c. 69, s. 6; 1971, c. 864, s. 17; 1973, c. 199, s. 12; 1975, c. 538, s. 1; 1977, c. 559, ss. 2, 3.)

§ 54-109.15. Reports.

(a) Credit unions organized under Articles 14A to 14L of this Chapter shall, in January and in July of each year, make a report of condition to the Administrator of Credit Unions on forms supplied for that purpose. Additional reports may be required.

(b) Any credit union that neglects to make semiannual reports as provided in subsection (a) of this section, or any of the other reports required by the Administrator of Credit Unions at the time fixed by the Administrator, shall pay a late penalty to the Administrator of Credit Unions of seventy-five dollars ($75.00) for each day the neglect continues. The Administrator of Credit Unions may revoke the certificate of incorporation and take possession of the assets and business of any credit union failing to pay a penalty imposed under this section after serving notice of at least 15 days upon the credit union of the proposed action. The clear proceeds of penalties collected pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1915, c. 115, s. 7; C.S., ss. 5238, 5240; 1925, c. 73, ss. 3, 7, 8; 1935, c. 87; 1941, c. 235; 1955, c. 1135, ss. 3, 4; 1957, c. 989, ss. 7, 8; 1965, c. 956, ss. 1, 23, 24; 1969, c. 69, s. 6; 1971, c. 864, s. 17; 1973, c. 199, s. 12; 1975, c. 538, s. 1; 1991, c. 651, s. 2; 2005-276, s. 6.37(u).)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 6.37(w), provides: "The Office of State Budget and Management shall develop a methodology for computing the actual costs of collection of civil penalties by State departments and agencies. This methodology shall apply to all State departments and agencies, effective July 1, 2006."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

§ 54-109.16. Annual examinations required; payment of cost.

The Administrator of Credit Unions shall cause every such corporation to be examined once a year and whenever he deems it necessary. The examiners appointed by him shall be given free access to all books, papers, securities, and other sources of information in respect to the corporation; and for the purpose of such examination the Administrator shall have power and authority to subpoena and examine personally, or by one of his deputies or examiners, witnesses on oath and documents, whether such witnesses are members of the corporation or not, and whether such documents are documents of the corporation or not. The Administrator may designate an independent auditing firm to do the work under his direction and supervision, with the cost to be paid by the credit union involved. (1915, c. 115, s. 7; C.S., s. 5239; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, ss. 1, 25; 1969, c. 69, ss. 7, 8; 1975, c. 538, s. 1; 1977, c. 559, s. 4.)

§ 54-109.17. Records.

(a) A credit union shall maintain all books, records, accounting systems and procedures in accordance with such rules as the Administrator from time to time prescribes. In prescribing such rules, the Administrator shall consider the relative size of a credit union and its reasonable capability of compliance.

(b) A credit union is not liable for destroying records after the expiration of the record retention time prescribed by the Administrator.

(c) A photostatic or photographic reproduction of any credit union records shall be admissible as evidence of transactions with the credit union. (1973, c. 98, s. 1; 1975, c. 538, s. 1.)

§ 54-109.18. Selection of attorneys to handle loan-closing proceedings.

The Administrator of Credit Unions shall establish rules and regulations relating to selection of attorneys-at-law to handle credit union loan closing proceedings. (1977, c. 559, s. 10.)

§ 54-109.19. Removal of officers.

(a) The Administrator of Credit Unions shall have the right and is hereby empowered to serve a written notice of his intention to remove from office any officer, director, committeeman or employee of any credit union doing business under Articles 14A through 15A of this Chapter who shall be found to be dishonest, incompetent, or reckless in the management of the affairs of the credit union, or who persistently violates the laws of this State or the lawful orders, instructions and regulations issued by the Administrator and/or the State Credit Union Commission.

(b) A notice of intention to remove a director, officer, committee member or employee from office shall contain a statement of the alleged facts constituting the grounds therefor and shall fix a time and place at which a hearing before the Credit Union Commission will be held thereon. Such hearing shall be fixed for a date not earlier than 30 days nor later than 60 days after the date of service of such notice unless an earlier or a later date is set by the Commission at the request of such director, officer, committee member or employee and for good cause shown. Pending this hearing, the Administrator may remove the alleged violator if he finds that it is essential to the continued well-being of the credit union or the public to do so. Unless, of course, such director, officer, committee member or employee shall appear at the hearing in person or by a duly authorized representative, he shall be deemed to have consented to the issuance of an order of such removal. In the event of such consent, or if upon the record made at any such hearing the Credit Union Commission shall find that any of the grounds specified in such notice has been determined by the greater weight of the evidence, the Commission may issue such orders of removal from office as it may deem appropriate. Any such order shall become effective at the expiration of 30 days after service upon such credit union and the director, officer, committee member or employee concerned (except in the case of an order issued upon consent, which shall become effective at the time specified therein). Such order shall remain effective and enforceable except to such extent as it is stayed, modified, terminated or set aside by action of the Credit Union Commission or a reviewing court. (1979, c. 197, s. 1.)

§ 54-109.20: Reserved for future codification purposes.

ARTICLE 14C.

Powers of Credit Union.

§ 54-109.21. General powers.

A credit union may:

(1) Make contracts;
(2) Sue and be sued;
(3) Adopt and use a common seal and alter the seal;
(4) Acquire, lease, hold and dispose of property, either in whole or in part, necessary or incidental to its operations;
(5) At the discretion of the board of directors, require the payment of an entrance fee or annual membership fee, or both, of any person admitted to membership;
(6) Receive savings from its members in the form of shares, deposits, or special-purpose thrift accounts;
(7) Lend its funds to its members as provided in Articles 14A to 14L of this Chapter;
(8) Borrow from any source in accordance with policy established by the board of directors;
(9) Discount and sell any eligible obligations, subject to rules adopted by the Administrator;
(10) Sell all or substantially all of its assets or purchase all or substantially all of the assets of another financial institution, subject to the approval of the Administrator of Credit Unions;
(11) Invest surplus funds as provided in Articles 14A to 14L of this Chapter;
(12) Make deposits in legally chartered banks, savings institutions, trust companies and central-type credit union organizations;
(13) Assess charges to members in accordance with the bylaws for failure to meet properly their obligations to the credit union;
(14) Hold membership in other credit unions organized under Articles 14A to 14L of this Chapter or other acts, and in other associations and organizations composed of credit unions;
(15) Declare dividends; pay interest on deposits and pay interest refunds to borrowers as provided in Articles 14A to 14L of this Chapter;
(16) Sell travelers checks and money orders and charge a reasonable fee for such services, provided the travelers checks are payable at institutions other than a credit union;
(17) Perform tasks and missions requested by the federal government or this State or any agency or political subdivision thereof, when approved by the board of directors and not inconsistent with Articles 14A to 14L of this Chapter;
(18) Act as fiscal agent for and receive deposits from the federal government, this State, or any agency or political subdivision thereof;
(19) Contribute to, support, or participate in any nonprofit service facility whose services will benefit the credit union or its membership subject to rules adopted by the Administrator;
(20) Make donations or contributions to any civic, charitable or community organization as authorized by the board of directors, subject to such regulations as are prescribed by the Administrator;
(21) Act as a custodian of qualified pension funds if permitted by federal law;
(22) Purchase or make available insurance for its directors, officers, agents, employees, and members; and

(23) Facilitate its members' purchase of goods and services in a manner which promotes the purposes of the credit union.

(24) The board of directors may expel from the corporation any member who has not carried out the engagement the member made with the corporation, has been convicted of a felony or crime involving moral turpitude, or neglects or refuses to comply with the provisions of this Article or of the bylaws. The Board may, after notice and hearing as provided in this subdivision, expel from the corporation any member who because of the member's intemperance disrupts the activities of the credit union or who because of the member's habitual neglect of financial obligations reflects discredit upon the credit union. No member shall be expelled until informed in writing of the charges made and given an opportunity, after reasonable notice, to be heard.

(25) Engage in activity permitted under this subdivision. Notwithstanding any other provision of this Chapter, the Administrator of Credit Unions, subject to the advice and consent of the Credit Union Commission, and upon a finding that action is necessary to preserve and protect the welfare of credit unions and to promote the general economy of the State, may adopt rules allowing State-chartered credit unions to engage in any activity in which they could engage if they were federally chartered credit unions.

(26) Subject to rules adopted by the Administrator, act as trustee or custodian, and receive reasonable compensation for so acting, under any written trust instrument or custodial agreement created or organized and forming a part of a deferred compensation plan for its members or groups or organizations of its members, provided the funds of the plans are invested in savings or deposits of the credit union. All funds held may be commingled for the purpose of investment, but individual records shall be kept by the credit union for each participant and shall show in proper detail all transactions engaged in under authority of this subdivision.

A member may withdraw from a credit union by filing a written notice of intent to withdraw.

The amounts paid in on shares or deposits by an expelled or withdrawing member, with any dividends credited to the shares and any interest accrued on the deposits to the date of expulsion or withdrawal shall be paid to the member, but in the order of expulsion or withdrawal, and only as funds therefor become available, after deducting any amounts due to the credit union by the member. The member shall have no other or further right in the credit union or to any of its benefits, but the expulsion or withdrawal shall not operate to relieve the member from any remaining liability to the credit union. (1915, c. 115, ss. 5, 16, 17, 23; C.S., ss. 5216-5218, 5231; 1925, c. 73, ss. 3, 10; 1935, c. 87; 1965, c. 956, s. 8; 1975, c. 538, s. 1; 1977, c. 559, s. 5; 1983, c. 568, s. 2; 1991, c. 651, s. 3.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, which have been codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

For act relating to withdrawal of deposits from the State Employees' Credit Union, see Session Laws 1943, c. 781.

OPINIONS OF ATTORNEY GENERAL

Performance Bonds. — A State-chartered credit union, acting pursuant to 4 N.C.A.C. 06C.0311, must provide a performance bond for not only its chief executive officer but for other officers, employees, or agents. See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Div., Department of Commerce, 59 N.C.A.G. 8 (1989).

§ 54-109.22. Incidental powers.

A credit union may exercise such incidental powers such as are necessary or requisite to enable it to promote and carry on most effectively its purposes. (1975, c. 538, s. 1.)

§§ 54-109.23 through 54-109.25: Reserved for future codification purposes.

Article 14D.

Membership.

§ 54-109.26. "Membership" defined.

(a) The membership of a credit union shall be limited to and consist of the subscribers to the articles of incorporation and such other persons within the common bond set forth in the bylaws as have been duly admitted members, have paid any required entrance fee or membership fee, or both, have subscribed for one or more shares, and have paid the initial installment thereon, and have complied with such other requirements as the articles of incorporation or bylaws specify.

(b) Credit union membership may include groups having a common bond of similar occupation, association or interest, or groups who reside within an identifiable neighborhood, community, or rural district, or employees of a common employer, and members of the immediate family of such persons. (1915, c. 115, s. 6; C.S., s. 5230; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, s. 18; 1975, c. 538, s. 1.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, which have been codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

Legal Periodicals. — For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

CASE NOTES

Legislative Intent as to "Common Bond" Requirement. — The clear legislative intent of this section is to invest the credit union incorporators with the prerogative to establish and describe the "common bond" of its members within the bounds of the three permissible groups described in subsection (b) of this section. North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 45 N.C. App. 19, 262 S.E.2d 361 (1980), rev'd on other grounds, 302 N.C. 458, 276 S.E.2d 404 (1981).

To qualify as a common bond within the meaning of this section, which provides that all persons eligible for membership in a credit union must share one and the same common bond, the trait or factor must be common to all eligible membership, and its very nature must provide the assurance of stability. North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.E.2d 404 (1981).

County, Municipal and State Employees. — Because county, municipal and State employees do not all engage in similar types of work with similar job descriptions, they do not share a common bond of similar occupation, since similarity in occupation means similarity in the actual work done rather than similarity in who is benefited and who pays; therefore, an amendment to the bylaws of the State Employees' Credit Union permitting an expansion of the field of membership to include certain county and municipal employees could not be upheld on this basis. North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.E.2d 404 (1981).

The class of persons eligible for membership in the State Employees' Credit Union under an amendment to the bylaws of the credit union permitting an expansion of the field of membership to include certain county and municipal employees did not possess the common bond of similar association or interest, and limitation of membership to governmental employees covered under a State administered retirement system did not provide a common bond of similar interest. North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.E.2d 404 (1981).

Cited in Branch Bank & Trust Co. v. National Credit Union Admin. Bd., 786 F.2d 621 (4th Cir. 1986).

OPINIONS OF ATTORNEY GENERAL

Credit unions, organized under the laws of North Carolina, may not be composed of separate employer groups with different common bonds. See opinion of Attorney General to The Honorable Walter G. Church, Sr., Member of the North Carolina House of Representatives, 1998 N.C.A.G. 19 (4/9/98).

§ 54-109.27. Societies and other associations.

Societies, and copartnerships composed primarily of individuals who are eligible to membership, and corporations whose stockholders are composed primarily of such individuals, may be admitted to membership in the same manner and under the same conditions as individuals, but may not borrow in excess of their shareholdings. Provided, however, secured loans in excess of shareholdings may be made to nonprofit societies, copartnerships, and corporations who are members. (1975, c. 538, s. 1; 1979, c. 809, s. 1.)

§ 54-109.28. Other credit unions.

Any credit union organized under Articles 14A to 14L of this Chapter may permit membership of any other credit union organized under Articles 14A to 14L of this Chapter or other acts. (1975, c. 538, s. 1.)

§ 54-109.29. Members who leave field.

Members who leave the field of membership may be permitted to retain their membership in the credit union as a matter of general policy of the board of directors. (1975, c. 538, s. 1.)

§ 54-109.30. Liability of shareholders.

A shareholder of any such corporation, unless the bylaws so provide, shall not be individually liable for the payment of its debts for an amount in excess of the par value of the shares which he owns or for which he has subscribed. (1975, c. 538, s. 1.)

§ 54-109.31. Meetings of members.

(a) The annual meeting and any special meetings of the members of the credit union shall be held at the time, place, and in the manner indicated by the bylaws.

(b) At all such meetings, a member shall have but one vote, irrespective of his shareholdings. No member may vote by proxy, but a member may vote by absentee ballot if the bylaws of the credit union so provide.

(c) A society, association, copartnership or corporation having membership in the credit union may be represented and have its vote cast by one of its members or shareholders, provided such person has been fully authorized by the organization's governing body.

(d) The board of directors may establish a minimum age of 16 years of age as a qualification to vote at meetings of the members.

(e) The board of directors may establish a minimum age of 18 years of age as a qualification to hold office. (1975, c. 538, s. 1.)

§§ 54-109.32 through 54-109.34: Reserved for future codification purposes.

Article 14E.

Direction of Affairs.

§ 54-109.35. Election or appointment of officials.

(a) The credit union shall be directed by a board of directors, at least five in number, to be elected at the annual members' meeting by and from the members. All members of the board shall hold office for such terms as the bylaws provide.

(b) The board of directors at its first meeting after its election shall appoint a supervisory committee from the membership (no more than one of whom may be a member of the board of directors and none a member of the credit committee) of not less than three members who shall serve for such terms as may be fixed by the bylaws; or in lieu thereof, the bylaws may authorize the board of directors to employ and use such clerical and auditing assistants as may be required to perform the duties required by G.S. 54-109.49. The board of directors may remove or suspend any member of the supervisory committee for neglect of duty, misfeasance, malfeasance, official misconduct, or for other good cause shown.

(c) The board of directors shall appoint a credit committee from the membership consisting of an odd number, not less than three, for such terms as the bylaws provide or, in lieu of a credit committee, appoint one or more loan officers from the membership and, in such instances, duties and responsibilities of the credit committee shall be carried out by such loan officer or officers. (1975, c. 538, s. 1.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, which have been codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

§ 54-109.36. Record of board and committee members.

Within 15 days following the board of directors' initial or annual organization meeting, a record of the names and addresses of the members of the board, committees and all other officers of the credit union shall be filed with the Credit Union Division on forms provided by that Division. (1975, c. 538, s. 1.)

§ 54-109.37. Vacancies.

The board of directors shall fill any vacancies occurring in the board until successors elected at the next annual meeting have qualified. The board shall also fill vacancies in the credit and supervisory committees. (1975, c. 538, s. 1.)

§ 54-109.38. Compensation of officials.

No member of the board of directors or of the credit committee or supervisory committee shall be compensated for his service in this position, but providing reasonable life, health, accident and similar insurance protection for a director or committee member shall not be considered compensation. Directors and committee members, while on official business of the credit union, may be reimbursed for necessary expenses incidental to the performance of the business. (1975, c. 538, s. 1.)

§ 54-109.39. Conflicts of interest.

No director, committee member, officer, agent or employee of the credit union shall in any manner, directly or indirectly, participate in the deliberation upon or the determination of any question affecting his pecuniary interest or the pecuniary interest of any corporation, partnership, or association (other than the credit union) in which he is directly or indirectly interested. (1975, c. 538, s. 1.)

§ 54-109.40. Executive officers.

(a) At their organization meeting and within 30 days following each annual meeting of the members, the directors shall elect from their own number an executive officer, who may be designated as chairman of the board or president; a vice-chairman of the board or one or more vice-presidents; a treasurer; and a secretary. The treasurer and the secretary may be the same individual. The persons so elected shall be the executive officers of the corporation.

(b) The terms of the officers shall be one year, or until their successors are chosen and have duly qualified.

(c) The duties of the officers shall be prescribed in the bylaws.

(d) The board of directors may employ an officer in charge of operations whose title shall be either president and/or general manager; or, in lieu thereof, the board of directors may designate the treasurer or an assistant treasurer to act as general manager and be in active charge of the affairs of the credit union. (1975, c. 538, s. 1.)

§ 54-109.41. Authority of directors.

The board of directors shall have the general direction of the business affairs, funds, and records of the credit union. (1975, c. 538, s. 1.)

§ 54-109.42. Executive committee.

From the persons elected to the board, the board may appoint an executive committee of not less than three directors who may be authorized to act for the board in all respects, subject to such conditions and limitations as are prescribed by the board. (1975, c. 538, s. 1.)

§ 54-109.43. Meetings of directors.

The board of directors and the executive committee shall meet as often as the bylaws prescribe. (1915, c. 115, s. 8; C.S., s. 5232; 1975, c. 538, s. 1.)

§ 54-109.44. Duties of directors.

It shall be the duty of the directors to:

(1) Act upon applications for membership or to appoint one or more membership officers to approve applications for membership under such conditions as the board prescribes. A record of a membership officer's approval or denial of membership shall be available to the

board of directors for inspection. A person denied membership by a membership officer may appeal the denial to the board;

(2) Purchase a blanket fidelity bond, in accordance with any rules and regulations of the Administrator, to protect the credit union against losses caused by occurrences covered therein such as fraud, dishonesty, forgery, embezzlement, misappropriation, misapplication, or unfaithful performance of duty by a director, officer, employee, member of an official committee, attorney-at-law or other agent;

(3) Determine from time to time the interest rate or rates consistent with Articles 14A to 14L of this Chapter, which shall be charged on loans and to authorize interest refunds, if any, to members from income earned and received in proportion to the interest paid by them on such classes of loans and under such conditions as the board prescribes;

(4) Fix from time to time the maximum amount which may be loaned to any one member;

(5) Declare dividends on shares in the manner and form as provided in the bylaws; and determine the interest rate or rates which will be paid on deposits;

(6) Set the number of shares and the amount of deposits which may be owned by a member, such limitations to apply alike to all members;

(7) Have charge of the investment of surplus funds, except that the board of directors may designate an investment committee or any qualified individual to have charge of making investments under controls established by the board of directors;

(8) Authorize the employment of such persons necessary to carry on the business of the credit union;

(9) Authorize the conveyance of property;

(10) Borrow or lend money to carry on the functions of the credit union;

(11) Designate a depository or depositories for the funds of the credit union;

(12) Suspend any or all members of the credit or supervisory committee for failure to perform their duties;

(13) Appoint any special committees deemed necessary; and

(14) Perform such other duties as the members from time to time direct, and perform or authorize any action not inconsistent with Articles 14A to 14L of this Chapter and not specifically reserved by the bylaws for the members. (1915, c. 115, s. 10; C.S., s. 5234; 1957, c. 989, s. 5; 1965, c. 956, s. 20; 1973, c. 199, s. 9; 1975, c. 538, s. 1.)

OPINIONS OF ATTORNEY GENERAL

Performance Bonds. — A State-chartered credit union, acting pursuant to 4 N.C.A.C. 06C.0311, must provide a performance bond for not only its chief executive officer but for other officers, employees, or agents. See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Div., Department of Commerce, 59 N.C.A.G. 8 (1989).

The language of § 54-109.11(5) and subdivision (2) of this section relating to blanket surety bonds is mandatory and extends to all state-chartered credit union officers, employees, agents, and others in a position of trust. See opinion of Attorney General to Mr. Stanley W. Brown, Jr., Deputy Administrator, Credit Union Division, Department of Commerce, 59 N.C.A.G. 8 (1989).

§ 54-109.45. Authority of credit committee.

The credit committee shall have the general supervision of all loans to members. (1915, c. 115, s. 11; C.S., s. 5235; 1961, c. 1187, s. 22; 1965, c. 956, s. 1; 1969, c. 69, s. 5; 1973, c. 199, s. 10; 1975, c. 538, s. 1.)

§ 54-109.46. Meetings of credit committee.

The credit committee shall meet as often as the business of the credit union requires and not less frequently than once a month to consider applications for loans. No loan shall be made unless it is approved by a majority of the committee who are present at the meeting at which the application is considered. (1915, c. 115, s. 11; C.S., s. 5235; 1961, c. 1187, s. 22; 1965, c. 956, s. 1; 1969, c. 69, s. 5; 1973, c. 199, s. 10; 1975, c. 538, s. 1.)

§ 54-109.47. Loan officers.

(a) The credit committee may appoint one or more loan officers and delegate the power to approve loans, subject to such limitations or conditions as the credit committee prescribes.

(b) Loan applications not approved by a loan officer shall be reviewed and acted upon by the credit committee. (1915, c. 115, s. 11; C.S., s. 5235; 1961, c. 1187, s. 22; 1965, c. 956, s. 1; 1969, c. 69, s. 5; 1973, c. 199, s. 10; 1975, c. 538, s. 1.)

§ 54-109.48. When credit committee dispensed with.

The credit committee may be dispensed with, and loan officer(s) empowered to approve or disapprove loans under conditions prescribed by the board of directors. In the event the credit committee is dispensed with, the procedures prescribed in G.S. 54-109.45, 54-109.46 and 54-109.47 do not apply, and no loans shall be made unless approved by the loan officer(s). (1915, c. 115, s. 11; C.S., s. 5235; 1961, c. 1187, s. 22; 1965, c. 956, s. 1; 1969, c. 69, s. 5; 1973, c. 199, s. 10; 1975, c. 538, s. 1.)

§ 54-109.49. Duties of supervisory committee.

The supervisory committee shall make or cause to be made an annual audit, in accordance with rules and regulations promulgated by the Administrator of Credit Unions, and shall submit a report of that audit to the board of directors and a summary of the report to the members at the next annual meeting of the credit union. The supervisory committee shall make or cause to be made such supplemental audits as deemed necessary by it or as may be ordered by the Administrator of Credit Unions. Any violation of this Article or of the bylaws or of any practice of the corporation which in the opinion of the supervisory committee is unsafe, unsound, or unauthorized, shall be reported to the board of directors and the Administrator of Credit Unions within seven days after its discovery. (1915, c. 115, s. 12; C.S., s. 5236; 1965, c. 956, s. 21; 1973, c. 199, s. 11; 1975, c. 538, s. 1.)

§§ 54-109.50 through 54-109.52: Reserved for future codification purposes.

ARTICLE 14F.

Savings Accounts.

§ 54-109.53. Shares.

(a) The capital of a credit union consists of the payments made by members on shares, undivided surplus, and reserves.

(b) Shares may be subscribed to, paid for and transferred in such manner as the bylaws prescribe.

(c) A certificate need not be issued to denote ownership of a share in a credit union. (1915, c. 115, s. 13; C.S., s. 5226; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, ss. 16, 17; 1975, c. 538, s. 1.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, which have been codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

§ 54-109.54. Dividends.

The board of directors of any credit union may declare dividends as its bylaws provide. (1915, c. 115, s. 22; C.S., s. 5223; 1925, c. 73, s. 3; 1935, c. 87; 1957, c. 989, s. 3; 1965, c. 956, s. 15; 1969, c. 69, ss. 3, 4; 1973, c. 199, s. 7; 1975, c. 538, s. 1; 1983, c. 568, s. 3.)

§ 54-109.55. Deposits.

A credit union may receive on deposit the savings of its members and also nonmembers in such amounts and upon such terms as the board of directors may determine and the bylaws shall provide. (1915, c. 115, s. 16; C.S., s. 5217; 1925, c. 73, s. 3; 1935, c. 87; 1975, c. 538, s. 1.)

§ 54-109.56. Thrift accounts.

Christmas clubs, vacation clubs, and other thrift accounts may be operated under conditions established by the board of directors. (1975, c. 538, s. 1.)

§ 54-109.57. Payable on Death (POD) accounts.

(a) Shares may be issued to and deposits received from any person or persons establishing an account who shall execute a written agreement with the credit union containing a statement that it is executed pursuant to the provisions of this section and providing for the account to be held in the name of the person or persons as owner or owners for one or more persons designated as beneficiaries, the account and any balance thereof shall be held as a Payable on Death account, with the following incidents:

(1) Any owner during the owner's lifetime may change any designated beneficiary by a written direction to the credit union.

(1a) If there are two or more owners of a Payable on Death account, the owners shall own the account as joint tenants with right of survivorship and, except as otherwise provided in this section, the account shall have the incidents set forth in G.S. 54-109.58.

(2) Any owner may withdraw funds by writing checks or otherwise, as set forth in the account contract, and receive payment in cash or check payable to the owner's personal order.

(3) If only one beneficiary is living and of legal age at the death of the last surviving trustee, the beneficiary shall be the holder of the account, and payment by the credit union to the holder shall be a total discharge of the credit union's obligation as to the amount paid. If two or more beneficiaries are living at the death of the last surviving owner, they shall be owners of the account as joint tenants with right of survivorship as provided in G.S. 54-109.58, and payment by the

credit union to the owners or to any of the owners shall be a total discharge of the credit union's obligation as to the amount paid.

(4) If one or more owners survive the last surviving beneficiary, the account shall become an individual account of the owner, or a joint account with right of survivorship of the owners and shall have the legal incidents of an individual account in the case of a single owner or a joint account with right of survivorship, as provided in G.S. 54-109.58, in the case of multiple owners.

(5) If only one beneficiary is living and that beneficiary is not of legal age at the death of the last surviving owner, the credit union shall transfer the funds in the account to the general guardian or guardian of the estate, if any, of the minor beneficiary. If no guardian of the minor beneficiary has been appointed, the credit union shall hold the funds in a similar interest bearing account in the name of the minor until the minor reaches the age of majority or until a duly appointed guardian withdraws the funds.

(6) Prior to the death of the last surviving owner, no beneficiary shall have any ownership interest in a Payable on Death account. Funds in a Payable on Death account established pursuant to this subsection shall belong to the beneficiary or beneficiaries upon the death of the last surviving owner and the funds shall be subject only to the personal representative's right of collection as set forth in G.S. 28A-15-10(a)(1). Payment by the credit union of funds in the Payable on Death account to the beneficiary shall terminate the personal representative's authority under G.S. 28A-15-10(a)(1) to collect against the credit union for the funds so paid, but the personal representative's authority to collect such funds from the beneficiary or beneficiaries is not terminated.

The person or persons establishing an account under this subsection shall sign a statement containing language set forth in a conspicuous manner and substantially similar to the following:

"CREDIT UNION (or name of institution) PAYABLE ON DEATH ACCOUNT

G.S. 54-109.57

I (or we) understand that by establishing a Payable on Death account under the provisions of North Carolina General Statute 54-109.57 that:

1. During my (or our) lifetime I (or we), individually or jointly, may withdraw the money in the account; and
2. By written direction to the credit union (or name of institution) I (or we), individually or jointly, may change the beneficiary or beneficiaries; and
3. Upon my (or our) death the money remaining in the account will belong to the beneficiary or beneficiaries, and the money will not be inherited by my (or our) heirs or be controlled by will.

____________________"

(a1) This section shall not be deemed exclusive. Deposit accounts not conforming to this section shall be governed by other applicable provisions of the General Statutes or the common law, as appropriate.

(b) Repealed by Session Laws 2001-267, s. 2, effective October 1, 2001.

(c) No addition to such accounts, nor any withdrawal, payment, or change of beneficiary shall affect the nature of such accounts as Payable on Death accounts, or affect the right of any owner to terminate the account.

(d) This section does not repeal or modify any provisions of law relating to estate taxes. (1915, c. 115, s. 14; C.S., s. 5227; 1975, c. 538, s. 1; 1987 (Reg. Sess., 1988), c. 1078, s. 2; 1989, c. 164, s. 6; 1989 (Reg. Sess., 1990), c. 866, s. 8; 2001-267, s. 2; 2001-487, s. 61(a).)

Editor's Note. — Session Laws 1987 (Reg. Sess., 1988), c. 1078, which amended this section, in s. 9 provided that all accounts opened pursuant to any statute amended by c. 1078 before July 1, 1989 would continue to be governed by the provisions of those statutes as they read prior to July 1, 1989.

§ 54-109.58. Joint accounts.

(a) Shares may be issued to and deposits received from any two or more persons opening or holding an account or accounts, but no joint tenant, unless a member in his own right, shall be permitted to vote, obtain loans, or hold office or be required to pay an entrance or membership fee. The account and any balance thereof shall be held by them as joint tenants, with or without right of survivorship, as the contract shall provide; the account may also be held pursuant to G.S. 41-2.1 and have the incidents set forth in that section, provided, however, if the account is held pursuant to G.S. 41-2.1 the contract shall set forth that fact as well. Unless the persons establishing the account have agreed with the credit union that withdrawals require more than one signature, payment by the credit union to, or on the order of, any persons holding an account authorized by this section shall be a total discharge of the credit union's obligations as to the amount so paid. Funds in a joint account established with right of survivorship shall belong to the surviving joint tenant or tenants upon the death of a joint tenant, and the funds shall be subject only to the personal representative's right of collection as set forth in G.S. 28A-15-10(a)(3), or as provided in G.S. 41-2.1 if the account is established pursuant to the provisions of that section. Payment by the credit union of funds in the joint account to a surviving joint tenant or tenants shall terminate the personal representative's authority under G.S. 28A-15-10(a)(3) to collect against the credit union for the funds so paid, but the personal representative's authority to collect such funds from the surviving joint tenant or tenants is not terminated. A pledge of such account by any holder or holders shall, unless otherwise specifically agreed upon, be a valid pledge and transfer of such account, or of the amount so pledged, and shall not operate to sever or terminate the joint ownership of all or any part of the account. Persons establishing an account under this section shall sign a statement showing their election of the right of survivorship in the account, and containing language set forth in a conspicuous manner and substantially similar to the following:

"CREDIT UNION (or name of institution)
JOINT ACCOUNT WITH RIGHT OF
SURVIVORSHIP

G.S. 54-109.58

We understand that by establishing a joint account under the provisions of North Carolina General Statute 54-109.58 that:

1. The credit union (or name of institution) may pay the money in the account to, or on the order of, any person named in the account unless we have agreed with the credit union that withdrawals require more than one signature; and

2. Upon the death of one joint owner the money remaining in the account will belong to the surviving joint owners and will not pass by inheritance to the heirs of the deceased joint owner or be controlled by the deceased joint owner's will.

We DO elect to create the right of survivorship in this account.

____

______________________________"

(a1) This section shall not be deemed exclusive. Deposit accounts, not conforming to this section shall be governed by other applicable provisions of the General Statutes or the common law as appropriate.

(b) This section does not repeal or modify any provisions of laws relating to estate taxes. This section regulates and protects the credit union in its relationship with joint owners of accounts.

(c) No addition to such account, nor any withdrawal or payment shall affect the nature of the account as a joint account, or affect the right of any tenant to terminate the account. (1975, c. 538, s. 1; 1987 (Reg. Sess., 1988), c. 1078, s. 3; 1989, c. 164, s. 3; 1989 (Reg. Sess., 1990), c. 866, s. 7; 1998-69, s. 15.)

Editor's Note. — Session Laws 1987 (Reg. Sess., 1988), c. 1078, which amended this section, in s. 9 provided that all accounts opened pursuant to any statute amended by c. 1078 before July 1, 1989 would continue to be governed by the provisions of those statutes as they read prior to July 1, 1989.

CASE NOTES

Cited in Napier v. High Point Bank & Trust Co., 100 N.C. App. 390, 396 S.E.2d 620 (1990); Mutual Community Savs. Bank v. Boyd, 125 N.C. App. 118, 479 S.E.2d 491 (1996).

§ 54-109.59. Liens.

The credit union shall have a lien on the shares, deposits and accumulated dividends or interest of a member in his individual, joint or trust account, for any sum past due the credit union from said member or for any loan endorsed by him. (1915, c. 115, s. 13; C.S., s. 5226; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, ss. 16, 17; 1975, c. 538, s. 1.)

CASE NOTES

Applicability of Section. — This section gives credit unions the opportunity to obtain a lien on their borrowers' funds but the lien is not complete until the deposit is actually made. Reynolds v. North Carolina State Employees Credit Union, 31 Bankr. 296 (Bankr. E.D.N.C. 1983).

Statutory lien created by this section is avoidable under federal bankruptcy law. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

Funds Deposited as a Result of Credit Union's Unfair and Deceptive Trade Practices. — Credit union was not entitled to assert statutory lien under this section on funds in debtor's share account because those funds were deposited in debtor's share account as result of credit union's unfair and deceptive trade practices. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

Lien created by this section becomes effective against debtor only when debtor's financial condition fails to meet a specified financial standard, i.e., when debtor is "past due" with payments to credit union; moreover, if in fact credit union had valid statutory lien on debtor's share account pursuant to this section, then trustee can avoid that lien pursuant to 11 U.S.C. § 545(1)(E) and 547(b). Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

§ 54-109.60: Repealed by Session Laws 1977, c. 559, s. 6.

§ 54-109.61. Reduction in shares.

(a) Whenever the losses of any credit union, resulting from a depreciation in value of its loans or investments or otherwise, exceed its undivided earnings and reserve fund so that the estimated value of its assets is less than the total amount due the shareholders, the credit union may by a majority vote of the members present at a special meeting called for that purpose order a reduction in the shares of each of its shareholders to divide the loss proportionately among the members.

(b) If the credit union thereafter realizes from such assets a greater amount than was fixed by the order of reduction, such excess shall be divided proportionately among the shareholders whose assets were reduced, but only to the extent of such reduction. (1975, c. 538, s. 1.)

§ 54-109.62: Reserved for future codification purposes.

§ 54-109.63. Personal agency accounts.

(a) A person may open a personal agency account by written contract containing a statement that it is executed pursuant to the provisions of this section. A personal agency account may be a checking account, savings account, time deposit, or any other type of withdrawable account or certificate. The written contract shall name an agent who shall have authority to act on behalf of the depositor in regard to the account as set out in this subsection. The agent shall have the authority to:

(1) Make, sign or execute checks drawn on the account or otherwise make withdrawals from the account;

(2) Endorse checks made payable to the principal for deposit only into the account; and

(3) Deposit cash or negotiable instruments, including instruments endorsed by the principal, into the account.

A person establishing an account under this section shall sign a statement containing language substantially similar to the following in a conspicuous manner:

"CREDIT UNION (or name of institution)
PERSONAL AGENCY ACCOUNT

G.S. 54-109.63

I understand that by establishing a personal agency account under the provisions of North Carolina General Statute 54-109.63 that the agent named in the account may:

1. Sign checks drawn on the account; and
2. Make deposits into the account.

I also understand that upon my death the money remaining in the account will be controlled by my will or inherited by my heirs.

____________________"

(b) An account created under the provisions of this section grants no ownership right or interest in the agent. Upon the death of the principal there is no right of survivorship to the account and the authority set out in subsection (a) terminates.

(c) The written contract referred to in subsection (a) shall provide that the principal may elect to extend the authority of the agent set out in subsection (a) to act on behalf of the principal in regard to the account notwithstanding the subsequent incapacity or mental incompetence of the principal. If the principal so elects to extend such authority of the agent, then upon the subsequent incapacity or mental incompetence of the principal, the agent may continue to exercise such authority, without the requirement of bond or of accounting to any court, until such time as the agent shall receive actual knowledge that such authority has been terminated by a duly qualified guardian of the estate of the incapacitated or incompetent principal or by the duly appointed attorney-in-fact for the incapacitated or incompetent principal, acting pursuant to a durable power of attorney (as defined in G.S. 32A-8) which grants to the attorney-in-fact that authority in regard to the account which is granted to the agent by the written contract executed pursuant to the provisions of this section, at which time the agent shall account to such guardian or attorney-in-fact for all actions of the agent in regard to the account during the incapacity or incompetence of the principal. If the principal does not so elect to extend the authority of the agent, then upon the subsequent incapacity or mental incompetence of the principal, the authority or the agent set out in subsection (a) terminates.

(d) When an account under this section has been established all or part of the account or any interest or dividend thereon may be paid by the credit union on a check made, signed or executed by the agent. In the absence of actual knowledge that the principal has died or that the agency created by the account has been terminated, such payment shall be a valid and sufficient discharge to the credit union for payment so made.

(e) An account established under the provisions of this section does not grant to the agent the authority to vote, obtain loans, or hold office and the agent shall not be required to pay an entrance or membership fee. (1987 (Reg. Sess., 1988), c. 1078, s. 4; 1989, c. 164, s. 9; 1989 (Reg. Sess., 1990), c. 866, s. 9.)

Editor's Note. — Session Laws 1987 (Reg. Sess., 1988), c. 1078, s. 9 provided that all accounts opened pursuant to any statute amended by c. 1078 before July 1, 1989 would continue to be governed by the provisions of those statutes as they read prior to July 1, 1989.

§ **54-109.64:** Reserved for future codification purposes.

ARTICLE 14G.

Loans.

§ 54-109.65. Purposes, terms and interest rate.

A credit union may loan to its members for such purpose and upon such security and terms as the board of directors prescribes at rates of interest not exceeding eighteen percent (18%) annual percentage rate, unless a greater rate not to exceed the annual percentage rate permitted to be charged by federally chartered credit unions, is otherwise approved by the Credit Union Commission. Such action by the Commission will be uniform and apply to all credit unions.

The term "interest," as used in this section, shall not be deemed to include charges made by a credit union for appraisals of real or personal property; attorneys' fees for searching title to real property, preparing notes, deeds of trust, mortgages and closing loans; and recording fees. Rate of interest and terms of repayment shall appear on each note but the corporation may, for the purpose of making loans, discount and negotiate promissory notes and deduct in advance, from the proceeds of such loan, interest at a rate not to exceed the rate herein fixed, which shall be the legal rate for corporations organized under this Article, and such deductions shall be made upon the amount of the loan from the date thereof until the maturity of the final installment, notwithstanding that the principal amount of such loan is required to be repaid in such installments. (1915, c. 115, ss. 19, 20; 1917, c. 232, s. 4; C.S., ss. 5220, 5221; 1925, c. 73, s. 3; 1935, c. 87; 1955, c. 1135, s. 2; 1957, c. 989, s. 2; 1961, c. 1187, s. 1; 1965, c. 956, ss. 1, 12, 13; 1969, c. 69, s. 9; 1973, c. 199, ss. 5, 6; 1975, c. 538, s. 1; 1983, c. 568, s. 4.)

OPINIONS OF ATTORNEY GENERAL

Loans Need Not Be Repaid in Installments. — See opinion of the Attorney General to Mr. W.V. Didawick, Administrator of Credit Unions, Department of Agriculture, 40 N.C.A.G. 49 (1969), issued under former G.S. 54-88.

§ 54-109.66. Application.

Every application for a loan shall be made in writing upon a form, which the board of directors prescribe. The application shall state the purpose for which the loan is desired, and the security, if any, offered. Each loan shall be evidenced by a written document. (1975, c. 538, s. 1.)

§ 54-109.67. Loan limit.

No loan shall be made to any member in an aggregate amount in excess of ten percent (10%) of the credit union's unimpaired capital and surplus. In accordance with the bylaws and subject to such rules and regulations as the Administrator may prescribe, the board of directors shall determine and set the maximum unsecured loan limits subject to the limitation contained in the preceding sentence. (1915, c. 115, s. 19; 1917, c. 232, s. 4; C.S., s. 5220; 1925, c. 73, s. 3; 1935, c. 87; 1955, c. 1135, s. 2; 1961, c. 1187, s. 1; 1965, c. 956, ss. 1, 12, 13; 1969, c. 69, s. 9; 1973, c. 199, s. 5; 1975, c. 538, s. 1; 1983, c. 568, s. 5.)

§ 54-109.68. Security.

In addition to generally accepted types of security, the endorsement of a note by a surety, comaker or guarantor, or assignment of shares, in a manner consistent with the laws of this State, shall be deemed security within the meaning of Articles 14A to 14L of this Chapter. The adequacy of any security shall be determined by the board of directors subject to Articles 14A to 14L of this Chapter and the bylaws. (1975, c. 538, s. 1.)

CASE NOTES

Attempt to Create Security Interest in Retirement Account by Using Deceptive Trade Practices. — Practices and actions of credit union in deceiving borrower into thinking that credit union had a valid, enforceable security interest in his retirement account by inserting the word "retirement" in the "other collateral" block on front of loan documents and having debtor sign documents at time of making first loan (which authorized sending employee's retirement checks to credit union and depositing therein and filing away of these forms and applying them to all loans thereafter made) violated public policy of protecting the retirement accounts of teachers and other state employees, having tendency to deceive them regarding their rights as to their retirement accounts. These acts collectively constitute unfair and deceptive trade practices. As debtor was damaged as a result of such practices (in that he lost ability to use his retirement fund for his own needs, including eventual retirement), he was entitled to recover treble damages and attorneys' fees. Petersen v. State Employees Credit Union (In re Kittrell), 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

§ 54-109.69. Installments.

A member may receive a loan in installments, or in one sum, and may pay the whole or any part of his loan on any day on which the office of the credit union is open for business. (1975, c. 538, s. 1.)

§ 54-109.70. Line of credit.

A line of credit and advances may be granted to each member within guidelines established by the board of directors. Where a line of credit has been approved, no additional loan applications are required as long as the aggregate obligation does not exceed the limit of such line of credit. (1975, c. 538, s. 1.)

§ 54-109.71. Other loan programs.

(a) A credit union may participate in loans to credit union members jointly with other credit unions, corporations, or financial organizations.

(b) A credit union may participate in guaranteed loan programs of the federal and State government.

(c) A credit union may purchase the conditional sales contracts, notes and similar instruments of its members. (1975, c. 538, s. 1.)

§§ 54-109.72 through 54-109.74: Reserved for future codification purposes.

Article 14H.

Insurance and Group Purchasing.

§ 54-109.75. Insurance for members.

(a) A credit union may purchase or make available insurance for its members in amounts related to their respective ages, shares, deposits or loan balances or to any combination of them.

(b) A credit union may enter into cooperative marketing arrangements to facilitate its members' voluntary purchase of insurance including, but not by way of limitation, life insurance, disability insurance, accident and health insurance, property insurance, liability insurance, and legal expense insurance. (1975, c. 538, s. 1.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, which have been codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

§ 54-109.76. Liability insurance for officers.

A credit union may purchase and maintain liability insurance on behalf of any person who is or was a director, officer, employee, or agent of the credit union, or who is or was serving at the request of the credit union as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against such person and incurred by such person in any such capacity or arising out of such person's status as such, whether or not the credit union would have the power to indemnify such person against such liability. (1975, c. 538, s. 1.)

§ 54-109.77. Group purchasing.

A credit union may enter into cooperative marketing arrangements to facilitate its members' voluntary purchase of such goods and services as are in the interest of improving economic and social conditions of the members. (1975, c. 538, s. 1.)

§ 54-109.78. Share and deposit insurance.

(a) All credit unions established under this Chapter shall, no later than July 1, 1976, apply for insurance of member share and deposit accounts from any mutual deposit guaranty association which qualifies under Article 7A of Chapter 54 of the General Statutes (Mutual Deposit Guaranty Associations), or from the National Credit Union Administration under the Federal Credit Union Act. All such credit unions shall, on or before January 1, 1977, obtain and thereafter maintain the above-mentioned insurance. A credit union which is unable to obtain a commitment for insurance of the share and deposit accounts within the time limit specified above shall be dissolved by action of the Administrator of Credit Unions or permitted to merge with another credit union. Provided, the Administrator may grant additional time to obtain the insurance commitment, upon satisfactory evidence that the credit union has made or is making a substantial effort to achieve the conditions precedent to issuance of the commitment. Granting of additional time or times to obtain the insurance commitment shall not extend later than January 1, 1978.

(b) All credit unions chartered under Articles 14A to 14L of this Chapter after ratification shall apply for and obtain insurance as a condition to granting the charter. (1975, c. 538, s. 1.)

Editor's Note. — Article 7A of Chapter 54, referred to in subsection (a) of this section, was repealed by Session Laws 1981, c. 282, s. 1. As to mutual deposit guaranty associations, see now G.S. 54B-236 et seq.

§§ 54-109.79 through 54-109.81: Reserved for future codification purposes.

ARTICLE 14I.

Investments.

§ 54-109.82. Investment of funds.

The capital, deposits, undivided profits and reserve fund of the corporation may be invested only in any of the following ways:

(1) They may be lent to the members of the corporation in accordance with the provisions of this Chapter.

(2) In capital shares, obligations, or preferred stock issues of any agency or association organized either as a stock company, mutual association, or membership corporation, provided the membership or stockholdings, as the case may be, of the agency or association are confined or restricted to credit unions or organizations of credit unions, or provided the purpose for which the agency or association is organized or designed is to service or otherwise assist credit union operations.

(3) In obligations of the State of North Carolina or any subdivision thereof.

(4) In obligations of the United States, including bonds and securities upon which payment of principal and interest is fully guaranteed by the United States.

(5) They may be deposited to the credit of the corporation in savings institutions, credit unions, or State banks or trust companies incorporated under the laws of the State, or in national banks located in the State.

(6) In loans to other credit unions in any amount not to exceed twenty-five percent (25%) of the shares and unimpaired surplus of the lending credit union.

(7) In an aggregate amount not to exceed twenty-five percent (25%) of the allocations to the reserve fund in any agency or association of the type described in subdivision (2) of this section provided the purposes of the agency or association are designed to assist in establishing and maintaining liquidity, solvency, and security in credit union operations.

(8) In the North Carolina Savings Guaranty Corporation.

(9) In any form of investment allowed by law to the State Treasurer under G.S. 147-69.1.

(10) Debentures issued by an agency of the United States government.

(11) In the College Foundation in any amount not to exceed ten percent (10%) of the shares and unimpaired surplus of the investing credit union.

(12) They may be deposited in any bank or savings institution insured by the federal government or any of its agencies. (1915, c. 115, s. 18; 1917, c. 232, ss. 2, 3; C.S., s. 5219; 1925, c. 73, ss. 12, 13, 14; 1935, c. 87; 1939, c. 400, s. 1; 1947, c. 781; 1965, c. 956, ss. 10, 11; 1969, c. 69, s. 1; 1973, c. 199, s. 4; c. 1255, s. 1; 1975, c. 538, s. 1; 1977, c. 559, s. 7; 1979, c. 467, s. 23; c. 809, s. 2; 1991, c. 651, s. 4; 1991 (Reg. Sess., 1992), c. 1030, s. 51.11.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, which have been codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

OPINIONS OF ATTORNEY GENERAL

Credit Unions May Invest in Government Securities Program. — See opinion of the Attorney General to Mr. W.V. Didawick, Administrator of Credit Unions, Department of Agriculture, 40 N.C.A.G. 50 (1970), issued under former G.S. 54-86.

§§ 54-109.83 through 54-109.85: Reserved for future codification purposes.

ARTICLE 14J.

Reserve Allocations.

§ 54-109.86. Transfers to regular reserve.

(a) At the end of each accounting period the gross income shall be determined. From this amount, there shall be set aside, as a regular reserve against losses on loans and against such other losses as may be specified in regulations prescribed pursuant to law, sums in accordance with the following schedule:

(1) A credit union in operation for more than four years and having assets of five hundred thousand dollars ($500,000) or more shall set aside

a. Ten per centum (10%) of gross income until the regular reserve shall equal four per centum (4%) of the total of outstanding loans and risk assets, then
b. Five per centum (5%) of gross income until the regular reserve shall equal six per centum (6%) of the total of outstanding loans and risk assets.

(2) A credit union in operation less than four years or having assets of less than five hundred thousand dollars ($500,000) shall set aside
a. Ten per centum (10%) of gross income until the regular reserve shall equal seven and one-half per centum (7½%) of the total of outstanding loans and risk assets, then
b. Five per centum (5%) of gross income until the regular reserve shall equal ten per centum (10%) of the total outstanding loans and risk assets.

(3) Whenever the regular reserve falls below the stated per centum of the total of outstanding loans and risk assets, it shall be replenished by regular contributions in such amounts as may be determined by the Administrator to maintain the stated reserve goals.

(b) The Administrator, with the advice and consent of the Credit Union Commission, may increase or decrease the reserve requirement set forth in subsection (a) of this section when such an increase or decrease is deemed necessary or desirable in order to conform to the reserve requirements of federally chartered credit unions.

(c) In addition to such regular reserve, special reserves to protect the interests of members shall be established:

(1) When required by regulation; or
(2) When found by the Administrator, in any special case, to be necessary for that purpose.

(d) Nothing in this section shall be construed as limiting the amount that a credit union may set apart to its reserve fund. (1915, c. 115, s. 21; C.S., s. 5222; 1939, c. 400, s. 2; 1955, c. 1135, s. 1; 1969, c. 69, ss. 2, 10; 1975, c. 538, s. 1; 1979, c. 293; 1997-456, s. 27.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, which have been codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

§ 54-109.87. Use of regular reserve.

The regular reserve shall belong to the credit union and shall be used to meet losses except those resulting from an excess of expenses over income and shall not be distributed except on liquidation of the credit union, or in accordance with a plan approved by the Administrator of Credit Unions. (1975, c. 538, s. 1.)

§ 54-109.88. "Risk assets" defined.

For the purpose of establishing the reserves required by G.S. 54-109.86, all assets except the following shall be considered risk assets:

(1) Cash on hand.
(2) Deposits and shares in federal or State banks, savings and loan associations, and credit unions.
(3) Assets which are issued by, fully guaranteed as to principal and interest by, or due from the U.S. government, its agencies, Fannie Mae, or the Government National Mortgage Association.
(4) Loans to other credit unions.

(5) Loans to students insured under the provision of Title IV, Part B of the Higher Education Act of 1965 (20 U.S.C. 1071, et seq.) or similar state insurance programs.
(6) Loans insured under Title I of the National Housing Act (12 U.S.C. 1703) by the Federal Housing Administration.
(7) Shares or deposits in central credit unions organized under Article 14I of this Chapter of any other State act or of the Federal Credit Union Act.
(8) Common trust investments which deal in investments authorized by Articles 14A to 14L of this Chapter.
(9) Prepaid expenses.
(10) Accrued interest on nonrisk investments.
(11) Furniture and equipment.
(12) Land and buildings.
(13) Loans secured by shares.
(14) Deposits in mutual savings guaranty associations which qualify under Article 7A of Chapter 54 of the General Statutes.
(15) Investments in the College Foundation. (1975, c. 538, s. 1; 1977, c. 559, s. 8; 2001-487, s. 14(c).)

Editor's Note. — Article 7A of Chapter 54, referred to in subdivision (14) of this section, was repealed by Session Laws 1981, c. 282, s. 1. As to mutual deposit guaranty associations, see now G.S. 54B-236 et seq.

§§ 54-109.89 through 54-109.91: Reserved for future codification purposes.

ARTICLE 14K.

Change in Corporate Status.

§ 54-109.92. Suspension and conservation.

(a) The Administrator of Credit Unions may determine in the performance of his duties under this Subchapter that a credit union is insolvent or in imminent danger of insolvency, or that an officer, director, or employee of a credit union, or the credit union itself, acting by and through an officer, director, or employee, has:

(1) Affected or is likely to affect the safety or soundness of the credit union by a violation of:
  a. This Subchapter,
  b. A rule adopted under this Subchapter, or
  c. Any federal law or regulation applicable to credit unions;
(2) Violated, neglected, or refused to comply with a duly issued final order of the Administrator of Credit Unions or the Credit Union Commission;
(3) Refused to submit to examination under oath, or to permit examination of the credit union's books, papers, records, accounts, and affairs by the Administrator of Credit Unions or his duly authorized representative;
(4) Failed or refused to authorize and direct any other person to permit the inspection and examination of the credit union's books, papers, records, or accounts in the other person's care, possession, custody, or control by the Administrator of Credit Unions or a duly authorized representative of the Administrator, after the Administrator has requested the granting of that authority and direction to the other person; or
(5) Affected or is likely to affect the safety or soundness of the credit union by conducting the credit union's business in an unauthorized or unlawful manner.

(b) If the Administrator of Credit Unions makes any of these findings, he may issue an order temporarily suspending the credit union's operations for not more than 90 days or, if the Administrator determines that the findings are of such severity that immediate affirmative action is needed to prevent further dissipation of the assets of the credit union, the Administrator may immediately issue an order of conservation and appoint a conservator to manage the affairs of the credit union. Service of the order of suspension or the order of conservation must be by certified or registered mail, addressed to the credit union at the last known address of its principal office, or by delivery to an officer or director of the credit union. Service by mail is complete upon the deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. The order must clearly state the grounds for suspension or conservation.

(c) After a conservation order has been served on the credit union, the Administrator of Credit Unions shall take possession and control of the books, records, property, assets, and business of the credit union. Upon the service of the suspension order, the credit union shall cease all operations, except those authorized by the Administrator and conducted under his supervision. Not later than 15 days after the date an order of suspension or conservation is served, the board of directors shall file a written reply to the order. They may file a written request for a hearing to present to the Administrator a plan to continue operations under the control of the board of directors setting out proposed corrective actions. Under an order of suspension, the board of directors may request that a conservator be appointed for the credit union or that the credit union be closed or merged or that a liquidating agent be appointed, and may waive rights to further appeal. In that event, the Administrator may immediately appoint a conservator, or order that the credit union be liquidated and appoint a liquidating agent. Under an order of conservation, the board of directors may consent to the conservatorship and waive rights to further appeals.

(d) If the board of directors files its reply and requests a hearing as provided by subsection (c), the Administrator of Credit Unions shall set and hold the hearing not less than 10 nor more than 30 days after the date of receipt of such a request. Not later than 10 days before the hearing, the Administrator shall give notice to the credit union of the date, time, and place of the hearing. Not later than 10 days after the earlier of the date of conclusion of the hearing or the date on which the suspension expires, the Administrator shall (i) adopt the plan to continue operations under the control of the board of directors presented by the credit union, (ii) agree with the credit union on an alternative plan to continue operations under the control of the board of directors or other appropriate measures, (iii) reject the plan to continue operations under the control of the board of directors and issue an order of conservation appointing a conservator, (iv) continue a previous order of conservation, or (v) issue an order of liquidation ordering that the credit union be closed, ordering that its affairs and business be liquidated, and appointing a liquidating agent.

(e) If the Administrator of Credit Unions rejects the credit union's plan to continue operations and determines that it is in the public interest and in the best interest of the members, depositors, and creditors of the credit union to rehabilitate the credit union, he may permit the credit union to operate under his direction and control, and shall issue an order of conservation appointing a conservator to manage the affairs of the credit union. The Administrator shall serve the order of conservation in the same manner as provided for service of an order of suspension.

(f) The conservator, on behalf and under the supervision and direction of the Administrator of Credit Unions, shall take charge of the books, records, property, assets, and business of the credit union and shall conduct the business and affairs of the credit union under the direction and supervision of the Administrator. The conservator shall take steps toward the removal of the causes and conditions that have necessitated the order that the Administrator directs. During the conservatorship, the conservator shall make reports to the Administrator from time to time as the Administrator requires. The conservator shall take all necessary measures to preserve, protect, and recover the assets or property of the credit union, including claims or causes of action belonging to or that may be asserted by the credit union. In addition, the conservator may deal with that property in his own name as conservator and may file, prosecute, or defend against a suit by or against the credit union if the conservator considers this action necessary to protect the interested parties or property affected by the suit.

(g) The Administrator of Credit Unions shall determine the cost incident to the conservatorship. The cost is a charge against the assets and funds of the credit union, and shall be paid as the Administrator directs.

(h) A suit filed against a credit union or its conservator while a conservatorship order is in effect must be brought in a court of proper jurisdiction in Wake County. The conservator may file suit in a court of proper jurisdiction in Wake County against any person for the purpose of preserving, protecting, or recovering assets or property of the credit union, including a claim or cause of action belonging to or that may be asserted by the credit union.

(i) The conservator shall serve for the period necessary to accomplish the purposes of conservatorship consistent with the intent of this section. If the credit union is rehabilitated, it shall be returned to the management of the board of directors under the terms that are reasonable and necessary to prevent recurrence of the conditions that occasioned the conservatorship.

(j) If the Administrator of Credit Unions determines that the credit union in conservatorship is not in a condition to continue business and cannot be rehabilitated as provided by this section, he shall issue, as he deems appropriate, either an order of merger or an order of liquidation, appointing a liquidating agent.

(k) If, after a hearing under this section, the board of directors of the credit union is dissatisfied with the decision of the Administrator of Credit Unions, the board may appeal to the Credit Union Commission by filing with the Administrator a written appeal, including a duly certified resolution of the board, not later than 10 days after the day that the Administrator's order is served. If the appeal is duly filed, the Administrator shall set a date for a hearing on the appeal not more than 30 days after the date on which the appeal is filed. The Administrator shall promptly give notice of the date, time, and place of the hearing to the credit union and any other interested party. The filing of an appeal does not suspend the effect of the order of the conservation and this order remains in force pending final disposition of the appeal by the Commission. At the conclusion of the hearing, the Commission may reverse the order of the Administrator and adopt and approve the credit union's plan to continue operations, affirm the Administrator's order of conservation, or order that other appropriate action be taken.

(*l*) If the board of directors of the credit union does not file a reply to the order of suspension or an order of conservation as required by this section or fails to request and appear at the hearing provided for by this section, the Administrator of Credit Unions may dispose of the matter as he considers appropriate. The credit union is presumed to have consented to the action and may not contest it.

(m) The period of suspension and the date and time of the hearings provided for by this section may be extended by agreement of the parties and the Administrator of Credit Unions.

(n) The Administrator of Credit Unions shall notify the members of the Credit Union Commission of any suspension. (1975, c. 538, s. 1; 1977, c. 559, s. 9; 1989, c. 72, s. 1.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, which have been codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

§ 54-109.93. Liquidation.

(a) A credit union may elect to dissolve voluntarily and liquidate its affairs in the manner prescribed in this section.

(b) The board of directors shall adopt a resolution recommending the credit union be dissolved voluntarily, and directing that the question of liquidation be submitted to the members.

(c) Within 10 days after the board of directors decides to submit the question of liquidation to the members, the president shall notify the Administrator of Credit Unions thereof in writing, setting forth the reasons for the proposed action. Within 10 days after the members act on the question of liquidation, the president shall notify the Administrator in writing as to whether or not the members approved the proposed liquidation.

(d) As soon as the board of directors decides to submit the question of liquidation to the members, payment on shares, withdrawal of shares, making any transfer of shares to loans and interest, making investments of any kind, and granting loans shall be suspended pending action by members on the proposal to liquidate. On approval by the members of such proposal, all such business transactions shall be permanently discontinued. Necessary expenses of operation shall, however, continue to be paid on authorization of the board of directors or liquidating agent during the period of liquidation.

(e) For a credit union to enter voluntary liquidation, approval by a majority of the members in writing or by a two-thirds majority of the members present at a regular or special meeting of the members is required. Where authorization for liquidation is to be obtained at a meeting of the members, notice in writing shall be given to each member, by first-class mail, at least 10 days prior to such meeting.

(f) A liquidating credit union shall continue in existence for the purpose of discharging its debts, collecting and distributing its assets, and doing all acts required in order to wind up its business and may sue and be sued for the purpose of enforcing such debts and obligations until its affairs are fully adjusted.

(g) The board of directors or the liquidating agent shall use the assets of the credit union to pay: first, expenses incidental to liquidating including any surety bond that may be required; second, any liability due nonmembers; third, deposits and special purpose thrift accounts as provided in Articles 14A to 14L of this Chapter. Assets then remaining shall be distributed to the members proportionately to the shares held by each member as of the date dissolution was voted.

(h) As soon as the board of directors or the liquidating agent determines that all assets from which there is a reasonable expectancy of realization have been liquidated and distributed as set forth in this section, the Administrator of Credit Unions shall issue to such corporation, in duplicate, a certificate of dissolution which shall be filed by the corporation in the office of the register of deeds of the county in which the corporation has its place of business. The corporation shall then be dissolved and its certificate of incorporation revoked. All pertinent books and records of the liquidating credit union shall be retained by the liquidating agent and/or filed with the Credit Union Division and kept for a minimum period not to exceed five years. The liquidating agent's fee, if any, shall be set by the Administrator of Credit Unions. (1915, c. 115, s. 24; C.S., s. 5224; 1925, c. 73, ss. 3, 15; 1935, c. 87; 1957, c. 989, s. 4; 1965, c. 956, s. 1; 1967, c. 823, s. 11; 1975, c. 538, s. 1.)

§ 54-109.94. Merger.

Any credit union may, with the approval of the Administrator of Credit Unions, merge with another credit union subject to the rules and regulations set forth by the Administrator of Credit Unions. (1975, c. 538, s. 1.)

§ 54-109.95. Conversion of charter.

(a) A credit union chartered under the laws of this State may be converted to a credit union chartered under the laws of any other state or under the laws of the United States, subject to regulations issued by the Administrator of the Credit Union Division.

(b) A credit union chartered under the laws of the United States or of any other state may convert to a credit union chartered under the laws of this State. To effect such a conversion, a credit union must comply with all the requirements of the jurisdiction under which it was originally chartered and the requirements of the Administrator of Credit Unions and file proof of such compliance with said Administrator. (1965, c. 956, s. 9; 1975, c. 538, s. 1.)

§§ 54-109.96 through 54-109.98: Reserved for future codification purposes.

Article 14L.

Taxation.

§ 54-109.99. Restriction of taxation.

The corporation shall be deemed an institution for savings, and together with all accumulations therein shall not be taxable under any law which shall exempt building and loan associations or institutions for savings from taxation; nor shall any law passed taxing corporations in any form, or the shares thereof, or the accumulations therein, be deemed to include corporations doing business in pursuance of the provisions of this Article, unless they are specifically named in such law. The shares of credit unions, being hereby regarded as a system for saving, shall not be subject to any stock-transfer tax either when issued by the corporation or transferred from one member to another. (1915, c. 115, s. 26; C.S., s. 5225; 1925, c. 73, ss. 3, 16; 1935, c. 87; 1975, c. 538, s. 1.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, which have been codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

CASE NOTES

Cited in North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.W.2d 404 (1981).

§§ 54-109.100 through 54-109.104: Reserved for future codification purposes.

ARTICLE 14M.

Confidential Information.

§ 54-109.105. What information deemed confidential; disclosure; certain information deemed public; exchange of information.

(a) The following records of information of the credit union division, the Administrator or the agent(s) of either shall be confidential and shall not be disclosed:

(1) Information obtained or compiled in preparation of, during, or as a result of an examination, audit or investigation of any credit union;

(2) Information reflecting the specific collateral given by a named borrower, or specific withdrawable accounts held by a named member;

(3) Information obtained, prepared or compiled during or as a result of an examination, audit or investigation of any credit union by an agency of the United States, if the records would be confidential under federal law or regulation;

(4) Information and reports submitted by credit unions to federal regulatory agencies, if the records or information would be confidential under federal law or regulation;

(5) Information and records regarding complaints from the members received by the division which concern credit unions when the complaint would or could result in an investigation, except to the management of those credit unions;

(6) Any other letters, reports, memoranda, recordings, charts or other documents or records which would disclose any information of which disclosure is prohibited in this subsection.

(b) A court of competent jurisdiction may order the disclosure of specific information.

(c) The information contained in an application for a new credit union shall be deemed to be public information.

(d) Nothing in this Article shall prevent the exchange of information relating to credit unions and the business thereof with the representatives of the agencies of this State, other states, or of the United States, or with reserve or insuring agencies for credit unions. Nothing in this Article shall prevent the Administrator, in his discretion, from disclosing pertinent information relating to a credit union and the business thereof with directors, officers, or members of the credit union. The private business and affairs of an individual or company shall not be disclosed by any person employed by the credit union division, or by any person with whom information is exchanged under the authority of this subsection.

(e) Any official or employee violating this section shall be liable to any person injured by disclosure of such confidential information for all damages sustained thereby. Penalties provided shall not be exclusive of other penalties.

(f) The willful or knowing violation of the provisions of this Article by any employee of the credit union division shall be a Class 1 misdemeanor. (1981, c. 512; 1993, c. 539, s. 429; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

ARTICLE 14N.

Foreign Credit Unions.

§ 54-109.106. Foreign Credit Unions.

(a) A credit union organized under the laws of another state or territory of the United States may conduct business as a credit union in this State with the approval of the Administrator, provided credit unions incorporated under Articles 14A through 14M of this Chapter are allowed to do business in the other state under conditions similar to these provisions. Before granting the approval, the Administrator must find that the foreign credit union:

(1) Is a credit union organized under laws similar to Articles 14A through 14M of this Chapter;
(2) Is financially solvent;
(3) Has account insurance through the federal government or any agency thereof;
(4) Is examined and supervised by a regulatory agency of the state in which it is organized;
(5) Will serve a field of membership not being served in this State or to adequately serve its members in this State;
(6) Operation by the credit union will not have adverse impact on the financial, economic or other interests of residents of this State.

(b) No foreign credit union may conduct business in this State unless it:

(1) Makes loans at such terms allowed under the provisions of Article 14G of this Chapter;
(2) Complies with the rules and regulations applicable to credit unions incorporated under Articles 14A through 14M of this Chapter;
(3) Agrees to furnish the Administrator a copy of the report of examination of its regulatory agency and such other documents or reports as may be requested or to submit to an examination as the Administrator deems necessary;
(4) Designates and maintains an agent for the service of process in this State.

(c) The Administrator may deny or revoke approval of a credit union to conduct business in this State if the Administrator finds that:

(1) The credit union fails to meet the requirements of subsection (a);
(2) The credit union fails to comply with the laws of this State or lawful rules or orders issued by the Administrator;
(3) The credit union has engaged in a pattern of unsafe or unsound credit union practices. (1991, c. 271, s. 1.)

ARTICLE 15.

Central Associations.

§ 54-110: Recodified as §§ 54-110.1 to 54-110.10.

Editor's Note. — This Article was rewritten by Session Laws 1983, c. 470, s. 1, and has been recodified as Article 15A of Chapter 54, G.S. 54-110.1 et seq.

ARTICLE 15A.

Corporate Credit Union.

§ 54-110.1. Definition and purposes.

(a) A corporate credit union may be incorporated under this Article and shall be subject to all parts of this Chapter not inconsistent with this Article.

(b) A corporate credit union is a cooperative nonprofit association whose members consist primarily of other credit unions and whose purposes are:

(1) To accumulate and prudently manage the liquidity of its member credit unions through interlending and investment services;

(2) To act as an intermediary for credit union funds between members and other corporate credit unions;

(3) To obtain liquid funds from other credit union organizations, financial intermediaries, and other sources;

(4) To foster and promote in cooperation with other state, regional, and national corporate credit unions and credit union organizations or associations the economic security, growth and development of member credit unions; and

(5) To perform such other financial services of benefit to its members which are authorized by the Administrator of Credit Unions. (1983, c. 470.)

Editor's Note. — This Article is Article 15 of Chapter 54, as rewritten by Session Laws 1983, c. 470, s. 1.

§ 54-110.2. Membership.

(a) Membership in the corporate credit union shall be institutional and be limited to the subscribers to the articles of incorporation, credit unions organized under Chapter 54 of the General Statutes, the Federal Credit Union Act or any other credit union act, organizations or associations of credit unions, and such other persons or organizations provided for in the articles of incorporation unless the bylaws otherwise prescribe.

(b) The board of directors of each credit union, organization or association becoming a member of the corporate credit union shall designate one person to be a voting representative in the corporate credit union. Such voting representatives shall be eligible to hold office in the corporate credit union as if such person were himself a member of the corporate credit union. (1983, c. 470.)

§ 54-110.3. Charter and name exclusive.

Only one corporate credit union shall be incorporated under this Article; and no other credit union may use the term "corporate credit union" as a part of its name. (1983, c. 470.)

§ 54-110.4. Organization.

(a) Application to form a corporate credit union shall be made in writing to the Administrator of Credit Unions. The application shall contain the names of at least 15 credit unions which have agreed to subscribe to shares in the corporate credit union at the time the application is made.

(b) The application shall be accompanied by articles of incorporation, bylaws, and articles of association or other appropriate documents.

(c) The bylaws shall provide for the selection of a board of directors of a least five members and shall require credit unions applying for membership to subscribe to shares in a minimum amount as specified in the bylaws. (1983, c. 470.)

§ 54-110.5. Powers and privileges.

(a) A corporate credit union shall enjoy the powers and privileges of any other credit union incorporated under Chapter 54 of the General Statutes in addition to those powers enumerated in this Article, notwithstanding any limitations or restrictions found elsewhere in this Article.

(b) A corporate credit union may:

(1) Accept shares or deposits in any form from its members, other state, regional or national corporate credit unions, and credit union organizations or associations;

(2) Make loans to its members and other credit unions and other State, regional or national corporate credit unions, organizations and associations of credit unions;

(3) Establish lines of credit for members and participate with other credit unions in making loans to its members under the terms and conditions determined by the board of directors;

(4) Invest in the shares of or make deposits in credit unions;

(5) Buy and sell any form of marketable debt obligations of domestic or foreign corporations or of federal, state or local government units;

(6) Borrow from any source without limitation, accept demand deposits from any source and issue notes or debentures;

(7) Acquire or sell the assets and assume the liabilities of a member; and

(8) Enter into agreements with credit unions to discount or purchase loans made pursuant to government-guaranteed loan programs, real estate loans made by members or any obligations of the United States or any agency thereof held by members.

(c) A corporate credit union shall not be taxable under any law which shall exempt any other credit union.

(d) The board of directors shall meet at least quarterly and shall have the general direction and control of the affairs of the corporation.

(e) The corporate credit union may exercise such incidental powers or privileges conferred upon a federal corporate credit union. (1983, c. 470.)

§ 54-110.6. Participation in central system.

The corporate credit union may enter into agreements for the purpose of participation in any state or federal central liquidity facility or central financial system for credit unions, and for the purpose of aiding credit unions in establishing concentrated lines of credit with other financial institutions and act as a depositor and transmitter of funds to carry out such agreements. (1983, c. 470.)

§ 54-110.7. Right of set-off; security interest.

(a) The corporate credit union shall have a right of immediate set-off against the balances of the share and deposit accounts of each member for any amounts due from the member to the corporate credit union.

(b) The corporate credit union shall have a lien on all share and deposit accounts of each member in the amount of the total indebtedness of the member to the corporate credit union. The lien created herein shall attach to such accounts and be effective whenever the member is indebted to the corporate credit union. The lien shall have priority over any interests of all members and unsecured creditors of the member credit unions of the corporate credit union.

(c) The board of directors or credit committee may require and accept additional security for loans to a member in the form of a pledge, assignment, hypothecation or mortgage of any assets of the member or a guarantor. (1983, c. 470.)

§ 54-110.8. Fees.

The operating fees established by the Administrator of Credit Unions shall make allowances for the special purposes and operations of a corporate credit union. (1983, c. 470.)

§ 54-110.9. Reserves.

A corporate credit union shall be exempt from the regular reserve requirements of Article 14J, but shall be required to establish and maintain an equity reserve to meet losses, in accordance with regulations prescribed by the Administrator of Credit Unions. (1983, c. 470.)

§ 54-110.10. Applicability of Article.

Nothing in this Article shall be construed as affecting the status of a central association formed prior to the enactment of this Article pursuant to former G.S. 54-110. For the purposes of this Article, the corporate credit union authorized by G.S. 54-110.3 shall be the central association in existence on June 8, 1983. (1983, c. 470.)

SUBCHAPTER IV. COOPERATIVE ASSOCIATIONS.

ARTICLE 16.

Organization of Associations.

§ 54-111. Nature of the association.

Any number of persons, not less than five, may associate themselves as a mutual association, society, company, or exchange, for the purpose of conducting any agricultural, housing (including apartment housing), horticultural, forestry, dairy, mercantile, mining, manufacturing, telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage, or mechanical business, or purchase, maintain and use fire-fighting equipment, or for any other lawful purpose, on the mutual plan. For the purposes of this Subchapter, the words association, company, corporation, exchange, society, or union shall be construed to mean the same; provided that the membership of agricultural organizations incorporated under this Subchapter shall consist of producers of agricultural products, handled by such organizations or by organizations owned and controlled by such producers. (1915, c. 144, s. 1; C.S., s. 5242; 1925, c. 179, ss. 1, 2; 1931, c. 447; 1949, c. 1042, ss. 1, 2(a); 1955, c. 746, s. 1; 1959, c. 991; 1985, c. 542, s. 1.)

Legal Periodicals. — For note on the Declaratory Judgment Act and due process in expulsions from voluntary trade associations, in light of Harrison v. Gaston Bd. of Realtors, Inc., 311 N.C. 230, 316 S.E.2d 59 (1984), see 21 Wake Forest L. Rev. 121 (1985).

§ 54-111.1: Repealed by Session Laws 1959, c. 991.

§ 54-112. Use of term restricted.

No corporation or association hereafter organized or doing business for profit in this State shall be entitled to use the term "mutual" as part of its corporate or other business name or title, unless it has complied with the provisions of this Subchapter; and any corporation or association violating the provisions of this section may be enjoined from doing business under such name at the instance of any shareholder of any association legally organized under this Subchapter. (1915, c. 144, s. 18; C.S., s. 5243; 1925, c. 179, s. 1; 1945, c. 635.)

§ 54-113. Articles of agreement.

The persons desiring to organize such association shall sign and acknowledge written articles which shall contain the name of the association and the names and residences of the persons forming the same. Such articles shall also contain a statement of the purposes of the association and shall designate the city, town, or village where its principal place of business shall be located. The articles shall also state the amount of authorized capital stock, the number of shares authorized, and the par value of each. No shareholder in any corporation organized under this Subchapter shall be personally liable for any debt of the corporation. (1915, c. 144, s. 2; C.S., s. 5244; 1985, c. 542, s. 2.)

§ 54-114. Certificate of incorporation.

The original articles of incorporation of corporations organized under this Subchapter, or a true copy thereof, verified as such by the affidavits of two of the signers thereof, shall be filed with the Secretary of State. A like verified copy of such articles and certificate of the Secretary of State, showing the date when such articles were filed with and accepted by the Secretary of State, within 30 days of such filing and acceptance, shall be filed with and recorded by the register of deeds of the county in which the principal place of business of the corporation is to be located, and no corporation shall, until such articles be left for record, have legal existence. The register of deeds shall forthwith transmit to the Secretary of State a certificate stating the time when such copy was recorded. Upon a receipt of such certificate, the Secretary of State shall issue a certificate of incorporation. (1915, c. 144, s. 3; C.S., s. 5245; 1967, c. 823, s. 12.)

§ 54-115. Fees for incorporation.

For filing the articles of incorporation of corporations organized under this Subchapter, there shall be paid the Secretary of State ten dollars ($10.00) and his fees allowed by law, and for the filing of an amendment to such articles, five dollars ($5.00) and his fees allowed by law: Provided, that when the authorized capital stock of such corporations shall be less than one thousand dollars ($1,000), such fee for filing either the articles of incorporation or amendments thereto shall be two dollars ($2.00). (1915, c. 144, s. 4; C.S., s. 5246; 1967, c. 823, s. 13.)

§ 54-116. Bylaws adopted.

At the time of making the articles of incorporation the incorporators shall make bylaws which shall provide:

(1) The name of the corporation.

(2) The purposes for which it is formed.
(3) Qualifications for membership.
(4) The date of the annual meeting; the manner in which members shall be notified of meetings; the manner of conducting the meetings; the number of members which shall constitute a quorum at the meetings, and regulations as to voting.
(5) The number of members of the board of directors; powers and duties; the compensation and duties of officers elected by the board of directors.
(6) In the case of selling agencies or productive societies, regulations for grading.
(7) In the case of selling agencies or productive societies, regulations governing the sale of products by the members through the organization.
(8) The par value of the shares of capital stock.
(9) The conditions upon which shares may be issued, paid in, transferred, and withdrawn.
(10) The manner in which the reserve fund shall be accumulated.
(11) The manner in which the dividends shall be determined and paid to members.
(12) Associations, societies, companies or exchanges, organized hereunder to engage in the telephone or electric light business upon a mutual basis, shall adopt a bylaw limiting the patrons and subscribers to members of the association.
(13) In the case of apartment housing, regulations governing the rental of apartments. (1915, c. 144, s. 5; C.S., s. 5247; 1925, c. 179, s. 4; 1959, c. 991.)

§ 54-117. General corporation law or general nonprofit corporation law applied; dealing in products of, or renting to, nonmembers.

All mutual associations shall be maintained in accordance with the general corporation law or general nonprofit corporation law, except as otherwise provided for in this Subchapter. And no corporation or association hereafter organized under this Subchapter for doing business in this State shall be permitted to deal in the products of nonmembers to an amount greater in value than such as are handled by it for members: Provided, no housing corporation or association hereafter organized under this Subchapter shall be permitted to rent to nonmembers for a period longer than 90 days. (1915, c. 144, s. 17; C.S., s. 5248; 1925, c. 179, s. 1; 1931, c. 447, s. 2; 1949, c. 1042, s. 2(b); 1985, c. 542, s. 3.)

CASE NOTES

This section does not convert a cooperative association into a general corporation, does not destroy the identity of the cooperative, and does not destroy the relationship between the tenant-shareholder and the owner-cooperative, which is based primarily on the long-term proprietary lease rather than the corporate stock. Sanders v. Tropicana, 31 N.C. App. 276, 229 S.E.2d 304 (1976).

§ 54-118. Other corporations admitted.

All mutual corporations, companies, or associations heretofore organized and doing business under other incorporation statutes, or which have attempted to so organize and do business, shall have the benefit of all of the provisions of this Subchapter, and be bound thereby on filing with the Secretary of State a written declaration, signed and sworn to by the president and secretary, to the effect that the mutual company or association has by a majority vote of its shareholders decided to accept the benefits of and to be bound by the provisions of this Subchapter. No association organized under this Subchapter shall be required to do or perform anything not specifically required herein, in order to become a corporation. (1915, c. 144, s. 16; C.S., s. 5249; 1925, c. 179, s. 1; 1985, c. 542, s. 4.)

§ 54-118.1. License taxes.

On and after June 1, 1955, the provisions of Article 2, Subchapter I of Chapter 105 of the General Statutes of North Carolina shall apply to an association or corporation organized under the provisions of this Subchapter. (1955, c. 1313, s. 1.)

§ 54-118.2. Franchise taxes.

On and after July 1, 1955, the provisions of Article 3, Subchapter I of Chapter 105 of the General Statutes of North Carolina shall apply to an association or corporation organized under the provisions of this Subchapter. (1955, c. 1313, s. 1.)

ARTICLE 17.

Stockholders and Officers.

§ 54-119. Certificate for stock fully paid.

Certificates of stock shall not be issued to any subscriber until fully paid, but the bylaws of the association may allow subscribers to vote as shareholders: Provided, part of the stock subscribed for has been paid in cash. (1915, c. 144, s. 11; C.S., s. 5250.)

§ 54-120. Ownership of shares limited.

No shareholder in any such association shall own shares of a greater aggregate par value than twenty percent (20%) of the paid-in capital stock, except as hereinafter provided, or be entitled to more than one vote. A mutual association shall reserve the right of purchasing the stock of any member whose stock is for sale, and may restrict the transfer of stock to such persons as are made eligible to membership in the bylaws. (1915, c. 144, s. 9; C.S., s. 5251; 1925, c. 179, s. 1.)

CASE NOTES

Directors' Authority to Enforce Transfer Restrictions. — There is no applicable general corporation law which would supplant the authority of a cooperative apartment association's board of directors in the enforcement of the transfer restrictions contained in a proprietary lease and authorized by this section. Sanders v. Tropicana, 31 N.C. App. 276, 229 S.E.2d 304 (1976).

§ 54-121. Shares issued on purchase of business.

Whenever an association, created under this Subchapter, shall purchase the business of another association or person, it may pay for the same in whole or in part by issuing to the selling association or persons shares of its capital stock to an amount which at par value would equal the fair market value of the business so purchased, and in such case the transfer to the association of such business at such valuation shall be equivalent to payment in cash for the shares of stock so issued. (1915, c. 144, s. 10; C.S., s. 5252.)

§ 54-122. Absent members voting.

At any regularly called general or special meeting of the shareholders a written vote received by mail from any absent shareholder, and signed by him, may be read in such meeting, and shall be equivalent to a vote of such of the shareholders so signing: Provided, he has been previously notified in writing of the exact motion or resolution upon which such vote is taken, and a copy of same is forwarded with and attached to the vote so mailed by him. In case of sickness or other unavoidable absence of a member, he shall be allowed to vote by proxy in writing; but no member shall vote more than one such proxy. (1915, c. 144, s. 12; C.S., s. 5253.)

§ 54-123. Directors and other officers.

Every such association shall be managed by a board of not less than five directors. The directors shall be elected by and from the stockholders of the association at such time and for such term of office as the bylaws may prescribe, and shall hold office for the time for which elected and until their successors are elected and shall enter upon the discharge of such duties as are prescribed in the bylaws; but a majority of the stockholders shall have the power at any regular or special stockholders' meeting, legally called, to remove any director or officer for cause, and fill the vacancy, and thereupon the director or officer so removed shall cease to be a director or officer of the association. The officers of every such association shall be a president, one or more vice-presidents, a secretary and treasurer, who shall be elected annually by the directors, and each of the officers must be a director of the association. The office of secretary and treasurer may be combined, and when so combined the person filling the office shall be secretary-treasurer. (1915, c. 144, s. 6; C.S., s. 5254.)

ARTICLE 18.

Powers and Duties.

§ 54-124. Nature of business authorized.

An association created under this Subchapter shall have power to conduct any agricultural, housing, horticultural, forestry, dairy, mercantile, mining, manufacturing, telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage, or mechanical business, or purchase, maintain and use fire-fighting equipment, or conduct any other lawful business, on the mutual plan. (1915, c. 144, s. 8; C.S., s. 5255; 1925, c. 179, ss. 1, 3; 1949, c. 1042, s. 2; 1955, c. 746, s. 2; 1985, c. 542, s. 5.)

§ 54-125. Amendment of articles.

The association may amend its articles of incorporation by a majority vote of its shareholders at any regular shareholders' meeting, or any special shareholders' meeting called for that purpose, on 10 days' notice to the shareholders. The power to amend shall include the power to increase or diminish the amount of capital stock and the number of shares: Provided, the amount of the capital stock shall not be diminished below the amount of the paid-up capital at the time the amendment is adopted. Within 30 days after the adoption of an amendment to its articles of incorporation, an association shall cause a copy of such amendment adopted to be recorded in the office of the Secretary of State and of the register of deeds of the county where the principal place of business is located. (1915, c. 144, s. 7; C.S., s. 5256; 1967, c. 823, s. 14.)

§ 54-126. Apportionment of earnings.

The net earnings or losses shall be apportioned among the members in accordance with the ratio which each member's patronage during the period involved bears to total patronage by all members during the period. "Patronage" means amount of purchases, sales, business, labor, wages or other similar criteria. (1915, c. 144, s. 13; C.S., s. 5257; 1925, c. 179, s. 5; 1985, c. 542, s. 6.)

§ 54-127. Time of allocation.

The profits or net earnings of such association shall be allocated to those entitled thereto, at such times as the bylaws shall prescribe, which shall be as often as once in 12 months. (1915, c. 144, s. 14; C.S., s. 5258; 1985, c. 542, s. 7.)

§ 54-128. Annual reports.

Every association organized under the provisions of this Subchapter shall annually, on or before the first day of March of each year, make a report to the Secretary of State; such report shall contain the name of the company, its principal place of business in this State, and generally a statement as to its business, showing total amount of business transacted, amount of capital stock subscribed for and paid in, number of shareholders, total expenses of operation, amount of indebtedness or liabilities, and its profits and losses. A copy of such report shall also be filed with the division of markets in the Department of Agriculture and Consumer Services. (1915, c. 144, s. 15; C.S., s. 5259; 1997-261, s. 109.)

SUBCHAPTER V. MARKETING ASSOCIATIONS.

Article 19.

Purpose and Organization.

§ 54-129. Declaration of policy.

In order to promote, foster, and encourage the intelligent and orderly producing and marketing of agricultural products through cooperation, and to eliminate speculation and waste, and to make the distribution of agricultural products as direct as can be efficiently done between producer and consumer, and to stabilize the marketing problems of agricultural products, this Subchapter is enacted. (1921, c. 87, s. 1; C.S., s. 5259(a); 1935, c. 230, s. 1.)

Legal Periodicals. — For discussion of cooperative marketing, see 1 N.C.L. Rev. 216 (1923), and 2 N.C.L. Rev. 222 (1924).

CASE NOTES

This Subchapter is valid. Tobacco Growers Coop. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923); Tobacco Growers Coop. Ass'n v. Bissett, 187 N.C. 180, 121 S.E. 446 (1924); Tobacco Growers Coop. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924); Tobacco Growers Coop. Ass'n v. Battle, 187 N.C. 260, 121 S.E. 629 (1924).

Collateral Attack on Validity of Organization. — The validity of the association cannot be assailed by alleging an insufficient number of signers. This is a collateral attack and is not a direct attack by the State upon a quo warranto to vitiate the incorporation. Pittman v. Tobacco Growers Coop. Ass'n, 187 N.C. 340, 121 S.E. 634 (1924).

Withdrawal of Charter. — Where an association formed under this Subchapter has no capital, stock, surplus or credit except as given by the statute, the legislature may withdraw its charter at any time. Tobacco Growers Coop. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923).

§ 54-130. Definitions and nature.

As used in this Subchapter —

(1) Agricultural Products. — The term "agricultural products" shall include horticultural, viticultural, forestry, dairy, livestock, poultry, bee, and any farm products.

(2) Association. — The term "association" means
  a. Any corporation organized under this Subchapter; or
  b. Any foreign corporation which
    1. Is organized under any general or special act of another state or the District of Columbia as a cooperative association for the mutual benefit of its members and other patrons,
    2. Confines its operations in this State to the purposes specified in, and restricts the return on the stock or membership capital and the amount of its business with nonmembers to the limits placed thereon by, this Subchapter for corporations organized hereunder, and
    3. Is authorized to transact business in this State pursuant to G.S. 54-139.

(3) Charter. — The term "charter" includes the original articles of incorporation, together with all amendments thereto and articles of merger or consolidation.

(4) Member. — The term "member" shall include actual members of associations without capital stock and holders of stock in associations organized with capital stock.

(5) Person. — The term "person" shall include individuals, firms, partnerships, corporations, and associations.

Associations organized or domesticated hereunder shall be deemed nonprofit, inasmuch as they are not organized to make profits for themselves, as such, or for their members, as such, but only for their members as producers.

This Subchapter shall be referred to as the "Cooperative Marketing Act." (1921, c. 87, s. 2; C.S., s. 5259(b); 1935, c. 436, s. 1; 1963, c. 1168, ss. 1-3.)

§ 54-131. Who may organize.

Three or more persons engaged in the production of agricultural products may form a nonprofit, cooperative association, with or without capital stock, under the provisions of this Subchapter. (1921, c. 87, s. 3; C.S., s. 5259(c); 1979, c. 908, s. 1.)

§ 54-132. Purposes.

An association may be organized to engage in any activity in connection with the producing, marketing or selling of the agricultural products of its members and other farmers, or with the harvesting, preserving, drying, processing, canning, packing, storing, handling, shipping, or utilization thereof, of the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling, or supplying to its members of machinery, equipment, or supplies; or in the financing of the above-enumerated activities; or in any one or more of the activities specified herein. (1921, c. 87, s. 4; C.S., s. 5259(d); 1933, c. 350, s. 2; 1935, c. 230, s. 2.)

§ 54-133. Preliminary investigation.

Every group of persons contemplating the organization of an association under this Subchapter is urged to communicate with the Chief of the Division of Markets, who will inform it whatever a survey of the marketing conditions affecting the commodities to be handled by the proposed association indicates regarding probable success. (1921, c. 87, s. 5; C.S., s. 5259(e).)

§ 54-134. Articles of incorporation.

Each association formed under this Subchapter must prepare and file articles of incorporation, setting forth:

(1) The name of the association.
(2) The purposes for which it is formed.
(3) The place where its principal business will be transacted.
(4) The period of duration, which may be perpetual. When the articles of incorporation fail to state the period of duration, it shall be considered perpetual. Any association heretofore or hereafter organized for a period less than perpetual, may by amendment to its articles of incorporation, extend the period of its duration for a specified period or perpetually.
(5) The names and addresses of those who are to serve as directors for the first term or until the election of their successors.
(6) If organized without capital stock, whether the property rights and interest of each member shall be equal or unequal; and if unequal, the article shall set forth the general rule or rules applicable to all members by which the property rights and interests, respectively, of each member may and shall be determined and fixed; and this association shall have the power to admit new members who shall be entitled to share in the property of the association with the old members in accordance with such general rule or rules. This provision of the articles of incorporation shall not be altered, amended, or repealed except by the written consent or the vote of three-fourths of the members.
(7) If organized with capital stock, the amount of such stock and the number of such shares into which it is divided and the par value thereof. The capital stock may be divided into preferred and common stock. If so divided, the articles of incorporation must contain a statement of the number of shares of stock to which preference is granted and the number of shares of stock to which no preference is granted and the nature and extent of the preference and the privileges granted to each.

In addition to the foregoing, the petition for articles of incorporation may contain any provision consistent with law with respect to management, regulation, government, financing, indebtedness, membership, the establishment of voting districts and the election of delegates for representative purposes, the issuance, retirement and transfer of its stock, if formed with capital stock, or any provisions relative to the way or manner in which it shall operate with respect to its members, officers, or directors, and any other provisions relating to its affairs; provided that nothing set forth in this paragraph shall be construed as limiting any of the rights or powers otherwise given to such associations.

The articles must be subscribed by the incorporators and acknowledged by one of them before an officer authorized by the law of this State to take and certify acknowledgments of deeds and conveyances; and shall be filed as provided in G.S. 55A-4; and when so filed the said articles of incorporation, or certified copies thereof, shall be received in all the courts of this State, and other places, as prima facie evidence of the facts contained therein, and of the due incorporation of such association. A certified copy of the articles of incorporation shall also be filed with the Chief of the Division of Markets. (1921, c. 87, s. 8; C.S., s. 5259(f); 1935, c. 230, ss. 3, 4; 1963, c. 1168, ss. 4, 5; 1979, c. 908, s. 2.)

CASE NOTES

When Agreement Becomes Binding. — The agreement to form an association under this Subchapter becomes binding at once upon its being accepted by the association after incorporation. Tobacco Growers Coop. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923).

§ 54-135. Amendments to articles of incorporation.

(a) An association may amend its charter from time to time in any and as many respects as may be desired, so long as its charter as amended contains only such provisions as are lawful under this Subchapter.

(b) Amendments to the charter shall be made as follows: The board of directors shall by a vote of not less than two-thirds of all of the members of the board, adopt a resolution approving the proposed amendment or amendments and directing that the proposed amendment or amendments be submitted to a vote at a meeting of members, which may be either an annual or a special meeting. Written or printed notice setting forth the proposed amendment or amendments, or a summary of the changes to be effected thereby shall be given to each member entitled to vote at such meeting, within the time and in the manner provided in this Subchapter for the giving of notice of meetings of members. The proposed amendment shall be adopted upon receiving at least a majority of the votes entitled to be cast by members present or represented by proxy at such meeting.

(c) The articles of amendment shall set forth:

(1) The name of the association;
(2) The amendment or amendments so adopted;
(3) A statement setting forth the date of the meeting of the board of directors at which the amendment or amendments were approved by the board, that a quorum was present at such meeting, and that such approval received a vote of not less than two-thirds of all the members of the board;
(4) A statement setting forth the date of the meeting of members at which the amendment was adopted, that a quorum was present at such meeting, and that such amendment received at least a majority of the votes entitled to be cast by members present or represented by proxy at such meeting;
(5) The articles of amendment shall be executed by the association and shall be filed all as provided in G.S. 55A-4;
(6) A certified copy of the articles of amendment shall be filed with the Chief of the Division of Markets. (1921, c. 87, s. 9; C.S., s. 5259(g); 1935, c. 230, s. 5; 1963, c. 1168, s. 6.)

§ 54-136. Bylaws.

Each association incorporated under this Subchapter must, within 30 days after its incorporation, adopt for its government and management a code of bylaws, not inconsistent with the powers granted by this Subchapter. A majority vote of a quorum of the members or stockholders attending a meeting, of which notice of the proposed bylaw or bylaws shall have been given, is sufficient to adopt or amend the bylaws. Each association under its bylaws may also provide for any or all of the following matters:

(1) The time, place, and manner of calling and conducting its meetings.
(2) The number of stockholders or members constituting a quorum.
(3) The right of members or stockholders to vote by proxy or by mail, or by both, and the conditions, manner, form, and effects of such votes.
(4) The number of directors constituting a quorum.
(5) The qualifications, compensations, and duties and terms of office of directors and officers; time of their election, and the mode and manner of giving notice thereof.
(6) Penalties for violations of the bylaws.
(7) The amount of entrance, organization, and membership fees, if any; the manner and method of collection of the same, and the purposes for which they may be used.
(8) The amount which each member or stockholder shall be required to pay annually or from time to time, if at all, to carry on the business of the association, the charge, if any, to be paid by each member or stockholder for services rendered by the association to him, and the time of payment and the manner of collection; and the marketing contract between the association and its members or stockholders which every member or stockholder may be required to sign.
(9) The number and qualification of members or stockholders of the association and the conditions precedent to membership or ownership of common stock; the method, time, and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members, and of the shares of common stock; the conditions upon which, and the time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association, and mode, manner, and effect of the expulsion of a member; manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or stockholder, or upon the expulsion of a member or forfeiture of his membership, or at the option of the association, by conclusive appraisal by the board of directors.

Upon the death, withdrawal or expulsion of a member, the board of directors of the association shall, within one year, cause to be paid to such member or his estate one hundred percent (100%) of all amounts due him for any and all raw products which have been delivered by him to the association. All other amounts which might be due for capital stock, certificates of interest, reserves or on account of any other equity credits shall be payable in accordance with the charter or bylaws of the association.

Notwithstanding the foregoing provisions of this section, any association may amend its articles of incorporation to provide that thereafter any bylaw or bylaws of the association may be amended or repealed, or any new bylaw may be adopted, either by the members or by the board of directors, but if the members amend any bylaw or bylaws or adopt any new bylaw or bylaws, such bylaw or bylaws shall not thereafter be amended or repealed by the board of directors, and if the members repeal any bylaw or bylaws, such bylaw or bylaws shall not be readopted by the board of directors; provided, however, that no bylaw shall be adopted by the board of directors which shall require a higher number or percentage of members to be present or represented at a members' meeting for the purpose of constituting a quorum, or a higher number or percentage of such quorum to take action, than was the case before the power to alter, amend, or repeal the bylaws was conferred upon the board of directors. (1921, c. 87, s. 10; C.S., s. 5259(h); 1935, c. 230, s. 6; 1963, c. 1168, s. 7; 1979, c. 543.)

§ 54-137. General and special meetings; how called.

In its bylaws each association shall provide for one or more regular meetings annually. The board of directors shall have the right to call a special meeting at any time, and ten percent (10%) of the members or stockholders may file a petition stating the specific business to be brought before the association, and demand a special meeting at any time. Such meeting must thereupon be called by the directors. Notice of all meetings, together with a statement of the purposes thereof, shall be mailed to each member at least 10 days prior to the meeting: Provided, however, that the bylaws may require instead that such notice may be given by publication in a newspaper of general circulation, published at the principal place of business of the association. (1921, c. 87, s. 11; C.S., s. 5259(i).)

§ 54-138. Conflicting laws not to apply.

Any provisions of law which are in conflict with this Subchapter shall not be construed as applying to the associations herein provided for. (1921, c. 87, s. 20; C.S., s. 5259(j).)

§ 54-139. Foreign cooperative corporations; limitation on use of word "cooperative."

(a) A foreign corporation (with or without capital stock) that can qualify as an association, as defined in G.S. 54-130(2)b1 and 2, may be authorized to transact business in this State under the provisions of Chapter 55A of the General Statutes.

(b) No person other than an association organized under this Subchapter, or a foreign corporation authorized to transact business in this State pursuant to subsection (a) of this section, or an electric or telephone membership corporation domesticated pursuant to G.S. 117-28, or an organization created under or governed by Subchapter IV of Chapter 54 of the General Statutes, shall be entitled to organize, domesticate, or transact business in this State if the corporate or other business name or title of such person contains the word "cooperative." (1921, c. 87, s. 21; C.S., s. 5259(k); 1963, c. 1168, s. 8; 1985, c. 542, s. 8; 1993, c. 552, s. 20.)

§ 54-140. Association heretofore organized may adopt the provisions of this Subchapter.

Any corporation or association organized under previously existing statutes may, by a majority vote of its stockholders or members, be brought under the provisions of this Subchapter by limiting its membership and adopting the other restrictions as provided herein. It shall make out in duplicate a statement signed and sworn to by its directors, upon forms supplied by the Secretary of State, to the effect that the corporation or association has by a majority vote of its stockholders or members decided to accept the benefits and be bound by the provisions of this Subchapter. Articles of incorporation shall be filed as required in G.S. 54-134, except that they shall be signed by the members of the board of directors. The filing fee shall be the same as for filing an amendment to articles of incorporation. (1921, c. 87, s. 24; C.S., s. 5259(l).)

Cross References. — As to fee for filing amendment to articles of incorporation, see G.S. 54-144.

§ 54-141. Associations not in restraint of trade.

No association organized hereunder shall be deemed to be a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarily, nor shall the marketing contracts or agreements between the association and its members, or any agreements authorized in this Subchapter be considered illegal or in restraint of trade. (1921, c. 87, s. 26; C.S., s. 5259(m).)

CASE NOTES

Purpose, Effect and Validity. — This Subchapter is an enabling act whereby an organization among tobacco growers may be formed by the voluntary act of those joining therein for handling the product of its members; and the statute, and the organization formed in pursuance thereof, are not objectionable as being in restraint of interstate commerce, or contrary to the law against monopolies or the public policy or Constitution of this State. Tobacco Growers Coop. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923).

Legal presumption is in favor of validity of the marketing contract made by a member with a cooperative association, in an action by the latter against the former for its breach, which presumption will only yield when its illegal character plainly appears; and in this case there is nothing appearing that would indicate the association proposed to sell the member's tobacco for a greater sum than its true or actual value, or that it was acting in violation of the anti-trust law, or in restraint of trade. Tobacco Growers Coop. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923).

Governmental Control to Prevent Restraint of Trade. — The governmental control to be exercised as herein prescribed renders the cooperative plan for the protection of its own members incapable of exercise to the extent of a monopoly or restraint of trade prohibited by law. Tobacco Growers Coop. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923).

Tobacco Cooperative Stabilization Corporations Marketing Operations Were Not Improper. — Trial court properly granted summary judgment to a tobacco cooperative stabilization corporation in a restraint of trade claim brought by various tobacco warehouses because the corporation's creation of market centers subsidizing warehouse operations fell within an exemption of North Carolina's antitrust laws under G.S. 54-151. Bailey v. Flue-Cured Tobacco Coop. Stabilization Corp., 158 N.C. App. 449, 581 S.E.2d 811, 2003 N.C. App. LEXIS 1179 (2003).

§ 54-142. Application of North Carolina Business Corporation Act to cooperative associations with capital stock.

The provisions of the North Carolina Business Corporation Act (Chapter 55 of the General Statutes) shall apply, so far as appropriate, to every cooperative association with capital stock heretofore or hereafter organized or domesticated under this Subchapter, except where the provisions of that act are in conflict with or inconsistent with the express provisions of this Subchapter. (1921, c. 87, s. 28; C.S., s. 5259(o); 1963, c. 1168, s. 9; 1989 (Reg. Sess., 1990), c. 1024, s. 3.)

CASE NOTES

Effect of Period Limiting Existence. — A charter provision that a cooperative marketing association shall exist for five years does not contemplate that the association shall hold over the crops raised in one year for one or more successive years. Tobacco Growers Coop. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923).

§ 54-142.1. Application of Nonprofit Corporation Act to cooperative associations without capital stock.

The provisions of the Nonprofit Corporation Act (Chapter 55A of the General Statutes) shall apply, so far as appropriate, to every cooperative association without capital stock heretofore or hereafter organized or domesticated under this Subchapter, except where the provisions of that act are in conflict with or inconsistent with the express provisions of this Subchapter. (1963, c. 1168, s. 9.)

§ 54-143. License taxes.

On and after June 1, 1955, the provisions of Article 2, Subchapter I of Chapter 105 of the General Statutes of North Carolina shall apply to an association or corporation organized under the provisions of this Subchapter. (1921, c. 87, s. 29; C.S., s. 5259(p); 1955, c. 1313, s. 1.)

§ 54-143.1. Franchise taxes.

On and after July 1, 1955, the provisions of Article 3, Subchapter I of Chapter 105 of the General Statutes of North Carolina shall apply to an association or corporation organized under the provisions of this Subchapter. (1955, c. 1313, s. 1.)

§ 54-144. Filing fees.

For filing articles of incorporation, an association organized hereunder shall pay ten dollars ($10.00); and for filing an amendment to the articles, two and one-half dollars ($2.50). (1921, c. 87, s. 30; C.S., s. 5259(q).)

Article 20.

Members and Officers.

§ 54-145. Members.

(a) Under the terms and conditions prescribed in its bylaws, an association may admit as members, or issue common stock, only to persons engaged in the production of agricultural products, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent part of the crop raised on the leased premises.

(b) If a member of a nonstock association be other than a natural person, such member may be represented by any individual, associate, officer, or member thereof, duly authorized in writing.

(c) One association organized hereunder may become a member or stockholder of any other association or associations, organized hereunder. (1921, c. 87, s. 7; C.S., s. 5259(r); 1963, c. 1168, s. 10.)

§ 54-146. Directors; election.

(a) The affairs of the association shall be managed by a board of not less than three directors, elected by the members or stockholders from their own number. The bylaws may provide that the territory in which the association has members shall be divided into districts, and that the directors shall be elected according to such districts. In such case the bylaws shall specify the number of directors to be elected by each district, the manner and method of reapportioning the directors and of redistricting the territory covered by the association. The bylaws may provide that primary elections should be held in each district to elect the directors apportioned to such districts, and the result of all such primary elections must be ratified by the next regular meeting of the association.

(b) The bylaws may provide that one or more directors may be appointed either by the Director of the Agricultural Extension Service or by such public official or public board or commission as may be designated by the bylaws. The directors so appointed need not be members or stockholders of the association, but shall have the same powers and rights as other directors.

(c) An association may provide a fair remuneration for the time actually spent by its officers and directors in its service. No director, during the term of his office, shall be a party to a contract for profit with the association differing in any way from the business relations accorded regular members or holders of common stock of the association, or to any other kind of contract differing from terms generally current in that district.

(d) When a vacancy on the board of directors occurs, other than by expiration of term, the remaining members of the board, by a majority vote, shall fill the vacancy, unless the bylaws provide for an election of directors by districts. In such case the board of directors shall immediately call a special meeting of the members or stockholders in that district to fill the vacancy: Provided, that this subsection shall not apply to the director or directors appointed under the provisions of subsection (b) of this section: Provided further, that any vacancy occurring in the office of a director appointed under subsection (b) of this section shall be filled in the same manner as the original appointment was made. (1921, c. 87, s. 12; C.S., s. 5259(s); 1963, c. 1168, s. 11; 1979, c. 908, s. 3.)

§ 54-147. Election of officers.

The directors shall elect a president, one or more vice-presidents, a secretary and treasurer who need not be directors, and they may combine the offices of secretary and treasurer designating the combined office as secretary-treasurer. They shall elect from their number a chairman and vice-chairman unless the president and vice-presidents are members of the board. The board may elect or appoint such additional officers as are necessary and appropriate. The treasurer may be a bank or any depository, and as such shall not be considered an officer, but as a function of the board of directors. In such a case the secretary shall perform the usual accounting duties of the treasurer, excepting that the funds shall be deposited only as authorized by the board of directors. (1921, c. 87, s. 13; C.S., s. 5259(t); 1971, c. 925.)

§ 54-148. Stock; membership certificates; when issued; voting; liability; limitation on transfer of ownership.

(a) When a member of an association established without capital stock has paid his membership fee in full, he shall receive a certificate of membership.

(b) No association shall issue stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment. The association shall hold the stock as security for the payment of the note, but such retention as security shall not affect the members' right to vote.

(c) Except for debts lawfully contracted between him and the association, no member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof.

(d) A cooperative association, incorporated under this Subchapter, may fix or limit in its bylaws the amount of stock which one member might own in said association.

(e) No member or stockholder shall be entitled to more than one vote; provided, however, that any association organized hereunder, all of whose members are other associations organized hereunder shall have power to determine by its bylaws the number of votes to which each member association shall be entitled and to provide for the appointment or election of delegates to cast such votes and to represent the member associations at all members' meetings.

(f) Any association organized with stock under this Subchapter may issue preferred stock, with or without the right to vote. Such stock may be redeemable or retirable by the association on such terms and conditions as may be provided for by the articles of incorporation and printed on the face of the certificate.

(g) The bylaws shall prohibit the transfer of the common stock of the association to persons not engaged in the production of agricultural products, and such restrictions must be printed upon every certificate of stock subject thereto.

(h) The association may at any time, except when the debts of the association exceed fifty percent (50%) of the assets thereof, buy in or purchase its common stock at book value thereof as conclusively determined by the board of directors, and pay for it in cash within one year thereafter. (1921, c. 87, s. 14; C.S., s. 5259(u); 1935, c. 436, s. 2; 1955, c. 596; 1963, c. 1168, s. 12.)

§ 54-149. Removal of officer or director.

Any member may bring charges against an officer or director by filing them in writing with the secretary of the association, together with a petition signed by ten percent (10%) of the members, requesting the removal of the officer or director in question. The removal shall be voted upon at the next regular or special meeting of the association, and by a vote of a majority of the members, the association may remove the officer or director and fill the vacancy. The director or officer against whom such charges have been brought shall be informed in writing of the charges previous to the meeting, and shall have an opportunity at the meeting to be heard in person or by counsel, and to present witnesses; and the person or persons bringing the charges against him shall have the same opportunity.

In case the bylaws provide for election of directors by districts, with primary elections in each district, then the petition for removal of a director must be signed by twenty percent (20%) of the members residing in the district from which he was elected. The board of directors must call a special meeting of the members residing in that district to consider the removal of the director. By a vote of the majority of that district, the director in question shall be removed from office: Provided, that this section shall not apply to directors appointed under subsection (b) of G.S. 54-146. (1921, c. 87, s. 15; C.S., s. 5259(v).)

§ 54-150. Referendum.

Upon demand of one third of the entire board of directors, any matter that has been approved or passed by the board must be referred to the entire membership of the stockholders for decision at the next special or regular meeting: Provided, however, that a special meeting may be called for the purpose. (1921, c. 87, s. 16; C.S., s. 5259(w).)

Article 21.

Powers, Duties, and Liabilities.

§ 54-151. Powers.

Each association incorporated under this Subchapter shall have the following powers:

(1) To engage in any activity in connection with the producing, marketing, selling, harvesting, preserving, drying, processing, canning, packing, storing, handling, or utilization of any agricultural products produced or delivered to it by its members and other farmers; or the manufacturing or marketing of the by-products thereof; or in connection with the purchase, hiring, or use by its members of supplies, machinery, or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. No such association, during any fiscal year thereof, shall deal in or handle products, machinery, equipment, supplies, and/or perform services for and on behalf of nonmembers to an amount greater in value than such as are dealt in, handled, and/or performed by it for and on behalf of members during the same period.

(2) To borrow money and to make advances to members and other farmers who deliver agricultural products to the association.

(3) To act as the agent or representative of any member or members in any of the above-mentioned activities.

(4) To purchase or otherwise acquire, and to hold, own, and exercise all rights or ownership in, and to sell, transfer, or pledge shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the handling or marketing of any of the products handled by the association, or engaged in the financing of the association.

(5) To establish reserves and to invest the funds thereof in bonds or such other property as may be provided in the bylaws.

(6) To buy, hold, and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conducting and operation of any of the business of the association, or incidental thereto.

(7) To do each and everything necessary, suitable, or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated; or conducive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition, to exercise and possess all powers, rights, and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and in addition, any other rights and powers, and privileges granted by the laws of this State to ordinary corporations, except such as are inconsistent with the express provisions of this Subchapter;

and to do any such thing anywhere. (1921, c. 87, s. 6; C.S., s. 5259(x); 1933, c. 350, ss. 3, 4; 1935, c. 230, ss. 7-9.)

Cross References. — As to formation of subsidiary companies, see G.S. 54-158 and note.

CASE NOTES

Tobacco Cooperative Stabilization Corporations Marketing Operations Were Not Improper. — Trial court properly granted summary judgment to a tobacco cooperative stabilization corporation in a restraint of trade claim brought by various tobacco warehouses because the corporation's creation of market centers subsidizing warehouse operations fell within an exemption of North Carolina's antitrust laws under G.S. 54-151. Bailey v. Flue-Cured Tobacco Coop. Stabilization Corp., 158 N.C. App. 449, 581 S.E.2d 811, 2003 N.C. App. LEXIS 1179 (2003).

§ 54-152. Marketing contract.

(a) The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over 10 years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association or any facilities to be created by the association. The contract may provide that the association may sell or resell the products of its members, with or without taking title thereto, and pay over to its members the resale price, after deducting all necessary selling, overhead, and other costs and expenses, including dividends on preferred stock, not exceeding ten percent (10%) per annum, and reserve for retiring the stock, if any; and other proper reserves; and dividends not exceeding ten percent (10%) per annum upon common stock.

(b) The bylaws and the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts of this State.

(c) In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract, and to a decree of specific performance thereof. Pending the adjudication of such an action, and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member.

(d) In the event that a member of an association incorporated under this chapter shall have died; and that, at a time more than six months after his death, such cooperative corporation has in its hands moneys not in excess of one hundred dollars ($100.00) which would have been distributable and payable to such member except for his death; and that there has been appointed no administrator of his estate or that the administration of his estate has been closed at such time; then such corporation, without making any publication of notice, may disburse such moneys (not in excess of one hundred dollars ($100.00)) in the following order:

(1) To the widow of the deceased if there is a widow,
(2) To pay any unsatisfied claims for funeral expenses or reimburse any person for the payment thereof, and
(3) To any adult person of the class of those nearest of kin to the deceased, for the benefit of all members of such class.

In making such disbursements the said corporation shall be responsible and liable only for the exercise of good faith and reasonable care and shall have no further responsibility or liability with respect to such moneys or their application or disbursement. (1921, c. 87, s. 17; C.S., s. 5259(y); 1959, c. 1174; 1979, 2nd Sess., c. 1302, ss. 1, 2.)

CASE NOTES

I. General Consideration.
II. Breach of Marketing Contract.

I. GENERAL CONSIDERATION.

Right of Member to Place Lien on Crop. — A member of a cooperative association may place a mortgage or crop lien on his crop for the current year for the purpose of enabling him to successfully cultivate and produce the same, where the contract between the parties clearly contemplates such a mortgage, and good policy requires that such a privilege should never be withdrawn. Tobacco Growers Coop. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924).

Rights of Lienholder Who Furnishes Supplies. — The mortgagee or lienholder for supplies furnished to an association member to produce his crop has a right to demand and receive of the member, or to enforce delivery by any appropriate procedure, a sufficient amount of the crop or other property included in his mortgage, to satisfy his claims to the extent that the same constitute a valid lien superior to the rights and interests of the association under its contract. If such a lien and the amount and extent of it cannot be agreed upon and adjusted it would seem that the lien claimant should become or be made a party of record, that authoritative and final disposition should be made of the matter. Tobacco Growers Coop. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924).

Liability of Member for Act of Nonmember Tenant. — The member of a cooperative association is not liable for a penalty on account of the failure of his tenant to market tobacco through the association until and unless he receives the tenant's crop as payment for rent, etc. He is then liable for as much as is received. Tobacco Growers Coop. Ass'n v. Bissett, 187 N.C. 180, 121 S.E. 446 (1924).

Validity of Tobacco Growers' Contract. — The provisions of the standard contract made by the Tobacco Growers Cooperative Association, formed under the provisions of this Subchapter, whereby a member agreed to sell and deliver to it all of the tobacco owned and produced by or for him or acquired by him as landlord or lessor during certain years, were valid and enforceable. Tobacco Growers Coop. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923); Tobacco Growers Coop. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924); Tobacco Growers Coop. Ass'n v. Battle, 187 N.C. 260, 121 S.E. 629 (1924).

Validity Of Marketing Contract. — Trial court properly granted summary judgment to a tobacco cooperative stabilization corporation in a restraint of trade claim brought by various tobacco warehouses because the corporation's creation of market centers subsidizing warehouse operations fell within an exemption of North Carolina's antitrust laws under G.S. 54-141 and the resultant marketing contracts were permissible under G.S. 54-152(a). Bailey v. Flue-Cured Tobacco Coop. Stabilization Corp., 158 N.C. App. 449, 581 S.E.2d 811, 2003 N.C. App. LEXIS 1179 (2003).

Avoiding Contract for Fraud. — In order to render void for fraud in its procurement a tobacco marketing contract made in conformity with the provisions of this section, it is required that the member seeking to do so must introduce evidence of the fraud he relies on, as well as allege it. Tobacco Growers Coop. Ass'n v. Chilton, 190 N.C. 602, 130 S.E. 312 (1925); Simpson v. Tobacco Growers Coop. Ass'n, 190 N.C. 603, 130 S.E. 507 (1925).

In order to avoid a written contract, made under this section, for fraudulent misrepresentations of the association's agent, it must not only be shown that the statements complained of were false, but that the plaintiff was at the time ignorant of their falsity and relied thereon to his damage, and he must show facts sufficient to make out a case of fraud with all the material elements required in such instances. Simpson v. Tobacco Growers Coop. Ass'n, 190 N.C. 603, 130 S.E. 507 (1925).

Where an agent of a cooperative association falsely represents to a prospective member certain material advantages that induce him to sign the membership contract, without affording him, an illiterate man, an opportunity to become informed as to its contents, and he, within a reasonable time afterwards, is informed of this misrepresentation, and requests the agent to take his name off the books as a member and cancel the contract, the law will avoid the contract for the fraud. The cases in which the representations were only promissory in character, not amounting to a factual representation, do not apply. Dunbar v. Tobacco Growers Coop. Ass'n, 190 N.C. 608, 130 S.E. 505 (1925).

II. BREACH OF MARKETING CONTRACT.

Remedies for Breach of Contract by Member. — Upon the breach by a member of a cooperative association of a contract for the sole handling of his crop by the association, the recovery of liquidated damages and costs, and equitable relief by injunction to prevent the further breach of the contract, and a decree of specific performance, can be had, and also pending the adjudication of such actions, a temporary restraining order may be had against the member upon the filing of a verified complaint showing the breach of the contract, with the filing of sufficient bond. Tobacco Growers Coop. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923).

Liquidated Damages. — The fact that a cooperative marketing contract provides for liquidated damages does not give the association an adequate remedy at law against the members selling their tobacco otherwise than as provided in the marketing contract. Tobacco Growers Coop. Ass'n v. Pollock, 187 N.C. 409, 121 S.E. 763 (1924).

Specific Performance. — Injuries from the breach of marketing contract by a member with the Tobacco Growers Cooperative Association, formed under the provisions of this Subchapter, cannot be adequately compensated for in damages, and the equitable remedy of specific performance as allowed by this section will be upheld by the courts. Tobacco Growers Coop. Ass'n v. Battle, 187 N.C. 260, 121 S.E. 629 (1924).

Injunctive Relief. — Upon an alleged breach of a cooperative marketing contract on the part of a member, the equitable remedy by injunction is available to the association. Tobacco Growers Coop. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924).

Continuation of Injunction to Final Hearing. — The right given to injunctive relief against a member breaching his contract, upon filing the bond and verified complaint showing such breach, or threatened breach, relates only to the initial process and does not, and is not, intended to withdraw from the courts their constitutional right to pass upon the question of continuing the injunction to the final hearing upon the issues, under approved principles of law and equity. Tobacco Growers Coop. Ass'n v. Bland, 187 N.C. 356, 121 S.E. 636 (1924).

Where defendant member has admitted breaking his contract with the association, and avows that he expects to continue doing so, a temporary injunction should be continued until the final hearing. Tobacco Growers Coop. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924).

Where the defendant resists injunctive relief upon the ground that he had not become a member, and the plaintiff's evidence tends strongly to show to the contrary, the injunction should be continued to the hearing upon the principle that the plaintiff has established an apparent right to the relief sought, and that the writ is reasonably necessary to protect the property pending the inquiry. Tobacco Growers Coop. Ass'n v. Battle, 187 N.C. 260, 121 S.E. 629 (1924); Tobacco Growers Coop. Ass'n v. Spikes, 187 N.C. 367, 121 S.E. 636 (1924).

Defenses to Continuance of Restraining Order. — The general denial by a cooperative marketing association of owing defendant member anything under the contract, without detailed statement as to the account between them from information available to it, was insufficient against the defense to continuation of a restraining order that the defendant was forced to sell a small portion of crop to maintain his livelihood because of a failure of the association to pay for bulk of crop under contract. Tobacco Growers Coop. Ass'n v. Bland, 187 N.C. 356, 121 S.E. 636 (1924).

A preliminary order restraining a member of a cooperative association from disposing of the tobacco embraced in his contract in breach thereof will not be dissolved by reason of a defense set up by the member that the tobacco was the subject of a lien for supplies necessary for its cultivation. The restraining order should be continued to the hearing, safeguarding the rights of the mortgagee to be asserted by his appropriate action. Tobacco Growers Coop. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924).

The temporary restraining order obtained under the provisions of this section will not be continued if the breach of the contract complained of was caused by the association's own default, or if the continuance of the temporary restraining order will work greater injury than its dissolution by the court. Tobacco Growers Coop. Ass'n v. Bland, 187 N.C. 356, 121 S.E. 636 (1924).

Effect of Lien on Right to Injunction. — The fact that the member of a cooperative association gave a lien on his crop for advancements does not invade the rights of the association under the marketing contract so as to require that an injunction against selling the crops should be continued until the final hearing. Tobacco Growers Coop. Ass'n v. Harvey & Son Co., 189 N.C. 494, 127 S.E. 545 (1925).

Justification for Breach Shown by Parol. — Where a member of a cooperative marketing association resists the performance of marketing his crop with the association under the usual and written contract, he may show by parol that he had never been a member thereof or obligated by the contract sued on, for the failure of the association to obtain a certain membership within the territory. Tobacco Growers Coop. Ass'n v. Moss, 187 N.C. 421, 121 S.E. 738 (1924).

Lack of Justification for Breach by Member. — A penalty in a small sum erroneously attempted to be imposed on a member by a marketing association, under its contract for the failure to market the crop of his nonmember tenant, is not of sufficient proportionate importance to justify an entire severance of the contract relation by the member thereof. Tobacco Growers Coop. Ass'n v. Bland, 187 N.C. 356, 121 S.E. 636 (1924).

Evasive Answer of Member Respecting Breach. — In proceedings for injunctive relief by a cooperative marketing association against a member wherein it definitely alleges that the defendant has breached his contract and declares his purpose to dispose of his tobacco in breach thereof, the defendant's answer not admitting the allegations, but demanding strict proof, is too evasive or illusive to be a denial of plaintiff's allegation, or received as sufficient evidence upon the question of injunctive relief. Tobacco Growers Coop. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924).

§ 54-153. Purchasing business of other associations, persons, firms, or corporations; payment; stock issued.

Whenever an association organized hereunder with preferred capital stock shall purchase the stock or any property, or any interest in any property of any person, firm, or corporation or association, it may by agreement with the other party or parties to the transaction discharge the obligations so incurred, wholly or in part, by exchanging for the acquired interest shares of its preferred capital stock to an amount which at par value would equal a fair market value of the stock or interest so purchased, as determined by the board of directors. In that case the transfer to the association of the stock or interest purchased shall be equivalent to payment in cash for shares of stock issued. (1921, c. 87, s. 18; C.S., s. 5259(z).)

§ 54-154. Annual reports.

Each association formed under this Subchapter shall prepare and make out an annual report on forms furnished by the Division of Markets, containing the name of the association, its principal place of business, and a general statement of its business operations during the fiscal year, showing the amount of capital stock paid up, and the number of stockholders of a stock association or the number of members and the amount of membership fees received, if a nonstock association; the total expenses of the operations; the amount of its indebtedness, or liability, and its balance sheets. (1921, c. 87, s. 19; C.S., s. 5259(aa).)

§ 54-155. Interest in other corporations or associations.

An association may organize, form, operate, own, control, have interest in, own stock of, or be a member of any other corporation or corporations, with or without capital stock, and engaged in preserving, drying, processing, canning, packing, storing, handling, shipping, utilizing, manufacturing, marketing, or selling of the agricultural products handled by the association, or the byproducts thereof. If such corporations are warehousing corporations, they may issue legal warehouse receipts to the association, or to any other person, and such legal warehouse receipts shall be considered as adequate collateral to the extent of the current value of the commodity represented thereby. In case such warehouse is licensed or licensed and bonded under the laws of this State or the United States, its warehouse receipt shall not be challenged or discriminated against because of ownership or control, wholly or in part, by the association. (1921, c. 87, s. 22; C.S., s. 5259(bb).)

§ 54-156. Contracts and agreements with other associations.

Any association may, upon resolution adopted by its board of directors, enter into all necessary and proper contracts and agreements, and make all necessary and proper stipulations, agreements and contracts and arrangements with any other cooperative corporation, association, or associations, formed in this or in any other state, for the cooperative and more economical carrying on of its business, or any part or parts thereof. Any two or more associations may, by agreement between them, unite in employing and using or may separately employ and use the same methods, means, and agencies for carrying on and conducting their respective businesses. (1921, c. 87, s. 23; C.S., s. 5259(cc).)

§ 54-157. Breach of marketing contract of cooperative association; spreading false reports about the finances or management thereof; misdemeanor.

Any person or persons, or any corporation whose officers or employees knowingly induces or attempts to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spreads false reports about the finances or management thereof shall be guilty of a Class 2 misdemeanor and subject only to a fine of not less than one hundred dollars ($100.00), and not more than one thousand dollars ($1,000), for such offense and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred dollars ($500.00) for each such offense: Provided, that this section shall not apply to a bona fide creditor of any member or stockholder of such association, or the agents or attorney of any such bona fide creditor, endeavoring to make collection of the indebtedness, or to any communication, written or oral, between a business company or concern and persons with whom it has an existing contractual relationship which communication relates to the performance of that contractual relationship and duties and responsibilities arising therefrom. (1921, c. 87, s. 25; C.S., s. 5259(dd); 1963, c. 1168, s. 14; 1993, c. 539, s. 430; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Failure of Milk Processor to Deduct Dues from Payments to Producers. — Where a milk processor, purchasing directly from producers, deducts dues from its payments for milk so purchased and remits such dues to the producers' marketing association, but discontinues making such deductions pursuant to written instructions of the producers and thereafter pays the producers in full for the milk purchased, the processor may not be held to have violated this section. Carolina Milk Producers Coop. v. Melville Dairy, Inc., 225 N.C. 1, 120 S.E.2d 548 (1961).

§ 54-158. Cooperative associations may form subsidiaries.

Nothing in this Subchapter shall prevent an association organizing, forming, operating, owning, controlling, having an interest in, owning stock of, or being a member of any other corporation (hereinafter referred to as a subsidiary corporation) from including or having included in the charter or bylaws of such subsidiary corporation provisions for the control or management of said subsidiary corporation by such association to such extent as shall by votes of the board of directors of such association, and the majority of the stockholders of such subsidiary corporation, be declared to be for the best interests of said association and said subsidiary corporation respectively. Such provisions may be so included in any such charter or bylaws and may by way of illustration, but not of limitation, include the following:

(1) Representation of said association on the board of directors or other governing body of said subsidiary corporation, upon such terms as may be deemed advisable.

(2) Ownership by an association of an interest or interests in a subsidiary corporation represented by stock of any class thereof, or otherwise, to such extent and upon such terms, and with such voting power, as may be deemed advisable.

(3) Participation by said association in the profits of such subsidiary corporation to such extent and upon such terms as shall be deemed advisable. (1933, c. 350, s. 1.)

CASE NOTES

Formation of Subsidiary Companies Prior to Enactment of Section. — That an organization of tobacco growers had formed subsidiary companies to cure tobacco, redry it, etc., was unobjectionable even prior to the enactment of this section. Tobacco Growers Coop. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923), decided prior to enactment of this section.

ARTICLE 22.

Merger, Consolidation and Other Fundamental Changes.

§ 54-159. Procedure for merger.

(a) Any two or more domestic associations organized under this Subchapter, either with or without capital stock, may merge into any one of such associations pursuant to a plan of merger approved in the manner provided in this Article.

(b) The board of directors of each association shall, by resolution adopted by each such board, approve a plan of merger setting forth:

(1) The names of the association proposing to merge, and the name of the association into which they propose to merge, which is hereinafter designated as the surviving association.

(2) The name which the surviving association is to have, which name may be that of any of the associations involved in the merger or any other available name, subject, however, to the limitations of G.S. 54-139 and 55A-10.

(3) The terms and conditions of the proposed merger.

(4) A statement of any changes in the charter of the surviving association to be effected by such merger.

(5) Such other provisions not inconsistent with law as are deemed necessary or desirable. (1963, c. 1168, s. 13.)

§ 54-160. Procedure for consolidation.

(a) Any two or more domestic associations organized under this Subchapter, either with or without capital stock, may consolidate into a new association pursuant to a plan of consolidation approved in the manner provided in this Article.

(b) The board of directors of each association shall, by resolution adopted by each such board, approve a plan of consolidation setting forth:

(1) The names of the associations proposing to consolidate, and the name of the new association into which they proposed to consolidate, which is hereinafter designated as the new association. The name of the new association may be that of any of the associations involved in the consolidation or any other available name, subject, however, to the limitations of G.S. 54-139 and 55A-10.
(2) The terms and conditions of the proposed consolidation.
(3) With respect to the new association, all of the appropriate statements required to be set forth in articles of incorporation for associations organized under this Subchapter.
(4) Such other provisions not inconsistent with law as are deemed necessary or desirable. (1963, c. 1168, s. 13.)

§ 54-161. Approval of merger or consolidation; abandonment.

(a) A plan of merger or consolidation shall be adopted in the following manner: The board of directors of each merging or consolidating association shall adopt a resolution approving the proposed plan, and directing that it be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice of the meeting shall be given to each member entitled to vote at such meeting. The notice shall state that the proposed plan of merger or consolidation will be considered and acted upon at the meeting, and a copy or a summary of the plan of merger or plan of consolidation, as the case may be, shall be included in or enclosed with such notice. Such notice shall contain a statement, displayed with reasonable prominence, to the effect that objecting members are entitled, upon compliance with G.S. 54-166, including the 20-day demand requirement, to be paid the fair market value of their stock or other property rights or interest in the association, but failure of the notice to contain such a statement shall not invalidate the merger or consolidation. Each such notice shall be mailed by first-class mail at such a time that not less than 10 full days shall elapse between the date of mailing the notice and the date of the meeting, and shall be mailed to the member at his last address as it appears on the records of the association. The proposed plan shall be adopted upon receiving at least two-thirds of the votes entitled to be cast by members present at each such meeting where a quorum is present.

(b) After such approval, and at any time prior to the filing of the articles of merger or consolidation, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation. (1963, c. 1168, s. 13.)

§ 54-162. Articles of merger or consolidation.

(a) Upon such approval, articles of merger or articles of consolidation shall be executed by each association and filed as provided in G.S. 55A-4, except that a copy thereof certified by the Secretary of State shall also be recorded in the office of the register of deeds of each county wherein the constituent associations have their principal places of business or their registered offices.

(b) The articles of merger or consolidation shall set forth:
(1) The plan of merger or the plan of consolidation; and
(2) A statement setting forth the date of the meeting of the members of each association at which the plan was adopted, that a quorum was present at such meeting, and that such plan received at least two-thirds of the votes entitled to be cast by members present at each such meeting where a quorum was present.

(c) The time when the merger or consolidation is effected is determined by the provisions of G.S. 55A-4. (1963, c. 1168, s. 13; 1967, c. 823, s. 15.)

§ 54-163. Effect of merger or consolidation.

When such merger or consolidation has been effected:

(1) The several associations, parties to the plan of merger or consolidation, shall be a single association which, in the case of a merger, shall be that association designated in the plan of merger as the surviving association, and, in the case of a consolidation, shall be the new association provided for in the plan of consolidation.

(2) The separate existence of all associations which are parties to the plan of merger or consolidation, except the surviving or new association, shall cease.

(3) Such surviving or new association shall have all the rights, privileges, immunities, and powers and shall be subject to all the duties and liabilities of an association organized under this Subchapter.

(4) Such surviving or new association shall thereupon and thereafter, to the extent consistent with its charter as established or changed by the merger or consolidation, possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating associations; and all property, real and personal, and all debts due on any account, and all other choses in action, and all and every other interest, of or belonging to or due to each of the associations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single association without further act or deed; and the title to any real estate, or any interest therein, vested in any of such associations shall not revert or be in any way impaired by reason of such merger or consolidation.

(5) Such surviving or new association shall thenceforth be responsible and liable for all the liabilities, contracts or other obligations, and penalties of each of the associations so merged or consolidated; and any claim existing or action or proceeding, civil or criminal, pending by or against any of such associations may be prosecuted as if such merger or consolidation had not taken place, or such surviving or new association may be substituted in its place; and any judgments rendered against any of the merged or consolidated associations may be enforced against the surviving or new association. Neither the rights of creditors nor any liens upon the property of any merged or consolidated association shall be impaired by such merger or consolidation.

(6) In the case of a merger, the charter of the surviving association shall be deemed to be amended to the extent, if any, that changes in its charter are stated in the plan of merger. In the case of a consolidation, the articles of consolidation shall be deemed to be the articles of incorporation of the new association. (1963, c. 1168, s. 13.)

§ 54-164. Merger or consolidation of domestic and foreign associations.

(a) One or more domestic associations organized under this Subchapter and one or more foreign corporations engaging in any activity such as is described in G.S. 54-132, and which is a nonprofit cooperative in the sense that the term "nonprofit" is used in G.S. 54-130, may be merged or consolidated into an association of this State or an association or corporation of another state if such merger or consolidation is permitted by the laws of the state under which each such foreign association or corporation is organized.

(b) Each domestic association shall comply with the provisions of this Article with respect to the merger or consolidation, as the case may be, of domestic associations, and each foreign association or corporation shall comply with the applicable provisions of the laws of the state under which it is organized.

(c) If the surviving or new association or corporation, as the case may be, is an association or corporation of any state other than this State, it shall comply with the provisions of this Subchapter with respect to foreign corporations if it is to transact business in this State; and if after the merger or consolidation it transacts no business in this State, the courts of this State shall have jurisdiction in actions to enforce any obligation of any constituent association of this State and process therein may be served as provided in G.S. 55-145.

(d) The effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic associations, if the surviving or new corporation is to be an association of this State. If the surviving or new association or corporation is to be an association or corporation of any state other than this State, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic associations except insofar as the laws of such other state provide otherwise.

(e) If the new or surviving association or corporation is not an association of this State, then notwithstanding anything in the foregoing provisions of this section:

(1) The rights of any member of any constituent association that is an association of this State to receive notice of objectors' rights, to file his objection, upon such objection to demand and receive payment of the fair market value of his stock or other property rights or interests in the association, or to avail himself of any equitable relief to which he would be entitled if the surviving or new association or corporation were an association of this State, shall not be impaired; and

(2) The courts of this State shall have jurisdiction in actions to enforce the aforesaid rights against the surviving or new association or corporation regardless of whether or not said association or corporation is otherwise subject to the jurisdiction of the courts of this State and in any such action service of process may be made in the manner provided in G.S. 55-145 that would be applicable if said association or corporation were transacting business in this State. (1963, c. 1168, s. 13.)

§ 54-165. Sale, lease or exchange of assets; mortgage or pledge of assets.

(a) A sale, lease, or exchange of all, or substantially all, the property and assets of an association organized under the provisions of this Subchapter may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares of any corporation for profit, domestic or foreign, as may be authorized in the following manner: The board of directors shall adopt a resolution recommending such sale, lease, or exchange and directing that it be submitted to a vote at a meeting of members, which may be either an annual or a special meeting. Written or printed notice of the meeting shall be given to each member entitled to vote at such meeting. The notice shall state that the proposed sale, lease, or exchange will be considered and acted upon at such meeting, and a statement of the terms of the proposed sale, lease, or exchange, as the case may be, shall be included in or enclosed with such notice. Each such notice shall be mailed by first-class mail at such a time that not less than 10 full days shall elapse between the date of mailing the notice and the date of the meeting, and shall be mailed to the member at his last address as it appears on the records of the association. The proposed sale, lease, or exchange, as the case may be, shall be adopted upon receiving at least two-thirds of the votes entitled to be cast by members present at the meeting, if a quorum is present.

(b) A mortgage or pledge of, or any other security interest in, all or any part or parts of the property of the association may be made by authority of the board of directors of the association without authorization of the members, unless otherwise provided in the charter or bylaws adopted by the members. (1963, c. 1168, s. 13.)

§ 54-166. Rights of objecting members.

(a) Any member of an association effecting a merger or consolidation may give to the association prior to or at the meeting of the members to which the proposal of merger or consolidation is submitted to a vote, written notice that he objects to such proposal. Within 20 days after the date on which the vote was taken, such member may, unless he votes in favor of the proposal, make written demand on the association for payment of the fair market value of his stock or other property rights or interest in the association. Such demand shall state the number and class of shares of stock owned by him or the nature and amount of other property rights or interest owned by him in the association. In addition to any other right he may have in law or equity, a member giving such notice shall be entitled, if and when the merger or consolidation is effected, to be paid by the surviving or new association, the fair market value of such stock, or other property rights or interests, as of the day prior to the date on which the vote was taken, subject only to the surrender by him of the certificate or certificates or other evidence of ownership of such stock or other property rights or interests.

(b) If within 30 days after the date upon which the objecting member becomes entitled to payment for such stock or other property rights or interest, the fair market value of such stock or other property rights or interests is agreed upon between the member and the surviving or new association, as the case may be, payment therefor shall be made within 60 days after the agreement, upon surrender of the certificate or other evidence of such property rights or interests, whereupon the member shall cease to have any interest in such stock or other property rights or interests in the association.

(c) If within the 30-day period mentioned in subsection (b) of this section the member and the association do not agree as to the fair market value of the stock or other property rights or interests, the member may, within 60 days after the expiration of the 30-day period, file a petition in the superior court of the county in which the association has its registered office or principal place of business asking for the appointment by the clerk of the superior court of that county of three qualified and disinterested appraisers to appraise the fair market value of the stock or other property rights or interests. A summons as in other cases of special proceedings, together with a copy of the petition, shall be served on the association at least 10 days prior to the hearing of the petition by the court. The award of the appraisers, or a majority of them, if no exceptions are filed thereto within 10 days after the award is filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive. The member, upon depositing with the court the proper stock certificates or other evidence of property rights or interests, shall be entitled to judgment against the association for the appraised value thereof as of the day prior to the date on which the vote was taken, together with interest thereon to the date of the confirmation. If either party files exceptions to the award within 10 days after the award is filed in court, the case shall be transferred to the civil issue docket of the superior court for trial during term and shall be there tried in the same manner, as near as may be practicable, as is provided in Chapter 40A of the General Statutes for the trial of cases under the eminent domain law of this State, and with the same right of appeal to the appellate division as is permitted in that Chapter. The court shall assess the cost of the proceedings as it shall deem equitable. Upon payment of the judgment, the owner of the stock or other property rights or interests shall cease to have any interest in the association and the association shall be entitled to have the stock certificates or other evidence of the property rights or interests surrendered to the association by the clerk of court. Unless the member files a petition within the time herein prescribed, the member and all persons claiming under the member shall have no right of payment hereunder, but in that event nothing herein shall impair the member's status as a member.

(d) If in the notices sent to members in connection with the meeting to vote upon a proposed merger or consolidation no reference is made as required by this Article to the provisions of this section, any member entitled to but who did not avail himself of the provisions of this section, unless he voted for the proposal, is entitled, if he so demands in writing within one year after the effective date of the merger or consolidation, to recover from the surviving or new association, as the case may be, any damage which he suffered from failure of the association of which he was a member to make the aforesaid reference.

(e) The liability to pay for shares or to pay damages imposed by this section on an association extends to the successor association which acquires the assets of the predecessor, whether by merger or consolidation.

(f) Shares of stock acquired by an association pursuant to payment of the agreed fair market value thereof or to payment of the judgment entered therefor as in this section provided, may be held and disposed of by the association as in the case of other treasury shares.

(g) The provisions of this section shall not apply to a merger if on the date of the filing of the articles of merger the surviving association is the owner of all the outstanding shares of the other association, domestic or foreign, participating in the merger and if such merger makes no changes in the relative rights of the members of the surviving association.

(h) Notwithstanding any of the foregoing provisions of this section, no member of an association effecting a merger or consolidation, who objects thereto and makes written demand for payment of the fair market value of his stock or other property rights or interests in the association, as hereinbefore provided in this section, shall be entitled to such payment at any time prior to the time that he would otherwise be entitled to payment pursuant to valid provisions of such stock, or valid provisions of the charter or the bylaws of the association, in effect on the date of the vote for such merger or consolidation. However, in any case where the owner of such stock or other property rights or interests in the association is not entitled, because of valid provisions of his stock, or because of valid provisions of the charter or bylaws of the association, to payment at the time hereinbefore provided in this section, the fair market value of such stock or other property rights or interests in the association, as of the day prior to the date on which the vote was taken, may be determined in any manner hereinbefore provided in this section, and the amount so determined, without interest, shall be an obligation of the surviving or new association, as the case may be, and shall be due and payable at the time that the owner thereof would be entitled to payment pursuant to valid provisions of such stock, or valid provisions of the charter or the bylaws of the association. (1963, c. 1168, s. 13; 1973, c. 108, s. 19; 2001-487, s. 38(c).)

CASE NOTES

Cited in Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

Chapter 54A.

Capital Stock Savings and Loan Associations.

§§ 54A-1 through 54A-27: Repealed by Session Laws 1981, c. 282, s. 2.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

Chapter 54A.

Capital Stock Savings and Loan Associations.

§§ 54A-1 through 54A-27: Repealed by Session Laws 1981, c. 282, s. 2.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

Chapter 54B.

Savings and Loan Associations.

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Article 1.

General Provisions.

§ 54B-1. Title.

This Chapter shall be known and may be cited as "Savings and Loan Associations." (1981, c. 282, s. 3.)

Editor's Note. — Session Laws 2001-193, s. 15, provides "All (i) statutory authority, powers, duties, and functions, including rule making, budgeting, and purchasing, (ii) records, (iii) personnel, personnel positions, and salaries, (iv) property, and (v) unexpended balances of appropriations, allocations, reserves, support costs, and other funds of the Savings Institutions Division of the Department of Commerce are transferred to and vested in the Office of Commissioner of Banks authorized by Article 8 of Chapter 53 of the General Statutes. Though transferred to the Office of Commissioner of Banks pursuant to this section, the Savings Institutions Division shall continue to function under that name. All statutory authority, powers, duties, and functions of the Administrator of the Savings Institutions Division are transferred to and vested in the Commissioner of Banks. This transfer has all the elements of a Type I transfer, as defined in G.S. 143A-6."

Session Laws 2004-171, s. 17, provides: "The Legislative Research Commission shall undertake a comprehensive study of those laws, including Chapters 53, 54B, and 54C of the General Statutes, which affect the establishment and operation of banks in North Carolina and shall make recommendations to the 2005 General Assembly, prior to the convening of the 2006 Regular Session as to which laws (i) are obsolete, unnecessary, or duplicative, (ii) are unnecessarily inconsistent in the treatment of banks, savings and loan associations, and savings banks, and (iii) unnecessarily restrict, impede, or prohibit activities of banks, savings and loan associations, and savings banks or the ability of the Commissioner of Banks to regulate banks and savings institutions in an effective, efficient, and equitable manner.

"In preparing its recommendations, the Commission shall actively solicit and consider information received from representatives of banks, savings and loan associations, savings banks, the State Banking Commission, the Commissioner of Banks and the Commissioner's staff, other interested parties, and the general public."

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

§ 54B-2. Purpose.

The purpose of this Chapter is:

(1) To provide for the safe and sound conduct of the business of savings and loan associations, the conservation of their assets and the maintenance of public confidence in savings and loan associations;

(2) To provide for the protection of the interests of customers and members, and the public interest in the soundness of the savings and loan industry;

(3) To provide the opportunity for savings and loan associations to remain competitive with each other and with other savings and financial institutions existing under other laws of this and other states and the United States;

(4) To provide the opportunity for savings and loan associations to serve effectively the convenience and advantage of customers and members, and to improve and expand their services and facilities for such purposes;

(5) To provide the opportunity for the management of savings and loan associations to exercise prudent business judgment in conducting the affairs of savings and loan associations to the extent compatible with the purposes recited in this section; and

(6) To provide adequate rulemaking power and administrative discretion so that the regulation and supervision of savings and loan associa-

tions are readily responsive to changes in economic conditions and in savings and loan practices. (1981, c. 282, s. 3.)

§ 54B-3. Applicability of Chapter.

The provisions of this Chapter, unless the context otherwise specifies, shall apply to all State associations. (1981, c. 282, s. 3.)

§ 54B-4. Definitions and application of terms.

(a) The terms "building and loan association" and "savings and loan association" when used in the General Statutes, shall mean an association and shall be interchangeable. Use of either term shall be construed to include the other unless a different intention is expressly provided.

(b) As used in this Chapter, unless the context otherwise requires, the term:

(1) Repealed by Session Laws 2001-193, s. 3, effective July 1, 2001.

(2) "Aggregate withdrawal value of withdrawable accounts" means the total value of all withdrawable accounts held by an association.

(3) "Application" means the completed package of the application to organize a State association, establish a branch office or conversion of structure of a savings and loan association which the Commissioner of Banks considers in making his recommendation.

(3a) "Affiliate" means a person or corporation that controls, is controlled by, or is under common control with an association.

(4) "Associate" when used to indicate a relationship with any person, means (i) any corporation or organization (other than the applicant or a majority-owned subsidiary of the applicant) of which such person is an officer or partner or is, directly or indirectly, the beneficial owner of ten percent (10%) or more of any class of equity securities, (ii) any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity, and (iii) any relative or spouse who lives in the same house as that person, or any relative of that person's spouse who lives in the same house as that person, or who is a director or officer of the applicant or any of its parents or subsidiaries.

(5) "Association" includes a State association or a federal association unless limited by use of the words "State" or "federal."

(6) "Borrowers" means those who borrow funds from or in any other way become obligated on a loan to an association.

(7) "Branch office" means an office of an association other than its principal office which renders savings and loan services.

(8) "Capital stock" means securities which represent ownership of a stock association.

(9) "Certificate of approval" means a document signed by the Commissioner of Banks informing the North Carolina Secretary of State that the Commission has approved the certificate of incorporation of a proposed association.

(10) Repealed by Session Laws 1985, c. 659, s. 1.

(11) "Certificate of incorporation or charter" means the document which represents the corporate existence of a State association.

(12) "Certified copy" means a copy of an original document or paper which has been signed by the person or persons who certify such document to be an exact copy of the original.

(13) "This Chapter" means Chapter 54B of the North Carolina General Statutes.

(14) "Commission" means the State Banking Commission of the Department of Commerce.

(14a) "Commissioner" means the Commissioner of Banks authorized pursuant to G.S. 53-92.

(15) "Conflict of interest" means a matter before the board of directors in which one or more of the directors, officers or employees has a direct or indirect financial interest in its outcome.

(16) "Conformed copies" means photocopies or carbon copies or other mechanical reproductions of an original document or paper.

(16a) "Control" means the power, directly or indirectly, to direct the management or policies of an association or to vote twenty-five percent (25%) or more of any class of voting securities for an association.

(17) "Court of competent jurisdiction" means a court in North Carolina which is qualified to hear the case at hand.

(18) "Disinterested directors" means those directors who have absolutely no direct or indirect financial interest in the matter before them.

(19) "Dividends on stock" means the earnings of an association paid out to holders of capital stock in a stock association.

(20) "Dividends on withdrawable accounts" means the consideration paid by an association to a holder of a withdrawable account for the use of his money.

(21) "Division" means the Savings Institutions Division of the North Carolina Department of Commerce.

(22) "Entrance fee per withdrawable account" means the amount to be paid by each person, firm or corporation when he or it pledges to a proposed mutual association to deposit funds in a withdrawable account.

(23) "Examination and investigation" means a supervisory inspection of an association or proposed association which may include inspection of every relevant piece of information including subsidiary or affiliated businesses.

(24) "Federal association" means a corporation or association organized and operated under the provisions of federal law and regulation to conduct a savings and loan business.

(25) "Financial institution" means a person, firm or corporation engaged in the business of receiving, soliciting or accepting money or its equivalent on deposit and/or lending money or its equivalent.

(26) Repealed by Session Laws 1985, c. 659, s. 1.

(27) "General reserve" means appropriated or restricted funds in the form of cash or investments to be used solely for the purpose of absorbing losses.

(28) "Guaranty association" means a mutual deposit guaranty association which is a corporation organized under this Chapter or its predecessor and operated under the provisions of Article 12 of this Chapter.

(29) "Immediate family" means one's spouse, father, mother, children, brothers, sisters, and grandchildren; and the father, mother, brothers, and sisters of one's spouse; and the spouse of one's child, brother or sister.

(30) "Initial pledges for withdrawable accounts" means those pledges of funds by persons who promise to a proposed mutual association to deposit such amount if and when such proposed association becomes established.

(31) "Insurance of withdrawable accounts" means insurance on an association's withdrawable accounts when the beneficiary is the holder of such insured account.

(32) "Liquidity fund" means that portion of the assets of an association which is required to be held in readily marketable form.

(32a) "Interim association" means an association formed to facilitate the acquisition of one hundred percent (100%) of the voting shares of an existing stock association by a newly-formed association or an existing savings and loan holding company or to facilitate any other transaction the Commissioner of Banks may approve.

(33) "Members" means withdrawable account holders and borrowers in a State mutual association.

(34) "Minimum amount of consideration" means the amount of money a stock association shall be required to have received on the sale of its stock, before it shall commence business.

(35) "Minimum amount on deposit in withdrawable accounts" means the amount of money which a mutual association must have on hand prior to its commencement of business.

(36) "Mutual association" means all mutual savings and loan associations owned by members of the association, and organized under the provisions of this Chapter or its predecessor for the primary purpose of promoting thrift and home financing.

(37) "Net withdrawal value of withdrawable accounts" means the aggregate of the withdrawal value of an association's withdrawable accounts less the amount of any pledged withdrawable account which serves as security for a loan.

(38) "Net worth" means an association's total assets less total liabilities.

(39) "Original incorporators" means the organizers of a State association responsible for the business of a proposed association from the filing of the application to the Commission's final decision on such application.

(40) "Plan of conversion" means a detailed outline of the procedure of the conversion of an association from one to another regulatory authority or from one to another form of ownership.

(41) "Principal office" means the office which houses the headquarters of an association.

(42) "Proposed association" means an entity in organizational procedures prior to the Commission's final decision on its charter application.

(43) "Registered agent" means the person named in the certificate of incorporation upon whom service of legal process shall be deemed binding upon the association.

(44) "Rules and regulations" means those regulatory procedures and guidelines issued by the Commissioner of Banks and approved by the Commission.

(44a) Repealed by Session Laws 1991, c. 680, s. 2.

(45) "Service corporation" means a corporation operating under the provision of Article 8 of this Chapter which engages in activities determined by the Commissioner of Banks by rules and regulations to be incidental to the conduct of a savings and loan business as provided in this Chapter or activities which further or facilitate the corporate purposes of an association, or which furnishes services to an association or subsidiaries of an association, the voting stock of which is owned directly or indirectly by one or more associations.

(46) "Specific reserve account" means an account held by an association as a loss reserve for coverage on specific loans and investments.

(47) "This State" means the State of North Carolina.

(48) "State association" means a corporation or association organized under this Chapter or its predecessor and operated under the provisions of this Chapter to conduct the savings and loan business; or a corporation organized under the provisions of the predecessors to this Chapter and operated under the provisions of this Chapter; or a

corporation organized under the provisions of federal law and so converted as to be operated under the provisions of this Chapter.

(49) "Stock association" means any corporation or company owned by holders of capital stock and organized under the provisions of this Chapter for the primary purpose of promoting thrift and home financing.

(50) "Subscriptions" means the promise to purchase capital stock in a stock association and payment of a portion of the selling price.

(51) "Total assets" means the aggregate amount of assets of any and every kind held by an association.

(52) "Voluntary dissolution" means the dissolution and liquidation of an association initiated by its ownership.

(53) "Withdrawable accounts" means accounts in which a customer or member places funds with an association which may be withdrawn by the account holder.

(54) Repealed by Session Laws 1989, c. 76, s. 1. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 1; 1983, c. 144, ss. 1, 2; 1985, c. 659, ss. 1, 9(a); c. 677, s. 1; 1989, c. 76, s. 1; c. 751, s. 7(3); 1991, c. 680, s. 2; 1991 (Reg. Sess., 1992), c. 829, s. 1; c. 959, ss. 5, 5.1; 2001-193, ss. 3, 4, 17.)

Cross References. — As to provisions for conversion of savings association to a bank, see G.S. 53-17.2.

Editor's Note. — Session Laws 1985, c. 677, which amended this section, in s. 7 provided: "The provisions of this act shall not apply to any institution chartered as a savings bank prior to the effective date of this act and any such institution shall continue to be regulated and supervised in accordance with the laws of the State of North Carolina in effect prior to ratification of this act." The act was ratified July 10, 1985.

CASE NOTES

Cited in Mutual Community Savs. Bank v. Boyd, 125 N.C. App. 118, 479 S.E.2d 491 (1996).

ARTICLE 2.

Incorporation and Organization.

§ 54B-5. Severability.

If any section or subsection of this Chapter, or the application thereof to any person is held invalid, the remaining sections or subsections of this Chapter, and the application of such section or subsection to any other person, shall not be invalidated or affected thereby. (1981, c. 282, s. 3.)

§ 54B-6. Hearings.

Any hearing required to be held by this Chapter shall be conducted in accordance with the applicable provisions of Article 3 of Chapter 150B of the General Statutes. (1981, c. 282, s. 3; 1987, c. 827, s. 1.)

§ 54B-7. Application of Chapter on business corporations.

All the provisions of law relating to private corporations, and particularly those enumerated in Chapter 55, of the General Statutes, entitled "North Carolina Business Corporation Act," which are not inconsistent with this

Chapter, or with the proper business of savings and loan associations shall be applicable to all State associations. (1981, c. 282, s. 3; 1989 (Reg. Sess., 1990), c. 1024, s. 3.)

§ 54B-8. Scope and prohibitions; existing charters; injunctions.

(a) Nothing in this Chapter shall be construed to invalidate any charter that was valid prior to the enactment of this Chapter. All such associations shall continue operation in full force, but such associations shall be operated in accordance with the provisions of this Chapter.

(b) Repealed by Session Laws 1985, c. 659, s. 2.

(c) No person or group of persons, nor any corporation, company, or association except one incorporated and licensed in accordance with the provisions of this Chapter to operate a State association, shall operate as a State association. Unless so authorized as a State or federal association and actually engaged in transacting a savings and loan business, no person or group of persons, nor any corporation, company, or association domiciled and doing business in this State shall:

(1) Use in its name the terms "building and loan association" or "savings and loan association" or words of similar import or connotation that lead the public reasonably to believe that the business so conducted is that of a savings and loan association; or

(2) Use any sign, or circulate or use any letterhead, billhead, circular or paper whatsoever, or advertise or communicate in any manner that would lead the public reasonably to believe that it is conducting the business of a savings and loan association.

(d) Upon application by the Commissioner of Banks or by any savings and loan association, a court of competent jurisdiction may issue an injunction to restrain any person or entity from violating or from continuing to violate any of the foregoing provisions of subsection (c). (1981, c. 282, s. 3; 1985, c. 659, s. 2; 1987, c. 237, s. 1; 2001-193, s. 16.)

§ 54B-9. Application to organize a savings and loan association.

(a) It shall be lawful for any five or more natural persons (hereinafter referred to as the "incorporators"), who are domiciled in this State, to organize and establish a savings and loan association in order to promote thrift and home financing, subject to approval as hereinafter provided in this Chapter. The incorporators shall file with the Commissioner of Banks a preliminary application to organize a State association, in the form to be prescribed by the Commissioner of Banks, together with the proper nonrefundable application fee.

(b) The application to organize a State association shall be received by the Commissioner of Banks not less than 60 days prior to the scheduled consideration of the application by the Commission, and it shall contain:

(1) The original of the certificate of incorporation, which shall be signed by the original incorporators, or a majority of them, but not less than five, and shall be properly acknowledged by a person duly authorized by this State to take proof or acknowledgment of deeds; and two conformed copies;

(2) The names and addresses of the incorporators; and the names and addresses of the initial members of the board of directors;

(3) Statements of the anticipated receipts, expenditures, earnings and financial condition of the association for its first two years of operation, or such longer period as the Commissioner of Banks may require;

(4) A showing satisfactory to the Commission that:
  a. The public convenience and advantage will be served by the establishment of the proposed association;
  b. There is a reasonable demand and necessity in the community which will be served by the establishment of the proposed association;
  c. The proposed association will have a reasonable probability of sustaining profitable and beneficial operations within a reasonable time in the community in which the proposed association intends to locate;
  d. The proposed association, if established, will promote healthy and effective competition in the community in the delivery to the public of savings and loan services;

(5) The proposed bylaws;

(6) Statements, exhibits, maps and other data which may be prescribed or requested by the Commissioner of Banks, which data shall be sufficiently detailed and comprehensive so as to enable the Commissioner of Banks to pass upon the criteria set forth in this Article.

(c) The application shall be signed by the original incorporators or a majority of them but not less than five, and shall be properly acknowledged by a person duly authorized by this State to take proof and acknowledgement of deeds. (1981, c. 282, s. 3; 1989, c. 76, s. 2; 2001-193, s. 16.)

§ 54B-10. Certificate of incorporation.

(a) The certificate of incorporation of a proposed mutual savings and loan association shall set forth:

(1) The name of the association, which must not so closely resemble the name of an existing association doing business under the laws of this State as to be likely to mislead the public;

(2) The county and city or town where its principal office is to be located in this State; and the name of its registered agent and the address of its registered office, including county and city or town, and street and number;

(3) The period of duration, which may be perpetual. When the certificate of incorporation fails to state the period of duration, it shall be considered perpetual;

(4) The purposes for which the association is organized, which shall be limited to purposes permitted under the laws of this State for savings and loan associations;

(5) The amount of the entrance fee per withdrawable account based upon the amount pledged;

(6) The minimum amount on deposit in withdrawable accounts before it shall commence business;

(7) Any provision not inconsistent with this Chapter and the proper operation of a savings and loan association, which the incorporators shall set forth in the certificate of incorporation for the regulation of the internal affairs of the association;

(8) The number of directors, which shall not be less than seven, constituting the initial board of directors (which may be classified in the certificate of incorporation), and the name and addresses of each person who is to serve as a director until the first meeting of members, or until his successor be elected and qualified;

(9) The names and addresses of the incorporators.

(b) The certificate of incorporation of a proposed stock savings and loan association shall set forth:

(1) The name of the association, which must not so closely resemble the name of an existing association doing business under the laws of this State as to be likely to mislead the public;

(2) The county and city or town where its principal office is to be located in this State; and the name of its registered agent and the address of its registered office, including county and city or town, and street and number;

(3) The period of duration, which may be perpetual. When the certificate of incorporation fails to state the period of duration, it shall be considered perpetual;

(4) The purposes for which the association is organized, which shall be limited to purposes permitted under the laws of this State for savings and loan associations;

(5) With respect to the shares of stock which the association shall have authority to issue:

a. If the stock is to have a par value, the number of such shares of stock and the par value of each;

b. If the stock is to be without par value, the number of such shares of stock;

c. If the stock is to be of both kinds mentioned in paragraphs a and b of subdivision (5) of this subsection, particulars in accordance with those paragraphs;

d. If the stock is to be divided into classes, or into series within a class of preferred or special shares of stock, the certificate of incorporation shall also set forth a designation of each class, with a designation of each series within a class, and a statement of the preferences, limitations, and relative rights of the stock of each class or series;

(6) The minimum amount of consideration to be received for its shares of stock before it shall commence business;

(7) A statement as to whether stockholders have preemptive rights to acquire additional or treasury shares of the association and any provision limiting or denying said rights;

(8) Any provision not inconsistent with this Chapter or the proper operation of a savings and loan association, which the incorporators shall set forth in the certificate of incorporation for the regulation of the internal affairs of the association;

(9) The number of directors, which shall not be less than seven, constituting the initial board of directors (which may be classified in the certificate of incorporation) and the name and address of each person who is to serve as a director until the first meeting of the stockholders, or until his successor be elected and qualified;

(10) The names and addresses of the incorporators.

(c) The certificate of incorporation, whether for a mutual association or stock association, shall be signed by the original incorporators, or a majority of them, but not less than 10, and shall be acknowledged before an officer duly authorized under the law of this State to take proof or acknowledgement of deeds, and shall be filed along with two conformed copies in the office of the Commissioner of Banks as provided in G.S. 54B-9. (1981, c. 282, s. 3; 1983, c. 144, s. 3; 1989 (Reg. Sess., 1990), c. 806, s. 17; 1991, c. 707, s. 1; 2001-193, s. 16.)

§ 54B-11. Commissioner of Banks to consider application.

Upon receipt of an application to organize and establish a savings and loan association, the Commissioner of Banks shall examine or cause to be examined all the relevant facts connected with the formation of the proposed association. If it appears to the Commissioner of Banks that the proposed association has complied with all the requirements set forth in this Chapter and the rules and regulations for the formation of a savings and loan association and is otherwise lawfully entitled to be organized and established as a savings and loan association, the Commissioner of Banks shall present the application to the Commission for its consideration. (1981, c. 282, s. 3; 1983, c. 144, s. 4; 2001-193, s. 16.)

§ 54B-12. Criteria to be met before the Commissioner of Banks may recommend approval of an application.

(a) The Commissioner of Banks may recommend approval of an application to form a mutual association only when all of the following criteria are met:

(1) The proposed association has an operational expense fund, from which to pay organizational and incorporation expenses, in an amount determined by the Commissioner of Banks to be sufficient for the safe and proper operation of the association, but in no event less than seventy-five thousand dollars ($75,000). The moneys remaining in such expense fund shall be held by the association for at least one year from its date of licensing. No portion of such fund shall be released to an incorporator or director who contributed to it, nor to any other contributor, nor to any other person and no dividends shall be accrued or paid on such funds without the prior approval of the Commissioner of Banks.

(2) The proposed association has pledges for withdrawable accounts in an amount determined by the Commissioner of Banks to be sufficient for the safe and proper operation of the association, but in no event less than four million dollars ($4,000,000).

(3) All entrance fees for withdrawable accounts of the proposed association have been made with legal tender of the United States.

(4) All initial pledges for withdrawable accounts of the proposed association are made by residents of North Carolina.

(5) The name of the proposed association will not mislead the public and is not the same as an existing association or so similar to the name of an existing association as to mislead the public.

(6) The character, general fitness and responsibility of the incorporators and the initial board of directors of the proposed association who shall be residents of North Carolina are such as to command the confidence of the community in which the proposed association intends to locate.

(7) There is a reasonable demand and necessity in the community which will be served by the establishment of the proposed association.

(8) The public convenience and advantage will be served by the establishment of the proposed association.

(9) The proposed association will have a reasonable probability of sustaining profitable and beneficial operations in the community.

(10) The proposed association, if established, will promote healthy and effective competition in the community in the delivery to the public of savings and loan services.

(b) The Commissioner of Banks may recommend approval of an application to form a stock association only when all of the following criteria are met:

(1) The proposed association has prepared a plan to solicit subscriptions for capital stock in an amount determined by the Commissioner of Banks to be sufficient for the safe and proper operation of the

association, but in no event less than three million dollars ($3,000,000).

(2) Repealed by Session Laws 1989, c. 76, s. 3.

(3) All subscriptions for capital stock of the proposed association have been purchased with legal tender of the United States.

(4) to (7) Repealed by Session Laws 1983, c. 144, s. 5.

(8) The name of the proposed association will not mislead the public and is not the same as an existing association or so similar to the name of an existing association as to mislead the public; and contains the wording "corporation," "incorporated," "limited," or "company," an abbreviation of one of such words or other words sufficient to distinguish stock associations from mutual associations.

(9) The character, general fitness, and trustworthiness of the incorporators, initial board of directors, and initial stockholders of the proposed association are such as to command the confidence of the community in which the proposed association intends to locate.

(10) There is a reasonable demand and necessity in the community which will be served by the establishment of the proposed association.

(11) The public convenience and advantage will be served by the establishment of the proposed association.

(12) The proposed association will have a reasonable probability of sustaining profitable and beneficial operations in the community.

(13) The proposed association, if established, will promote healthy and effective competition in the community in the delivery to the public of savings and loan services.

(c) The minimum amount of pledges for withdrawable accounts or subscriptions for capital stock may be adjusted in the discretion of the Commissioner of Banks if he determines that a greater requirement is necessary or that a smaller requirement will provide a sufficient capital base. Such a finding and recommendation to the Commission shall be based upon due consideration of (i) the population of the proposed trade area, (ii) the total deposits of the depository financial institutions operating in the proposed trade area, (iii) the economic conditions of and projections for the proposed trade area, (iv) the business experience and reputation of the proposed management, (v) the business experience and reputation of the proposed incorporators and directors, and (vi) the projected deposit growth, capitalization, and profitability of the proposed association. (1981, c. 282, s. 3; 1983, c. 144, s. 5; 1985, c. 659, s. 3; 1989, c. 76, s. 3; 2001-193, s. 16.)

§ 54B-13. State Banking Commission to review findings and recommendations of Commissioner of Banks.

(a) If the Commissioner of Banks does not have the completed application within 120 days of the filing of the preliminary application, the application shall be returned to the applicants.

(b) When the Commissioner of Banks has completed his examination and investigation of the facts relevant to the establishment of the proposed association, he shall present his findings and recommendations to the Commission at a public hearing. The State Banking Commission must approve or reject an application within 180 days of the submission of the preliminary application.

(c) Not less than 45 days prior to the public hearing held for the consideration of the application to establish a savings and loan association, the incorporators shall cause to be published a notice in a newspaper of general circulation in the area to be served by the proposed association. Such notice shall contain:

(1) A statement that the application has been filed with the Commissioner of Banks;
(2) The name of the community where the principal office of the proposed association intends to locate;
(3) A statement that a public hearing shall be held to consider the application; and
(4) A statement that any interested or affected party may file a written statement either favoring or protesting the creation of the proposed association. Such statement must be filed with the Commissioner of Banks within 30 days of the date of publication.

(d) The Commission, at the public hearing, shall consider the findings and recommendation of the Commissioner of Banks and shall hear such oral testimony as he may wish to give or be called upon to give, and shall also receive information and hear testimony from the incorporators of the proposed association and from any and all other interested or affected parties. The Commission shall hear only testimony and receive only information which is relevant to the consideration of the application and the operation of the proposed association. (1981, c. 282, s. 3; 1989, c. 76, s. 4; 2001-193, ss. 16, 17.)

§ 54B-14. Grounds for approval or denial of application.

(a) After consideration of the findings and recommendation of the Commissioner of Banks and his oral testimony, if any, and the consideration of such other information and evidence, either written or oral, as has come before it at the public hearing, the Commission shall approve or disapprove the application within 30 days after the public hearing. The Commission shall approve the application if it finds that the certificate of incorporation is in compliance with the provisions of G.S. 54B-10, that all the criteria set out in G.S. 54B-12 have been complied with, and that all other applicable provisions of this Chapter, rules and regulations, and the General Statutes have been complied with.

(b) If the Commission approves the application, the Commissioner of Banks shall so notify the Secretary of State with a certificate of approval, accompanied by the original of the certificate of incorporation and the two conformed copies.

(c) Upon receipt of the certificate of approval, the original of the certificate of incorporation, and the two conformed copies, the Secretary of State shall, upon the payment by the newly chartered association of the appropriate organization tax and fees, file the certificate of incorporation in accordance with G.S. 55-1-20. He shall certify under his official seal the two conformed copies of the certificate of incorporation, one of which shall forthwith be forwarded to the incorporators or their representative, for the purpose of recordation in the office of the register of deeds of the county where the principal office of the association shall be located, the other of which shall be forwarded to the office of the Commissioner of Banks for filing. Upon the recordation of the certificate of incorporation by the Secretary of State, the association shall be a body politic and corporate under the name stated in such certificate, and shall be authorized to begin the savings and loan business when duly licensed by the Commissioner of Banks.

(d) The said certificate of incorporation, or a copy thereof, duly certified by the Secretary of State, or by the register of deeds of the county where the association is located, or by the Commissioner of Banks, under their respective seals, shall be evidence in all courts and places, and shall, in all judicial proceedings, be deemed prima facie evidence of the complete organization and incorporation of the association purporting thereby to have been established.

(1981, c. 282, s. 3; 1983, c. 144, s. 9; 1985, c. 369; 1989 (Reg. Sess., 1990), c. 806, s. 18; 2001-193, s. 16.)

§ 54B-15. Final decision.

The Commission shall present the Commissioner of Banks with a final decision which shall be in accordance with the applicable provisions of Chapter 150B of the General Statutes. (1981, c. 282, s. 3; 1987, c. 827, s. 1; 2001-193, s. 16.)

§ 54B-16. Appeal.

The final decision of the Commission may be appealed in accordance with Chapter 150B of the General Statutes. (1981, c. 282, s. 3; 1987, c. 827, s. 1.)

§ 54B-17. Insurance of accounts required.

All State associations must obtain and maintain insurance on all members' and customers' withdrawable accounts. Contracts for such insurance may be made only with an insurance corporation created by an act of Congress. Prior to the licensing of an association, a certificate of incorporation duly recorded under the provisions of G.S. 54B-14(c), shall be deemed to be sufficient certification to the insuring corporation that the association is a legal corporate entity. Such insurance must be obtained within the time limit prescribed in G.S. 54B-18. (1981, c. 282, s. 3; 1987, c. 237, s. 2.)

§ 54B-18. Time allowed to commence business.

A newly chartered association shall commence business within six months after the date upon which its corporate existence shall have begun. An association which shall not commence business within such time, shall forfeit its corporate existence, unless the Commissioner of Banks, before the expiration of such six-month period, shall have approved an extension of the time within which the association may commence business, upon a written request stating the reasons for which such request is made. Upon such forfeiture, the certificate of incorporation shall expire, and any and all action taken in connection with the incorporation and chartering of the association, with the exception of fees paid to the Division, shall become null and void. The Commissioner of Banks shall determine if an association has failed to commence business within six months, without extension as provided in this section, and shall notify the Secretary of State and the register of deeds in the county in which the association is located that the certificate of incorporation has expired. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-19. Licensing.

A newly chartered association shall be entitled to a license to operate upon payment to the Division of the appropriate license fee as prescribed by the Commissioner of Banks, when it shows to the satisfaction of the Commissioner of Banks evidence of capable, efficient and equitable management, and when it passes a final inspection by the Commissioner of Banks or his representatives preceding the opening of its doors for business. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-20. Amendments to certificate of incorporation.

(a) Any addition, alteration or amendment to the certificate of incorporation of any State association shall be made at any annual or special meeting of such association, held in accordance with the provisions of G.S. 54B-106 and G.S. 54B-107, by a majority of votes or shares cast by members or stockholders present in person or by proxy at such meeting. Any such addition, alteration or amendment shall be signed, submitted to the Commissioner of Banks for his approval or rejection, and if approved, then certified by the Commissioner of Banks and recorded as provided in G.S. 54B-14 for certificates of incorporation.

(b) Notwithstanding the provisions of subsection (a) of this section, any State association may change its registered office or its registered agent or both in accordance with the provisions of G.S. 55D-31. A copy of the statement or certificate certified by the Secretary of State shall be filed in the office of the Commissioner of Banks. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 4; 1985, c. 659, s. 17; 1989 (Reg. Sess., 1990), c. 806, s. 19; 2001-193, s. 16; 2001-358, s. 47(g); 2001-387, s. 173; 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§ 54B-21. List of stockholders to be maintained.

Every stock association organized and operated under the provisions of this Chapter or its predecessor shall at all times cause to be kept an up-to-date list of the names of all its stockholders. Whenever called upon by the Commissioner of Banks, a stock association shall file in the office of the Commissioner of Banks a correct list of all its stockholders, the resident address of each, the number of shares of stock held by each, and the dates of issue. (1981, c. 282, s. 3; 1983, c. 144, s. 10; 2001-193, s. 16.)

§ 54B-22. Branch offices.

(a) Any State association may apply to the Commissioner of Banks for permission to establish a branch office. The application shall be in such form as may be prescribed by the Commissioner of Banks and shall be accompanied by the proper branch application fee. Branch applications shall be approved or denied by the Commissioner of Banks within 120 days of filing.

(b) The Commissioner of Banks shall approve a branch application when all of the following criteria are met:

(1) The applicant has gross assets of at least ten million dollars ($10,000,000);

(2) The applicant has evidenced financial responsibility;

(3) The applicant has a net worth equal to or exceeding the amount required by the insurer of the applicant's withdrawable accounts;

(4) The applicant has an acceptable internal control system. Such a system would include certain basic internal control requirements essential to the protection of assets and the promotion of operational efficiency regardless of the size of the applicant. Some of the factors which require extensive internal control requirements such as the use of the controller or internal auditor and more distinctive placement responsibilities include the applicant's size, number of personnel and history of and anticipated plans for expansion.

(c) Upon receipt of a branch application, the Commissioner of Banks shall examine or cause to be examined all the relevant facts connected with the establishment of the proposed branch office. If it appears to the satisfaction of the Commissioner of Banks that the applicant has complied with all the requirements set forth in this section and the regulations for the establishment of a branch office and that the association is otherwise lawfully entitled to establish such branch office, then the administrator shall approve the branch application.

(d) Not more than 10 days following the filing of the branch application with the Commissioner of Banks, the applicant shall cause a notice to be published in a newspaper of general circulation in the area to be served by the proposed branch office. Such notice shall contain:

(1) A statement that the branch application has been filed with the Commissioner of Banks;
(2) The proposed address of the branch office, including city or town and street; and
(3) A statement that any interested or affected party may file a written statement with the Commissioner of Banks, within 30 days of the date of the publication of the notice, protesting the establishment of the proposed branch office and requesting a hearing before the Commissioner of Banks on the application.

(e) Any interested or affected party may file a written statement with the Commissioner of Banks within 30 days of the date of initial publication of the branch application notice, protesting the establishment of the proposed branch office and requesting a hearing before the Commissioner of Banks on the application. If a hearing is held on the branch application, the Commissioner of Banks shall only receive information and hear testimony from the applicant and from any interested or affected party which is relevant to the branch application and the operation of the proposed branch office. The Commissioner of Banks shall issue his final decision on the branch application within 30 days following the hearing. Such final decision shall be in accordance with the applicable provisions of Chapter 150B of the General Statutes.

(f) If a hearing is not held on the branch application, the Commissioner of Banks shall issue his final decision within 120 days of the filing of the application. Such final decision shall be in accordance with the applicable provisions of Chapter 150B of the General Statutes.

(g) to (i) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1238, s. 3.

(j) Any party to a branch application may appeal the final decision of the to the Commission at any time after final decision, but not later than 30 days after a written copy of the final decision is served upon the party and his attorney of record by personal service or by certified mail. Failure to file such appeal within the time stated shall operate as a waiver of the right of such party to review by the Commission and by a court of competent jurisdiction in accordance with Chapter 150B of the General Statutes, relating to judicial review. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 3; 1987, c. 827, s. 1; 2001-193, s. 16.)

§ 54B-23. Application to change location of a branch or principal office.

(a) The board of directors of a State association may change the location of a branch office or the principal office of the association by submitting to the Commissioner of Banks an application for such change on forms prescribed by the Commissioner of Banks.

(b) Upon receipt of an application accompanied by the proper application fee, the Commissioner of Banks shall conduct, or cause to be conducted, an examination and investigation of the facts and circumstances connected with the consideration of the application. After such examination and investigation, the Commissioner of Banks shall approve or deny the application.

(c) If an application filed under this section is approved by the Commissioner of Banks and the association fails to change the location of such branch office or principal office within six months after the date of the order approving such application, such approval shall be revoked. Such a six-month period may be extended upon a showing to the satisfaction of the Commissioner of Banks of good cause. (1981, c. 282, s. 3; 1983, c. 144, s. 11; 2001-193, s. 16.)

§ 54B-24. Approval revoked; branch office.

The Commission may, for good cause and after a hearing, order the closing of a branch office. Such order shall be made in writing to the association and shall fix a reasonable time after which the association shall close the branch office. (1981, c. 282, s. 3.)

§ 54B-25. Branch offices closed.

The board of a State association may discontinue the operation of a branch office upon giving at least 90 days' prior written notice to the Commissioner of Banks and depositors, the notice to include the date upon which the branch office shall be closed. (1981, c. 282, s. 3; 1983, c. 144, s. 12; 1989, c. 76, s. 5; 1991 (Reg. Sess., 1992), c. 829, s. 2; 2001-193, s. 16.)

§ 54B-26: Repealed by Session Laws 1991, c. 680, s. 3.

§§ 54B-27 through 54B-29: Reserved for future codification purposes.

Article 3.

Fundamental Changes.

§ 54B-30. Conversion from State to federal association.

Any State savings and loan association, stock or mutual, organized and operated under the provisions of this Chapter, may convert into a federal savings and loan association in accordance with the provisions of the laws and regulations of the United States and with the same force and effect as though originally incorporated under such laws, and the procedure to effect such conversion shall be as follows:

(1) The association shall submit a plan of conversion to the Commissioner of Banks, and he may approve the same, with or without amendment, or refuse to approve the plan. If he approves the plan, then the plan shall be submitted to the members or stockholders as provided in the next subdivision. If he refuses to approve the plan, he shall state his objections in writing and give the converting association an opportunity to amend the plan to obviate such objections or to appeal his decision to the Commission.

(2) A meeting of the members or stockholders shall be held upon not less than 15 days' notice to each member or stockholder. Notice can be made either by mailing such to each member or stockholder, postage prepaid, to the last known address or by the board of directors causing to be published once a week for two weeks preceding such meeting, in a newspaper of general circulation published in the county where such association has its principal office, a notice of the meeting. It shall be

regarded as sufficient notice of the purpose of the meeting if the notice contains the following statement: "The purpose of this meeting is to consider the conversion of this State-chartered association into a federally chartered association, pursuant to the laws of the United States." An appropriate officer of the association shall make proof by affidavit at such meeting of due service of the notice or call for said meeting.

(3) At the meeting of the members or stockholders of such association, such members or stockholders may by affirmative vote of a majority of votes or shares present, in person or by proxy, resolve to convert said association to a federal savings and loan association. A copy of the minutes of the meeting of the members or stockholders certified by an appropriate officer of the association shall be filed in the office of the Commissioner of Banks. The said certified copy when so filed shall be prima facie evidence of the holding and the action of the meeting.

(4) Within a reasonable time after the receipt of a certified copy of the minutes, the Commissioner of Banks shall either approve or disapprove the proceedings of the meeting for compliance with the procedure set forth in this section. If the Commissioner of Banks approves the proceedings he shall endorse the certified copy of the minutes, and shall issue a certificate of his approval of the conversion and proceedings and send the same to the association. Such certificate shall be recorded in the office of the Secretary of State and in the office of the register of deeds of the county in which the association has its principal office, and the original shall be held by the association. If the Commissioner of Banks disapproves the proceedings he shall note his disapproval on the certified copy of the minutes and notify the Commission and the association of his disapproval. The association may appeal a disapproval to the Commission.

(5) Within 60 days after approval of the proceedings by the Commissioner of Banks, the association shall file an application, in the manner prescribed or authorized by the laws and regulations of the United States, to consummate the conversion to a federal association. A copy of the charter or authorization issued to such association by the federal regulatory authority, or a certificate showing the organization or conversion of such association into a federal savings and loan association, and upon such filing with the Commissioner of Banks the association shall cease to be a State association and shall be a federal association.

(6) Whenever any such association shall convert into a federal savings and loan association it shall cease to be an association under the laws of this State, except that its corporate existence shall be deemed to be extended for the purpose of prosecuting or defending suits by or against it and of enabling it to close its business affairs as a State association, and to dispose of and convey its property. At the time when such conversion becomes effective, all the property of the state association including all its rights, title and interest in and to all property of whatever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest and asset of any conceivable value or benefit then existing, belonging or pertaining to it, or which would inure to it, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of the federal association, which shall have, hold and enjoy the same in its own right as fully and to the same extent as the same was possessed, held and enjoyed by the State association; and the federal association as of the effective time

of such conversion shall succeed to all the rights, obligations and relations of the State association. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 5; 1989, c. 76, s. 6; 1989 (Reg. Sess., 1990), c. 806, s. 1; 2001-193, s. 16.)

§ 54B-31. Conversion from federal to State association.

Any federal savings and loan association, stock or mutual, organized and existing under the laws and regulations of the United States and duly authorized to operate and actually operating in North Carolina may convert into a State savings and loan association operating under the provisions of this Chapter, with the same force and effect as though originally incorporated under the provisions of this Chapter, by complying with the rules and regulations of the federal regulatory authority, and also by following the procedure as set forth in this section:

(1) The federal association shall submit a plan of conversion to the Commissioner of Banks. When such plan, either with or without amendment, has been approved by the Commissioner of Banks, it shall be submitted to the members or stockholders of the association as provided in the next subdivision.

(2) A meeting of the members or stockholders shall be held upon not less than 15 days' notice to each member or stockholder. Notice can be made either by mailing such to each member or stockholder, postage prepaid, to the last known address or by the board of directors causing to be published once a week for two weeks preceding such meeting, in a newspaper of general circulation published in the county where such association has its principal office, a notice of the meeting. It shall be regarded as sufficient notice of the purpose of the meeting if the call contains the following statement: "The purpose of this meeting is to consider the conversion of this federally chartered association to a State-chartered savings and loan association, pursuant to the provisions of the laws of the State of North Carolina." An appropriate officer of the association shall make proof by affidavit at such meeting of the due service of the notice or call for said meeting.

(3) At the meeting of the members or stockholders of such association, such members or stockholders may by affirmative vote of a majority of votes or shares present, in person or by proxy, resolve to convert said association to a State association. A copy of the minutes of the meeting of the members or stockholders, certified by an appropriate officer of the association, shall be filed with the Commissioner of Banks, accompanied by a conversion fee. The certified copy when so filed shall be prima facie evidence of the holding of and the action taken at the meeting.

(4) Within 30 days after the approval of the proceedings by the Commissioner of Banks, the association shall file with the Commissioner of Banks, the Secretary of State, and the register of deeds of the county where such association intends to operate a copy of the certificate of incorporation of such association, signed by at least seven directors. The certificate of incorporation shall conform to the provisions of the laws of this State. The Secretary of State and the register of deeds of the county where the association has its principal office shall not issue or record the certificate of incorporation until authorized to do so by the Commissioner of Banks. Upon receipt of a copy of the certificate of incorporation the Commissioner of Banks shall cause to be made a careful examination and investigation of the facts connected with the conversion of the association, including an examination of its affairs

generally and a determination of its assets and liabilities. The reasonable cost and expenses of the examination and investigation shall be paid by the association. If it appears that the association, if converted, will lawfully be entitled to conduct business as a State association pursuant to the provisions of this Chapter, the Commissioner of Banks shall so certify to the Secretary of State and the register of deeds in the county in which the association is located, who shall thereupon issue and record such certificate of incorporation. Upon issuance and recordation of the certificate of incorporation the association shall file with the appropriate federal regulatory authority a certified copy of same. Upon such filing, the association shall cease to be a federal association and shall be converted to a State association.

(5) Upon conversion, all the property of the federal association, including all its rights, title and interest in and to all property of whatsoever kind whether real, personal or mixed, and things in action, and every right, privilege, interest and asset of any conceivable value or benefit then existing, belonging or pertaining to it, or which would inure to it, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of the State association, which shall have, hold, and enjoy the same in its own right as fully and to the same extent as if the same was possessed, held or enjoyed by said federal association; and such State association shall be deemed to be a continuation of the entity and the identity of said federal association, operating under and pursuant to the provisions of this Chapter, and all rights, obligations and relations of said federal association to or in respect to any person, estate, or creditor, depositor, trustee or beneficiary of any trust, and to or in respect to any executorship or trusteeship or other trust or fiduciary function, shall remain unimpaired, and the State association, shall by operation of this section succeed to all such rights, obligations, relations and trusts, and the duties and liabilities connected therewith, and shall execute and perform each and every such right, obligation, trust and relation in the same manner as if such State association had itself assumed the trust or relation, including the obligations and liabilities connected therewith. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 6; 1985, c. 659, s. 4; 1989, c. 76, s. 7; 2001-193, s. 16.)

§ 54B-32. Simultaneous charter and ownership conversion.

(a) In the event of a State charter to federal charter conversion, when the form of ownership will also simultaneously be changed from stock to mutual, or from mutual to stock, the conversion shall proceed initially as if it involves only a charter conversion, under G.S. 54B-30. After the association becomes a federal association, then the federal regulatory authority shall govern the continuing conversion of the form of ownership of such newly converted association.

(b) In the event of a federal charter to State charter conversion, when the form of ownership will also simultaneously be changed from stock to mutual or from mutual to stock, the conversion shall proceed initially as if it involves only a charter conversion, under G.S. 54B-31. After the association becomes a State association, the provisions of G.S. 54B-33 or 54B-34 shall govern the continuing conversion of the form of ownership of such newly converted association.

(c) The provisions of this section shall not apply to any simultaneous charter and ownership conversion accomplished in conjunction with a merger under the provisions of G.S. 54B-39. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 9.)

§ 54B-33. Conversion of mutual to stock association.

(a) Any mutual association may convert from mutual to the stock form of ownership as provided in this section.

(b) A mutual association may apply to the Commissioner of Banks for permission to convert to a stock association and for certification of appropriate amendments to the association's certificate of incorporation. Upon receipt of an application to convert from mutual to stock form the Commissioner of Banks shall examine all facts connected with the requested conversion. The expenses and cost of such examination, monitoring and supervision shall be paid by the association applying for permission to convert.

(c) The association shall submit a plan of conversion as a part of the application to the Commissioner of Banks, and he may approve it with or without amendment, if it appears that:

(1) After conversion the association will be in sound financial condition and will be soundly managed;

(2) The conversion will not impair the capital of the association nor adversely affect the association's operations;

(3) The conversion will be fair and equitable to the members of the association and no person whether member, employee or otherwise, will receive any inequitable gain or advantage by reason of the conversion;

(4) The savings and loan services provided to the public by the association will not be adversely affected by the conversion;

(5) The substance of the plan has been approved by a vote of two thirds of the board of directors of the association;

(6) All shares of stock issued in connection with the conversion are offered first to the members of the association; except that any one or more tax qualified stock benefit plan may first purchase in the aggregate not more than ten percent (10%) of the total offering of shares;

(7) All stock shall be offered to members of the association and others in prescribed amounts and otherwise pursuant to a formula and procedure which is fair and equitable and will be fairly disclosed to all interested persons;

(8) The plan provides a statement as to whether stockholders shall have preemptive rights to acquire additional or treasury shares of the association and any provision limiting or denying said rights; and

(9) The conversion shall not be complete until all stock offered in connection with the conversion has been subscribed.

If the Commissioner of Banks approves the plan, then the plan shall be submitted to the members as provided in subsection (d) of this section. If the Commissioner of Banks refuses to approve the plan, the Commissioner of Banks shall state the objections in writing and give the converting association an opportunity to amend the plan to obviate the objections or to appeal the Commissioner of Banks' decision to the Commission.

(d) After lawful notice to the members of the association and full and fair disclosure, the substance of the plan must be approved by a majority of the total votes which members of the association are eligible and entitled to cast. Such a vote by the members may be in person or by proxy. Following the vote of the members, the results of the vote certified by an appropriate officer of the association shall be filed with the Commissioner of Banks. The Commissioner of Banks shall then either approve or disapprove the requested conversion. After approval of the conversion, the Commissioner of Banks shall supervise and monitor the conversion process and he shall ensure that the conversion is conducted pursuant to law and the association's approved plan of conversion.

(e) Upon conversion of a mutual association to the stock form of ownership, the legal existence of the association shall not terminate but the converted stock association shall be a continuation of the mutual association. The conversion shall be deemed a mere change in identity or form of organization. All rights, liabilities, obligations, interest and relations of whatever kind of the mutual association shall continue and remain in the stock-owned association. All actions and legal proceedings to which the association was a party prior to conversion shall be unaffected by the conversion and proceed as if the conversion had not taken place.

(f) The Commissioner of Banks may promulgate such rules and regulations as may be necessary to govern conversions; provided, however, that such rules and regulations as may be promulgated by the Commissioner of Banks shall be equal to or exceed the requirements for conversion imposed by the rules and regulations governing conversions of federal chartered mutual savings and loan associations.

(g) Repealed by Session Laws 1987, c. 237, s. 3(d). (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 7; 1983, c. 144, s. 6; 1987, c. 237, s. 3; 1989 (Reg. Sess., 1990), c. 806, s. 2; 1991 (Reg. Sess., 1992), c. 829, s. 3; 2001-193, s. 16.)

§ 54B-34. Conversion of stock associations to mutual associations.

Any stock savings and loan association organized and operating under the provisions of this Chapter may, subject to the approval of the Commission, convert to a mutual savings and loan association under the provisions of this section. The Commissioner of Banks may promulgate rules and regulations governing the conversion of stock associations to mutual associations. Such rules and regulations shall include, but shall not be limited to requirements that:

(1) The conversion neither impair the capital of the converting association nor adversely affect its operations;
(2) The conversion shall be fair and equitable to all stockholders of the converting associations;
(3) The public shall not be adversely affected by the conversion;
(4) Conversion of an association shall be accomplished only pursuant to a plan approved by the Commissioner of Banks. Said plan must have been approved by an affirmative vote of two thirds of the members of the board of directors of the converting association, and only after a full and fair disclosure to the stockholders, by an affirmative vote [of] a majority of the total votes which stockholders of the association are eligible and entitled to cast;
(5) The plan of conversion provides that:
    a. Withdrawable accounts be issued in connection with the conversion to the stockholders of the converting association;
    b. A uniform date be fixed for the determination of the stockholders to whom, and the amount to each stockholder of which, withdrawable accounts shall be made available;
    c. Withdrawable accounts so made available to stockholders be based upon a fair and equitable formula approved by the Commissioner of Banks and fully and fairly disclosed to the stockholders of the converting association. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-34.1. Conversion to State association.

(a) A savings bank or State or national bank, upon a majority vote of its board of directors, may apply to the Commissioner of Banks for permission to convert to a State association and for certification of appropriate amendments to its certificate of incorporation to effect the change. Upon receipt of an application to convert to a State association, the Commissioner of Banks shall examine all facts connected with the conversion. The depository institution applying for permission to convert shall pay all the expenses and costs of examination.

(b) The converting depository institution shall submit a plan of conversion as a part of the application to the Commissioner of Banks. The Commissioner of Banks may approve it with or without amendment. If the Commissioner of Banks approves the plan, then the plan shall be submitted to the members or stockholders as provided in subsection (c) of this section. If the Commissioner of Banks refuses to approve the plan, the Commissioner of Banks' objections shall be stated in writing and the converting depository institution shall be given an opportunity to amend its plan to obviate the objections or to appeal the Commissioner of Banks' decision to the Commission.

(c) After lawful notice to the members or stockholders of the converting depository institution and full and fair disclosure, the substance of the plan shall be approved by a majority of the votes or shares present, in person or by proxy. Following the vote of the members or stockholders, the results of the vote certified by an appropriate officer of the converting depository institution shall be filed with the Commissioner of Banks. The Commissioner of Banks shall then either approve or disapprove the requested conversion to a State association. After approval of the conversion, the Commissioner of Banks shall supervise and monitor the conversion process and shall ensure that the conversion is conducted lawfully and under the approved plan of conversion. (1993, c. 163, s. 5; 2001-193, s. 16.)

§ 54B-34.2. Conversion to bank.

(a) A savings and loan association, upon a majority vote of its board of directors, may apply to the Commissioner of Banks for permission to convert to a bank, as defined under G.S. 53-1(1), or to a national bank or other form of depository institution and for certification of appropriate amendments to its certificate of incorporation to effect the change. Upon receipt of an application to so convert, the Commissioner of Banks shall examine all facts connected with the conversion including receipt of approval of the converting institution's plan of conversion by other federal or state regulatory agencies having jurisdiction over the institution upon completion of its conversion. The depository institution applying for permission to convert shall pay all the expenses and costs of examination.

(b) The converting depository institution shall submit a plan of conversion as a part of the application to the Commissioner of Banks. The Commissioner of Banks may approve it with or without amendment. If the Commissioner of Banks approves the plan, then the plan shall be submitted to the members or stockholders as provided in subsection (c) of this section. If the Commissioner of Banks refuses to approve the plan, the Commissioner of Banks' objections shall be stated in writing and the converting depository institution shall be given an opportunity to amend its plan to obviate the objections or to appeal the Commissioner of Banks' decision to the Commission.

(c) After lawful notice to the members or stockholders of the converting depository institution and full and fair disclosure, the substance of the plan shall be approved by the members or the shareholders at a duly called and properly convened meeting of the members or shareholders. Following the meeting of the members or shareholders, the results of the vote certified by an appropriate officer of the converting depository institution shall be filed with the Commissioner of Banks. The Commissioner of Banks shall then either approve or disapprove the requested conversion to a bank, national bank, or other form of depository institution. After approval of the conversion, the Commissioner of Banks shall supervise and monitor the conversion process and shall ensure that the conversion is conducted lawfully and under the approved plan of conversion. (1993, c. 163, s. 5; 2001-193, s. 16.)

§ 54B-35. Merger of like savings and loan associations.

Any two or more mutual associations or any two or more stock associations organized and operating, may merge or consolidate into a single association which may be either one of said merging associations, and the procedure to effect such merger shall be as follows:

(1) The directors, or a majority of them, of such associations as desire to merge, may, at separate meetings, enter into a written agreement of merger signed by them and under the corporate seals of the respective associations, specifying each association to be merged and the association which is to receive into itself the merging association or associations, and prescribing the terms and conditions of the merger and the mode of carrying it into effect. Such merger agreement must provide the manner and basis of converting or exchanging the withdrawable accounts in the mutual association or associations so merged for withdrawable accounts of the same or a different class of the receiving association, or of converting or exchanging the stock in the stock association or associations so merged into stock or other securities or obligations of the receiving association. The merger agreement may provide for such other provisions with respect to the merger as appear necessary or desirable, or as the Commissioner of Banks may require by regulation to enable him to discharge his duties with respect to such merger.

(2) Such merger agreement together with copies of the minutes of the meetings of the respective boards of directors verified by the secretaries of the respective associations shall be submitted to the Commissioner of Banks, who shall cause a careful investigation and examination to be made of the affairs of the associations proposing to merge, including a determination of their respective assets and liabilities. The reasonable cost and expenses of such examination shall be defrayed by each association so investigated and examined. If, as a result of such investigation, he shall conclude that the members or stockholders of each of the associations proposing to merge will be benefited thereby, he shall, in writing, approve same. If he deems that the proposed merger will not be in the interest of all members or stockholders of the associations so merging, he shall, in writing, disapprove the same. If he approves the merger agreement, then same shall be submitted, within 45 days after notice of such associations of such approval, to the members or stockholders of each of such association, as provided in the next subdivision. Such disapproval may be appealed by the association to the Commission.

(3) A special meeting of the members or stockholders of each of the associations shall be held separately upon written notice of not less than 20 days to members or stockholders of each association. The notice shall specify the time, place, and purpose for the calling of the meeting. Notice may be given to members of mutual associations by one or more of the following methods: (i) personal service, (ii) postage prepaid mail to the last address of each member appearing upon the records of the association, or (iii) publication of notice at least once a week for four successive weeks in one or more newspapers published

in the county or counties where each association has its principal or a branch office, or in a newspaper published in an adjoining county if none is published in the county. Notice may be given to stockholders by personal service or prepaid mail to the last address of each stockholder appearing upon the records of the association. The Commissioner of Banks may approve notice to stockholders by publication in the same manner as provided to members of mutual associations. The secretary or other officer of the association shall make proof by affidavit at such meeting of the due service of the notice or call for said meeting.

(4) At separate meetings of the members or stockholders of the respective associations, the members or stockholders may adopt, by an affirmative vote of a majority of the votes or shares present, in person or by proxy, a resolution to merge into a single association upon the terms of the merger agreement as shall have been agreed upon by the directors of the respective associations and as approved by the Commissioner of Banks. Upon the adoption of the resolution, a copy of the minutes of the proceedings of the meetings of the members or stockholders of the respective associations, certified by the president or vice-president and secretary or assistant secretary of the merging associations, shall be filed in the office of the Commissioner of Banks. Within 15 days after the receipt of a certified copy of the minutes of such meetings the Commissioner of Banks shall either approve or disapprove the proceedings for compliance with this section. If the proceedings are approved by him, he shall issue a certificate of his approval of the merger and send it to each of the associations. The certificate shall be filed and recorded in the office of the Secretary of State. When the certificate is so filed, the merger agreement shall take effect according to its terms and shall be binding upon all the members or stockholders of the associations merging, and it shall be deemed to be the act of merger of such constituent savings and loan associations under the laws of this State, and the certificate or certified copy thereof shall be evidence of the agreement and act of merger of the savings and loan associations and the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such merger. Within 60 days after its receipt from the Secretary of State, the certified copy of the certificate shall be filed with the register of deeds of the county or counties in which the respective associations so merged have recorded their original certificates of incorporation. Failure to so file shall only subject the association to a penalty of one hundred dollars ($100.00) to be collected by the Secretary of State. The only fees that shall be collected in connection with the merger of the associations shall be filing and recording fees. If the Commissioner of Banks disapproves the proceedings, he shall mark the certified copies of the meetings in his office as disapproved and notify the associations to that effect. Such disapproval may be appealed by the association to the Commission.

(5) Upon the merger of any association, as above provided, into another:

a. Its corporate existence shall be merged into that of the receiving association; and all and singular its rights, powers, privileges and franchises, and all of its property, including all right, title, interest in and to all property of whatsoever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest or asset of any conceivable value or benefit then existing, belonging or pertaining to it, or which would inure to it under an unmerged existence, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of such receiving association which shall have, hold and enjoy the same in its own right as fully and to the same extent as if the same were possessed, held or enjoyed by the association or associations so merged; and such receiving association shall absorb fully and completely the association or associations so merged.

b. Its rights, liabilities, obligations and relations to any person shall remain unchanged and the association into which it has been merged shall, by the merger, succeed to all the relations, obligations and liabilities as though it had itself assumed or incurred the same. No obligation or liability of a member, customer or stockholder in an association which is a party to the merger shall be affected by the merger, but obligations and liabilities shall continue as they existed before the merger, unless otherwise provided in the merger agreement.

c. A pending action or other judicial proceeding to which any association that shall be so merged is a party, shall not be deemed to have abated or to have discontinued by reason of the merger, but may be prosecuted to final judgment, order or decree in the same manner as if the merger had not been made; or the receiving association may be substituted as a party to such action or proceeding, and any judgment, order or decree may be rendered for or against it that might have been rendered for or against such other association if the merger had not occurred.

(6) Notwithstanding any other provision of this section, the Commissioner of Banks may waive any or all of the foregoing requirements upon finding that such waiver would be in the best interest of the members or stockholders of the merging associations. (1981, c. 282, s. 3; c. 670, s. 1; 1981 (Reg. Sess., 1982), c. 1238, s. 8; 1983, c. 144, s. 13; 1985, c. 659, s. 5; 1989, c. 76, s. 8; 2001-193, s. 16.)

§ 54B-36. Merger of associations where ownership is converted.

(a) Any two or more State mutual associations organized or operating may merge to form a single State stock association. The procedure to effect such a merger and conversion of ownership shall be as follows:

(1) The merging associations shall merge (to form a mutual association), as provided under G.S. 54B-35.

(2) The surviving association shall then convert to a stock association, as provided under G.S. 54B-33.

(b) Any two or more State stock associations organized or operating may merge to form a single mutual association. The procedure to effect such a merger and conversion of ownership shall be as follows:

(1) The merging associations shall merge (to form a stock association), as provided under G.S. 54B-35.

(2) The surviving association shall then convert to a mutual association, as provided under G.S. 54B-34.

(b1) Nothing in this section shall be construed to prevent a simultaneous merger-conversion in subsections (a) and (b) of this section.

(c) The Commissioner of Banks may promulgate rules and regulations to facilitate the transition from two or more associations to a single association under a new form of ownership. (1981, c. 282, s. 3; 1985, c. 659, s. 6; 2001-193, s. 16.)

§ 54B-37. Merger of mutual and stock associations.

(a) Any State mutual association and any State stock association, organized or operating, may merge to form a single stock association. The procedure to effect such a merger shall be as follows:

(1) The mutual association involved shall convert separately to a stock association, as provided under G.S. 54B-33.

(2) The two stock associations shall then merge to form a single stock association, as provided in G.S. 54B-35.

(b) Any State mutual association, and any State stock association organized or operating may merge to form a mutual association. The procedure to effect such merger shall be as follows:

(1) The stock association involved shall convert separately to a mutual association, as provided under G.S. 54B-34.

(2) The two mutual associations shall then merge to form a single mutual association, as provided in G.S. 54B-35.

(b1) Nothing in this section shall be construed to prevent a simultaneous conversion-merger in subsections (a) and (b) of this section.

(c) The Commissioner of Banks is hereby empowered to promulgate rules and regulations to facilitate such a merger of mutual with stock associations. (1981, c. 282, s. 3; 1985, c. 659, s. 7; 2001-193, s. 16.)

§ 54B-37.1. Simultaneous conversion/merger.

(a) The Commissioner of Banks shall not approve any application for the conversion of an association from mutual to stock form and its simultaneous (i) merger into a stock-owned savings institution or bank or (ii) acquisition by an operating financial institution holding company except as authorized in subsection (b) of this section. As used in this section, "simultaneous conversion/merger" shall mean a transaction in which the members of a mutual association proposing to convert to stock form are offered the opportunity to purchase (i) stock in the savings institution or bank into which it will be merged or (ii) stock in the holding company by which it will be acquired.

(b) The Commissioner of Banks shall approve a plan of simultaneous conversion/merger only if:

(1) The transaction is proposed to address supervisory concerns of the Commissioner of Banks as to the safety and soundness of the mutual association; or

(2) The mutual association:

a. Operates in a local market area in which long-term trends make reasonable growth, continued profitability, and safe and sound operation appear unlikely;

b. Furnishes evidence concerning its asset size, capital to assets ratio, and other factors, which may include a cost/benefit analysis, satisfactory to the Commissioner of Banks that a simultaneous conversion/merger is more likely than remaining independent, merging with a mutual institution, converting to stock ownership, or other alternatives available to the association, to result in deposit, credit, and other financial services being provided within the local community safely and soundly on a long-term basis; and

c. Furnishes evidence satisfactory to the Commissioner of Banks that no director, officer, or other person associated with the parties to the proposed transaction will receive benefits as a result of the simultaneous conversion/merger which in the aggregate exceed those permitted under federal regulations governing similar transactions.

(c) The Commissioner of Banks may adopt rules to govern simultaneous conversion/mergers, which rules shall contain restrictions or limitations which equal or exceed the limitations or restrictions contained in the rules of federal regulatory agencies governing similar transactions. No plan of a simultaneous conversion/merger shall be approved by the Commissioner of Banks unless it includes notification by first class mail to the members of the association to be acquired explaining the details of the plan including economic benefits or incentives to be received by officers and directors of the association, if any. Shares of stock in the acquiring entity purchased at a discount or otherwise by members of the association as part of the simultaneous conversion/merger shall be without limitation on subsequent sales by such members: provided, however, rules adopted by the Commissioner of Banks may place limitations of the sale of such stock purchased by officers and directors of the association. (1995, c. 479, s. 4; 2001-193, s. 16.)

§ 54B-38: Repealed by Session Laws 1985, c. 659, s. 8.

§ 54B-39. Merger of federal with State associations.

(a) Any two or more associations, when one or more is a State association and one or more is a federal association operating in North Carolina, may merge to form one association under either a State or federal charter.

(b) The Commissioner of Banks shall promulgate rules and regulations to facilitate the merger of federal and State associations. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 10; 2001-193, s. 16.)

§ 54B-40. Voluntary dissolution by directors.

A State association may be voluntarily dissolved by a majority vote of the board of directors when substantially all of the assets have been sold for the purpose of terminating the business of the association or as provided in G.S. 55-14-01, and when a certificate of dissolution is recorded in the manner required by this Chapter for the recording of certificates of incorporation. (1981, c. 282, s. 3; 1989 (Reg. Sess., 1990), c. 806, s. 20; 1991, c. 707, s. 2.)

§ 54B-41. Voluntary dissolution by stockholders or members.

At any annual or special meeting called for such purpose, an association may, by an affirmative vote in person or by proxy of at least two thirds of the total number of shares or votes which all members or stockholders of the association are entitled to cast, resolve to dissolve and liquidate the association and adopt a plan of voluntary dissolution. Upon adoption of such resolution and plan of voluntary dissolution, the members or stockholders shall proceed to elect not more than three liquidators who shall post bond as required by the Commissioner of Banks. The liquidators shall have full power to execute the plan; and the procedure thereafter shall be as follows:

(1) A copy of the resolution certified by the president or secretary of the association, together with the minutes of the meeting of members or stockholders, the plan of liquidation, and an itemized statement of the association's assets and liabilities sworn to by a majority of its board of directors, shall be filed with the Commissioner of Banks. The minutes of the meeting of members or stockholders shall be certified by the president or secretary of the association, and shall set forth the notice given and the time of mailing thereof, the vote on the resolution and the total number of shares or votes which all members of the

association were entitled to cast thereon, and the names of the liquidators elected.

(2) If the Commissioner of Banks finds that the proceedings are in accordance with the provisions of this Chapter, and that the plan of liquidation is not unfair to any person affected, he shall attach his certificate of approval to the plan and shall forward one copy to the liquidators and one copy to the association's withdrawable account insurance corporation. Once the Commissioner of Banks has approved the resolution and the plan of liquidation it shall thereafter be unlawful for such association to accept any additional withdrawable accounts or additions to withdrawable accounts or make any additional loans, but all its income and receipts in excess of actual expenses of liquidation of the association shall be applied to the discharge of its liabilities.

(3) The liquidator or liquidators so appointed shall be paid a reasonable compensation by the liquidating association subject to the approval of the Commissioner of Banks.

(4) The plan shall become effective upon the recording of the Commissioner of Banks' certificate of approval in the manner required by this Chapter for the recording of the certificate of incorporation.

(5) The liquidation of the association shall be subject to the supervision and examination of the Commissioner of Banks. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-42. Rules, regulations and reports of voluntary dissolution.

(a) The Commissioner of Banks shall promulgate rules and regulations governing the dissolution and liquidation of State associations. These rules and regulations shall include, but not be limited to, provisions with respect to:

(1) The protection and liquidation of assets;
(2) The plan of liquidation;
(3) Notice to file claims;
(4) Claims of members;
(5) Payments of claims and distribution; and
(6) Final distribution and liquidation.

(b) Upon completion of liquidation, the liquidators shall file with the Commissioner of Banks a final report and accounting of the liquidation. The approval of the report by the Commissioner of Banks shall operate as a complete and final discharge of the liquidators, the board of directors, and each member or stockholder in connection with the liquidation of such association. Upon approval of the report, the Commissioner of Banks shall issue a certificate of dissolution of the association and shall record same in the manner required by this Chapter for the recording of certificates of incorporation; and upon such recording, the dissolution shall be effective. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-43. Stock dividends.

No dividend on stock shall be paid unless the association has the prior written approval of the Commissioner of Banks. (1981, c. 282, s. 3; 1983, c. 144, s. 7; 1989, c. 76, s. 9; 2001-193, s. 16.)

§ 54B-44. Supervisory mergers, consolidations, conversions, and combination mergers and conversions.

(a) Notwithstanding any other provision of this Chapter, in order to protect the public, including members, depositors and stockholders of a State association, the Commissioner of Banks, upon making a finding that a State association is unable to operate in a safe and sound manner, may authorize or require a short form merger, consolidation, conversion, or combination merger and conversion of the State association, or any other transaction, as to which the finding is made.

(b) The Commissioner of Banks shall promulgate rules and regulations to govern supervisory mergers, consolidations, conversions, and combination mergers and conversions authorized by this section. (1981, c. 670, s. 2; 1981 (Reg. Sess., 1982), c. 1238, s. 11; 1985, c. 659, s. 18; 1985 (Reg. Sess., 1986), c. 948, s. 2; 2001-193, s. 16.)

§ 54B-45. Interim associations.

(a) Article 2 of this Chapter shall not apply to applications for permission to organize an interim State association so long as the application is approved by the Commissioner of Banks.

(b) Preliminary approval of an application for permission to organize an interim State association shall be conditional upon the Commissioner of Banks' approval of an application to merge the interim association and an existing stock association or on the Commissioner of Banks' approval of any other transaction.

(c) The Commissioner of Banks shall promulgate rules and regulations to govern the formation of interim associations authorized by this section. (1985, c. 659, s. 9(b); 2001-193, s. 16.)

§ 54B-46. Conversion of bank to stock association.

(a) Any bank, as defined in G.S. 53-1, may convert to a stock association as provided in this section.

(b) Any bank, upon a majority vote of its board of directors, may apply to the Commissioner of Banks for permission to convert to a stock association and for certification of appropriate amendments to the bank's certificate of incorporation to effect the conversion.

(c) The bank shall submit a plan of conversion as a part of the application to the Commissioner of Banks. The Commissioner of Banks may recommend approval of the plan of conversion with or without amendment. The Commissioner of Banks shall recommend approval of the plan of conversion if upon examination and investigation he finds that:

(1) The resulting stock association will operate in a safe, sound, and prudent manner with adequate capital, liquidity, and earnings prospects;

(2) The directors, officers, and other managerial officials of the bank are qualified by character and financial responsibility to control and operate in a legal and proper manner the stock association proposed to be formed as a result of the conversion;

(3) The interest of the depositors, the creditors, and the public generally will not be jeopardized by the proposed conversion; and

(4) The proposed name will not mislead the public as to the character or purpose of the resulting stock association, and the proposed name is not the same as one already adopted or appropriated by an existing

association in this State or so similar as to be likely to mislead the public.

(d) Any action taken by the Commissioner of Banks pursuant to this section shall be subject to review by the Commission which may approve, modify, or disapprove any action taken or recommended by the Commissioner of Banks. The Commission may promulgate rules to govern conversions undertaken pursuant to this section. The requirements for a converting bank shall be no more stringent than those provided by rule or regulation applicable to other FDIC-insured stock associations. The requirements for a converting bank shall be no less stringent than those provided by rule or regulation applicable to other FDIC-insured stock associations, except as may be allowed during transition periods permitted by subdivisions (e)(4) and (h)(2) of this section.

(e) In the absence of the promulgation of rules under subsection (d), the conditions to be met for approval of the application for conversion should include the following:

(1) Condition. The applicant's general condition must reflect adequate capital, liquidity, reserves, earnings, and asset composition necessary for safe and sound operation of the resulting stock association.

(2) Management. The management and the board of directors must be capable of supervising a sound stock association operation and overseeing the changes that must be accomplished in the conversion from a bank to a stock association.

(3) Public Convenience. The Commission must determine that the conversion will have a positive impact on the convenience of the public and will not substantially reduce the services available to the public in the market area.

(4) Transition. Within a reasonable time after the effective date of the conversion, the resulting stock association must divest itself of all assets and liabilities that do not conform to State banking law or rules. The length of this transition period shall be determined by the Commissioner of Banks and shall be specified when the application for conversion is approved.

In evaluating each of these conditions, the Commission shall consider a comparison of the relevant financial ratios of the applicant with the average ratios of North Carolina stock associations of similar asset size. The Commission may not approve a conversion where the applicant presents an undue supervisory concern or has not been operated in a safe and sound manner.

(f) If the Commissioner of Banks approves the plan of conversion, then the bank shall submit the plan to the stockholders as provided in subsection (g). After approval of the plan of conversion, the Commissioner of Banks shall supervise and monitor the conversion process and shall ensure that the conversion is conducted pursuant to law and the bank's approved plan of conversion.

(g) After lawful notice to the stockholders of the bank and full and fair disclosure of the plan of conversion, the plan must be approved by a majority of the total votes that stockholders of the bank are eligible and entitled to cast. The vote by the stockholders may be in person or by proxy. Following the vote of the stockholders, the bank shall file with the Commissioner of Banks the results of the vote certified by an appropriate officer of the bank. The Commissioner of Banks shall approve the requested conversion and the bank shall file with the Secretary of State amended articles of incorporation with the certificate of the Commissioner of Banks attached. The conversion of the bank to a stock association shall be effective upon this filing.

(h) The Commissioner of Banks may authorize the resulting stock association to do the following:

(1) Wind up any activities legally engaged in by the bank at the time of conversion but not permitted to stock associations.

(2) Retain for a transitional period any assets and deposit liabilities legally held by the bank at the effective date of the conversion that may not be held by stock associations.

The length, terms, and conditions of the transitional periods under subdivisions (1) and (2) are subject to the discretion of the Commissioner of Banks, but may not exceed five years after the effective date of the conversion.

(i) Upon conversion of a bank to a stock association, the legal existence of the bank does not terminate, and the resulting stock association is a continuation of the bank. The conversion shall be a mere change in identity or form of organization. All rights, liabilities, obligations, interest, and relations of whatever kind of the bank shall continue and remain in the resulting stock association. Except as may be authorized during a transitional period by the Commissioner of Banks pursuant to subsection (h), a stock association resulting from the conversion of a bank shall have only those rights, powers, and duties which are authorized for stock associations by the laws of this State and the United States. All actions and legal proceedings to which the bank was a party prior to conversion shall be unaffected by the conversion and proceed as if the conversion had not taken place. (1989 (Reg. Sess., 1990), c. 845, s. 2; 2001-193, s. 16.)

§ 54B-47. Merger of banks and associations.

(a) Any State association, upon a majority vote of its board of directors, may apply to the Commissioner of Banks for permission to merge with any bank, as defined in G.S. 53-1.

(b) The State association shall submit a plan of merger as a part of the application to the Commissioner of Banks. The Commissioner of Banks may recommend approval of the plan of merger with or without amendment.

If he approves the plan, then the plan shall be submitted to the stockholders or members as provided in the next subsection. If he refuses to approve the plan, he shall state his objections in writing and give the merging association an opportunity to amend the plan to obviate such objections or to appeal his decision to the commission.

(c) After lawful notice to the stockholders or members of the association and full and fair disclosure, the substance of the plan must be approved by a majority of the total votes which stockholders or members of the association are eligible and entitled to cast. Such a vote by the stockholders or members may be in person or by proxy. Following the vote of the stockholders or members, the results of the vote certified by an appropriate officer of the association shall be filed with the Commissioner of Banks. The Commissioner of Banks shall then either approve or disapprove the requested merger.

(d) The Commissioner of Banks may promulgate such rules and regulations as may be necessary to govern such mergers. (1991, c. 707, s. 7; 2001-193, s. 16.)

§ 54B-48: Reserved for future codification purposes.

ARTICLE 3A.

North Carolina Regional Reciprocal Savings and Loan Acquisition Act.

§ 54B-48.1. Title.

This Article shall be known and may be cited as the North Carolina Regional Reciprocal Savings and Loan Acquisition Act. (1983 (Reg. Sess., 1984), c. 1087, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 7, made this Article effective on the earlier of: (1) the date on which legislation becomes effective in one of the states listed in G.S. 54B-48.2(16) which authorizes regional acquisitions of savings and loan associations and savings and loan holding companies on a reciprocal basis and which applies to savings and loan associations and savings and loan holding companies in North Carolina; or (2) July 1, 1986. The Article became effective on July 1, 1985, when the legislation became effective in Virginia.

Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 3, provides:

"Nonseverability. It is the purpose of this Article to facilitate orderly development of thrift organizations that have branch offices in more than one state within the Southern Region. It is not the purpose of this Article to authorize acquisitions of North Carolina savings and loan holding companies or North Carolina associations by savings and loan holding companies that do not have their principal place of business in this State on any basis other than as expressly provided in this Article. Therefore, if any portion of this Article pertaining to the terms and conditions for and limitations upon acquisition of North Carolina savings and loan holding companies and North Carolina associations by savings and loan holding companies that do not have their principal place of business in this State is determined to be invalid for any reason by a final nonappealable order of any North Carolina or federal court of competent jurisdiction, then this entire Article shall be null and void in its entirety and shall be of no further force or effect from the effective date of such order: Provided, however, that any transaction that has been lawfully consummated pursuant to this Article prior to a determination of invalidity shall be unaffected by such determination."

§ 54B-48.2. Definitions.

Notwithstanding the provisions of G.S. 54B-4, as used in this Article, unless the context requires otherwise:

(1) "Acquire", as applied to an association or a savings and loan holding company, means any of the following actions or transactions:
   a. The merger or consolidation of an association with another association or savings and loan holding company or a savings and loan holding company with another savings and loan holding company.
   b. The acquisition of the direct or indirect ownership or control of voting shares of an association or savings and loan holding company if, after the acquisition, the acquiring association or savings and loan holding company will directly or indirectly own or control more than five percent (5%) of any class of voting shares of the acquired association or savings and loan holding company.
   c. The direct or indirect acquisition of all or substantially all of the assets of an association or savings and loan holding company.
   d. The taking of any other action that would result in the direct or indirect control of an association or savings and loan holding company.

(2) "Commissioner of Banks" means the Commissioner of Banks.

(3) "Association" means a mutual or capital stock savings and loan association, building and loan association or savings bank chartered under the laws of any one of the states or under the laws of the United States.

(4) "Branch office" means any office at which an association accepts deposits. The term branch office does not include:
   a. Unmanned automatic teller machines, point-of-sale terminals, or similar unmanned electronic banking facilities at which deposits may be accepted;
   b. Offices located outside the United States; and
   c. Loan production offices, representative offices, service corporation offices, or other offices at which deposits are not accepted.

(5) "Company" means that which is set forth in the Federal Savings and Loan Holding Company Act, 12 U.S.C. Section 1730a(a)(1)(C), as amended.

(6) "Control" means that which is set forth in the Federal Savings and Loan Holding Company Act, 12 U.S.C. Section 1730a(a)(2), as amended.

(7) "Deposits" means all demand, time, and savings deposits, without regard to the location of the depositor: Provided, however, that "deposits" shall not include any deposits by associations. For purposes of this Article, determination of deposits shall be made with reference to regulatory reports of condition or similar reports made by or to State and federal regulatory authorities.

(8) "Federal association" means an association chartered under the laws of the United States.

(9) "North Carolina association" means an association organized under the laws of the State of North Carolina or under the laws of the United States and that:
   a. Has its principal place of business in the State of North Carolina;
   b. Which if controlled by an organization, the organization is either a North Carolina association, Southern Region association, North Carolina savings and loan holding company, or a Southern Region savings and loan holding company; and
   c. More than eighty percent (80%) of its total deposits, other than deposits located in branch offices acquired pursuant to Section 123 of the Garn-St. Germain Depository Institutions Act of 1982 (12 U.S.C. 1730a(m)) or comparable state law, are in its branch offices located in one or more of the Southern Region states.

(10) "North Carolina Savings and Loan Holding Company" means a savings and loan holding company that:
   a. Has its principal place of business in the State of North Carolina;
   b. Has total deposits of its Southern Region association subsidiaries and North Carolina association subsidiaries that exceed eighty percent (80%) of the total deposits of all association subsidiaries of the savings and loan holding company other than those association subsidiaries held pursuant to Section 123 of the Garn-St. Germain Depository Institutions Act of 1982 (12 U.S.C. 1730a(m)) or comparable state law.

(11) "Principal place of business" of an association means the state in which the aggregate deposits of the association are the largest. For the purposes of this Article, the principal place of business of a savings and loan holding company is the state where the aggregate deposits of the association subsidiaries of the holding company are the largest.

(12) "Savings and loan holding company" means any company which directly or indirectly controls an association or controls any other company which is a savings and loan holding company.

(13) "Service Corporation" means any corporation, the majority of the capital stock of which is owned by one or more associations and which engages, directly or indirectly, in any activities which may be engaged in by a service corporation in which an association may invest under the laws of one of the states or under the laws of the United States.

(14) "Southern Region association" means an association other than a North Carolina association organized under the laws of one of the Southern Region states or under the laws of the United States and that:
   a. Has its principal place of business only in a Southern Region state other than North Carolina;
   b. Which if controlled by an organization, the organization is either a Southern Region association or a Southern Region savings and loan holding company; and

c. More than eighty percent (80%) of its total deposits, other than deposits located in branch offices acquired pursuant to Section 123 of the Garn-St. Germain Depository Institutions Act of 1982 (12 U.S.C. 1730a(m)) or comparable state law, are in its branch offices located in one or more of the Southern Region states.

(15) "Southern Region savings and loan holding company" means a savings and loan holding company that:

a. Has its principal place of business in a Southern Region state other than the State of North Carolina;

b. Has total deposits of its Southern Region association subsidiaries and North Carolina association subsidiaries that exceed eighty percent (80%) of the total deposits of all association subsidiaries of the savings and loan holding company other than those association subsidiaries held pursuant to Section 123 of the Garn-St. Germain Depository Institutions Act of 1982 (12 U.S.C. 1730a(m)) or comparable state law.

(16) "Southern Region states" means the states of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, West Virginia, and the District of Columbia.

(17) "State" means any state of the United States and the District of Columbia.

(18) "State association" means an association organized under the laws of one of the states.

(19) "Subsidiary" means that which is set forth in the Federal Savings and Loan Holding Company Act, 12 U.S.C. Section 1730a(a)(1)(H), as amended. (1983 (Reg. Sess., 1984), c. 1087, s. 1; 1989, c. 76, s. 15; 1989 (Reg. Sess., 1990), c. 806, s. 3; 2001-193, s. 16.)

§ 54B-48.3. Acquisitions by Southern Region savings and loan holding companies and Southern Region associations.

(a) A Southern Region savings and loan holding company or a Southern Region association that does not have a North Carolina association subsidiary (other than a North Carolina association subsidiary that was acquired either pursuant to Section 123 of the Garn-St. Germain Depository Institutions Act of 1982 (12 U.S.C. 1730a(m)), or comparable provisions in state law, or in the regular course of securing or collecting a debt previously contracted in good faith) may acquire a North Carolina savings and loan holding company or a North Carolina association with the approval of the Commissioner of Banks. The Southern Region savings and loan holding company or Southern Region association shall submit to the Commissioner of Banks an application for approval of such acquisition, which application shall be approved only if:

(1) The Commissioner of Banks determines that the laws of the state in which the Southern Region savings and loan holding company or Southern Region association making the acquisition has its principal place of business permit North Carolina savings and loan holding companies and North Carolina associations to acquire associations and savings and loan holding companies in that state;

(2) The Commissioner of Banks determines that the laws of the state in which the Southern Region savings and loan holding company or Southern Region association making the acquisition has its principal place of business permit such Southern Region savings and loan holding company or Southern Region association to be acquired by the

North Carolina savings and loan holding company or North Carolina association sought to be acquired;

(3) The Commissioner of Banks determines either that the North Carolina association sought to be acquired has been in existence and continuously operating for more than five years or that all of the association subsidiaries of the North Carolina savings and loan holding company sought to be acquired have been in existence and continuously operating for more than five years: Provided, that the Commissioner of Banks may approve the acquisition by a Southern Region savings and loan holding company or Southern Region association of all or substantially all of the shares of an association organized solely for the purpose of facilitating the acquisition of an association that has been in existence and continuously operating as an association for more than five years; and

(4) The Commissioner of Banks makes the acquisition subject to any conditions, restrictions, requirements or other limitations that would apply to the acquisition by a North Carolina savings and loan holding company or North Carolina association of an association or savings and loan holding company in the state where the Southern Region savings and loan holding company or Southern Region association making the acquisition has its principal place of business but that would not apply to the acquisition of an association or savings and loan holding company in such state by an association or a savings and loan holding company all the association subsidiaries of which are located in that state;

(5) With respect to acquisitions involving the merger or consolidation of two associations resulting in a Southern Region association, the application includes a business plan extending for an initial period of at least three years from the date of the acquisition which shall be renewed thereafter for as long as may be required by the Commissioner of Banks. The association may not deviate without the prior written approval of the Commissioner of Banks from the business plan which shall address such matters as the Commissioner of Banks may deem appropriate for the protection of the depositors and members of the acquired North Carolina association and the general public. The business plan shall address, without limitation:
   a. Insurance of depositors' accounts.
   b. Limitation of services and activities to those permitted under this Chapter to North Carolina associations.
   c. Conversion of corporate form or other fundamental changes.
   d. Closing, selling or divesting any or all North Carolina branches.
   e. Protection of the voting rights of North Carolina members.

(b) A Southern Region savings and loan holding company or Southern Region association that has a North Carolina association subsidiary (other than a North Carolina association subsidiary that was acquired either pursuant to Section 123 of the Garn-St. Germain Depository Institutions Act of 1982 (12 U.S.C. 1730a(m)), or comparable provisions in North Carolina law, or in the regular course of securing or collecting a debt previously contracted in good faith) may acquire any North Carolina association or North Carolina savings and loan holding company with the approval of the Commissioner of Banks. The Southern Region savings and loan holding company shall submit to the Commissioner of Banks an application for approval of such acquisition, which application shall be approved only if:

(1) The Commissioner of Banks determines either that the North Carolina association sought to be acquired has been in existence and continuously operating for more than five years or that all of the

association subsidiaries of the North Carolina savings and loan holding company sought to be acquired have been in existence and continuously operating for more than five years: Provided, that the Commissioner of Banks may approve the acquisition by a Southern Region savings and loan holding company or Southern Region association of all or substantially all of the shares of an association organized solely for the purpose of facilitating the acquisition of an association that has been in existence and continuously operating as an association for more than five years; and

(2) The Commissioner of Banks makes the acquisition subject to any conditions, restrictions, requirements or other limitations that would apply to the acquisition by the North Carolina savings and loan holding company or North Carolina association of an association or savings and loan holding company in the State where the Southern Region savings and loan holding company or Southern Region association making the acquisition has its principal place of business but that would not apply to the acquisition of an association or savings and loan holding company in such state by a savings and loan holding company all the association subsidiaries of which are located in that state.

(3) With respect to acquisitions involving the merger or consolidation of two associations resulting in a Southern Region association, the application includes a business plan extending for an initial period of at least three years from the date of the acquisition which shall be renewed thereafter for as long as may be required by the Commissioner of Banks. The association may not deviate without the prior written approval of the Commissioner of Banks from the business plan which shall address such matters as the Commissioner of Banks may deem appropriate for the protection of the depositors and members of the acquired North Carolina association and the general public. The business plan shall address, without limitation:

a. Insurance of depositors' accounts.

b. Limitation of services and activities to those permitted under this Chapter to North Carolina associations.

c. Conversion of corporate form or other fundamental changes.

d. Closing, selling or divesting any or all North Carolina branches.

e. Protection of the voting rights of North Carolina members.

(b1) A North Carolina savings and loan holding company or a North Carolina association may acquire any Southern Region association or Southern Region savings and loan holding company with the approval of the Commissioner of Banks. The North Carolina savings and loan holding company or North Carolina association shall submit to the Commissioner of Banks an application for approval of the acquisition, which application shall be approved only if the application includes a business plan extending for an initial period of at least three years from the date of the acquisition which shall be renewed thereafter for as long as may be required by the Commissioner of Banks. The association may not deviate without the prior written approval of the Commissioner of Banks from the business plan which shall address such matters as the Commissioner of Banks may deem appropriate for the protection of the depositors and members of the North Carolina association and the general public. The business plan shall address, without limitation:

(1) Insurance of depositors' accounts.

(2) Conversion of corporate form or other fundamental changes.

(3) Closing, selling, or divesting any or all North Carolina branches.

(c) The Commissioner of Banks shall rule on any application submitted under this section not later than 90 days following the date of submission of a complete application. If the Commissioner of Banks fails to rule on the application within the requisite 90-day period, the failure to rule shall be deemed a final decision of the Commissioner of Banks approving the application. (1983 (Reg. Sess., 1984), c. 1087, s. 1; 1989 (Reg. Sess., 1990), c. 806, s. 4; 2001-193, s. 16.)

§ 54B-48.4. Exceptions.

A North Carolina savings and loan holding company, a North Carolina association, a Southern Region savings and loan holding company, or a Southern Region association may acquire or control, and shall not cease to be a North Carolina savings and loan holding company, a North Carolina association, a Southern Region savings and loan holding company, or a Southern Region association, as the case may be, by virtue of its acquisition or control of:

(1) An association having branch offices in a state not within the region, if such association has been acquired pursuant to the provisions of Section 123 of the Garn-St. Germain Depository Institutions Act of 1982 (12 U.S.C. 1730a(m)), or comparable provisions of state law;

(2) An association which is not a Southern Region association if such association has been acquired in the regular course of securing or collecting a debt previously contracted in good faith, and if the association or savings and loan holding company divests the securities or assets acquired within two years of the date of acquisition. A North Carolina association, a North Carolina savings and loan holding company, or a Southern Region association may retain these interests for up to three additional periods of one year if the Commissioner of Banks determines that the required divestiture would create undue financial difficulties for that association or savings and loan holding company. (1983 (Reg. Sess., 1984), c. 1087, s. 1; 2001-193, s. 16.)

§ 54B-48.5. Prohibitions.

(a) Except as may be expressly permitted by federal law, no savings and loan holding company that is not either a North Carolina savings and loan holding company or a Southern Region savings and loan holding company shall acquire a North Carolina savings and loan holding company or a North Carolina association.

(b) Except as required by federal law, a North Carolina savings and loan holding company or a Southern Region savings and loan holding company that ceases to be a North Carolina savings and loan holding company or a Southern Region savings and loan holding company shall as soon as practicable and, in all events, within one year after such event divest itself of control of all North Carolina savings and loan holding companies and all North Carolina associations: Provided, however, that such divestiture shall not be required if the North Carolina savings and loan holding company or the Southern Region savings and loan holding company ceases to be a North Carolina savings and loan holding company or a Southern Region savings and loan holding company, as the case may be, because of an increase in the deposits held by association subsidiaries not located within the region and if such increase is not the result of the acquisition of an association or savings and loan holding company. Provided further that nothing in this Article shall be construed to permit interstate branching by associations nor to require the divestiture of a North Carolina association or a North Carolina savings and loan holding company by a savings and loan holding company which acquired its subsidiary North Carolina association or North Carolina savings and loan holding company prior to the effective date of this Article. Nor shall anything in this Article be construed to prohibit any savings and loan holding company which has acquired a North Carolina association or North Carolina savings and loan holding company prior to the effective date of this Article from acquiring additional North Carolina associations or North Carolina savings and loan holding companies. Nor shall anything in this Article be construed to limit the authority of the Commissioner of Banks pursuant to G.S. 54B-44. (1983 (Reg. Sess., 1984), c. 1087, s. 1; 2001-193, s. 16.)

§ 54B-48.6. Applicable laws, rules and regulations.

(a) Any North Carolina association that is controlled by a savings and loan holding company that is not a North Carolina savings and loan holding company shall be subject to all laws of this State and all rules and regulations under such laws that are applicable to North Carolina associations that are controlled by North Carolina savings and loan holding companies.

(b) The Commissioner of Banks may promulgate rules, including the imposition of a reasonable application and administration fee, to implement and effectuate the provisions of this Article. (1983 (Reg. Sess., 1984), c. 1087, s. 1; 2001-193, s. 16.)

§ 54B-48.7. Appeal of Commissioner of Banks' decision.

Notwithstanding any other provision of law, any aggrieved party in a proceeding under G.S. 54B-48.3 or G.S. 54B-48.4(2) may, within 30 days after final decision of the Commissioner of Banks and by written notice to the Commissioner of Banks, appeal directly to the North Carolina Court of Appeals for judicial review on the record. In the event of an appeal, the Commissioner of Banks shall certify the record to the Clerk of the Court of Appeals within 30 days after filing of the appeal. (1983 (Reg. Sess., 1984), c. 1087, s. 1; 2001-193, s. 16.)

§ 54B-48.8. Periodic reports; interstate agreements.

(a) The Commissioner of Banks may from time to time require reports under oath in such scope and detail as he may reasonably determine of each Southern Region savings and loan holding company or Southern Region association subject to this Article for the purpose of assuring continuing compliance with the provisions of this Article.

(b) The Commissioner of Banks may enter into cooperative agreements with other savings and loan regulatory authorities for the periodic examination of any Southern Region savings and loan holding company or Southern Region association that has a North Carolina association subsidiary and may accept reports of examination and other records from such authorities in lieu of conducting its own examinations. The Commissioner of Banks may enter into joint actions with other savings and loan regulatory authorities having concurrent jurisdiction over any Southern Region savings and loan holding company or Southern Region association that has a North Carolina association subsidiary or may take such actions independently to carry out his responsibilities under this Chapter and assure compliance with the provisions of this Article and the applicable laws of this State. (1983 (Reg. Sess., 1984), c. 1087, s. 1; 2001-193, s. 16.)

§ 54B-48.9. Enforcement.

The Commissioner of Banks shall have the power to enforce the provisions of this Article, including the divestiture requirement of G.S. 54B-48.5(b), through an action in any court of this State or any other state or in any court of the United States for the purpose of obtaining an appropriate remedy for violation of any provision of this Article, including such criminal penalties as are contemplated by G.S. 54B-66. (1983 (Reg. Sess., 1984), c. 1087, s. 1; 2001-193, s. 16.)

§§ 54B-49 through 54B-51: Reserved for future codification purposes.

ARTICLE 4.

Supervision and Regulation.

§ 54B-52. Commissioner of Banks.

The Commissioner of Banks of the State is hereby empowered and directed to perform all the duties and exercise all the powers as to savings and loan associations organized or operated under this Chapter, unless herein otherwise provided. (1981, c. 282, s. 3; 1989, c. 76, s. 16; 2001-193, s. 16.)

§ 54B-53: Repealed by Session Laws 2001-193, s. 3, effective July 1, 2001.

§ 54B-54. Deputy commissioner of Savings Institutions Division.

There shall be a deputy commissioner of the Savings Institutions Division as appointed by the Commissioner in G.S. 53-93.1(b). The deputy commissioner authorized by this section shall perform any duties and exercise any powers directed by the Commissioner. (1981, c. 282, s. 3; 1989, c. 76, s. 18; 2001-193, s. 5.)

§ 54B-55. Power of Commissioner of Banks to promulgate rules and regulations; reproduction of records.

(a) The Commissioner of Banks shall have the right, and is empowered, to promulgate rules, instructions and regulations as may be necessary to the discharge of his duties and powers as to savings and loan associations for the supervision and regulation of said associations, and for the protection of the public investing in said savings and loan associations.

(b) Without limiting the generality of the foregoing paragraph, rules, instructions, and regulations may be promulgated with respect to:

(1) Reserve requirements;
(2) Stock ownership and dividends;
(3) Stock transfers;
(4) Incorporators, stockholders, directors, officers and employees of an association;
(5) Bylaws;
(6) Repealed by Session Laws 2001-193, s. 3, effective July 1, 2001.
(7) The structure of the office of the Commissioner of Banks;
(8) The operation of associations;
(9) Withdrawable accounts, bonus plans, and contracts for savings programs;
(10) Loans and loan expenses;
(11) Investments;

(12) Forms and definitions;
(13) Types of financial records to be maintained by associations;
(14) Retention periods of various financial records;
(15) Internal control procedures of associations;
(16) Conduct and management of associations;
(17) Chartering and branching;
(18) Liquidations;
(19) Mergers;
(20) Conversions;
(21) Reports which may be required by the Commissioner of Banks;
(22) Conflicts of interest;
(23) Collection of State savings and loan taxes;
(24) Service corporations; and
(25) Savings and loan holding companies.

(c) Repealed by Session Laws 1983, c. 144, s. 14.

(d) Any association may cause any or all records by it to be recorded, copied or reproduced by any photographic, photostatic or miniature photographic process which correctly, accurately, permanently copies, reproduces or forms a medium for copying or reproducing the original record on a film or other durable material.

(e) Any such photographic, photostatic or miniature photographic copy or reproduction shall be deemed to be an original record in all courts and administrative agencies for the purpose of its admissibility in evidence. A facsimile, exemplification or certified copy of any such photographic copy or reproduction shall, for all purposes, be deemed a facsimile, exemplification or certified copy of the original record.

(f) The provisions of this section with reference to the retention and disposition of records shall apply to any federal savings and loan association operating in North Carolina unless in conflict with regulations prescribed by its supervisory authority. (1981, c. 282, s. 3; 1983, c. 144, s. 14; 1989, c. 76, s. 19; 2001-193, ss. 3, 16.)

§ 54B-56. Examinations by Commissioner of Banks; report.

(a) If at any time the Commissioner of Banks deems it prudent, it shall be his duty to examine and investigate everything relating to the business of a State association or a savings and loan holding company, and to appoint a suitable and competent person to make such investigation, who shall file with the Commissioner of Banks a full report of his finding in such case, including in his report any violation of law or any unauthorized or unsafe practices of the association disclosed by his examination.

(b) The Commissioner of Banks shall furnish a copy of the report to the association examined and may, upon request, furnish a copy of or excerpts from the report to the appropriate federal regulatory authorities.

(c) No association may willfully delay or willfully obstruct an examination in any fashion. Any person failing to comply with this subsection shall be guilty of a Class 1 misdemeanor.

(d) No person having in his possession or control any books, accounts or papers of any State association shall refuse to exhibit same to the Commissioner of Banks or his agents on demand, or shall knowingly or willingly make any false statement in regard to the same. Any person failing to comply with this subsection shall be guilty of a Class 1 misdemeanor. (1981, c. 282, s. 3; 1989 (Reg. Sess., 1990), c. 806, s. 5; 1993, c. 539, ss. 431, 432; 1994, Ex. Sess., c. 24, s. 14(c); 2001-193, s. 16.)

§ 54B-57. Supervision and examination fees.

(a) Every State association, including associations in process of voluntary liquidation or savings and loan holding company, shall pay into the office of the Commissioner of Banks each July a supervisory fee. Examination fees shall be paid promptly upon an association's receipt of the examination billing. The Commissioner of Banks, subject to the advice and consent of the Commission, shall, on or before June 1 of each year:

(1) Determine and fix the scale of supervisory and examination fees to be assessed and collected during the next fiscal year;

(2) Determine and fix the amount of the fee and set the fee collection schedule for the fees to be assessed to and collected from applicants to defray the cost of processing their charter, branch, merger, conversion, location change, savings and loan holding company acquisition, and name change applications.

(b) All funds and revenue collected by the Division under the provisions of this section and the provisions of all other sections of this Chapter which authorize the collection of fees and other funds shall be deposited with the State Treasurer of North Carolina and expended under the terms of the Executive Budget Act, solely to defray expenses incurred by the office of the Commissioner of Banks in carrying out its supervisory and auditing functions.

(c) Notwithstanding any of the provisions of subsections (a) and (b) of this section, whenever the Commissioner of Banks under the provisions of G.S. 54B-56 appoints a suitable and competent person, other than a person employed by the Commissioner of Banks' office, to make an examination and investigation of the business of a State association, all costs and expenses relative to such examination and investigation shall be paid by such association. (1981, c. 282, s. 3; 1983, c. 144; s. 15; 1985, c. 659, s. 10; 2001-193, s. 16.)

§ 54B-58. Prolonged audit, examination or revaluation; payment of costs.

(a) If, in the opinion of the Commissioner of Banks, an examination conducted under the provisions of G.S. 54B-57 fails to disclose the complete financial condition of an association, he may in order to ascertain its complete financial condition:

(1) Make an extended audit or examination of the association or cause such an audit or examination to be made by an independent auditor;

(2) Make an extended revaluation of any of the assets or liabilities of the association or cause an independent appraiser to make such revaluation.

(b) The Commissioner of Banks shall collect from the association a reasonable sum for actual or necessary expenses of such an audit, examination or revaluation. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-59. Cease and desist orders.

(a) If any person or association is engaging in, or has engaged in, any unsafe or unsound practice or unfair and discriminatory practice in conducting the association's business, or of any other law, rule, regulation, order or condition imposed in writing by the Commissioner of Banks, the Commissioner of Banks may issue a notice of charges to such person or association. A notice of charges shall specify the acts alleged to sustain a cease and desist order, and state the time and place at which a hearing shall be held. A hearing before the Commission on the charges shall be held no earlier than seven days, and no later than 14 days after issuance of the notice. The charged institution is entitled to a further extension of seven days upon filing a request with the Commissioner of Banks. The Commissioner of Banks may also issue a notice of charges if he has reasonable grounds to believe that any person or association is about to engage in any unsafe or unsound business practice, or any violation of this Chapter, or any other law, rule, regulation or order. If, by a preponderance of the evidence, it is shown that any person or association is engaged in, or has been engaged in, or is about to engage in, any unsafe or unsound business practice, or unfair and discriminatory practice or any violation of this Chapter, or any other law, rule, regulation, or order, a cease and desist order shall be issued. The Commission may issue a temporary cease and desist order to be effective for 14 days and may be extended once for a period of 14 days.

(b) If any person or State association is engaging in, has engaged in, or is about to engage in any unsafe or unsound practice in conducting the association's business, or any violation of this Chapter or of any other law, rules, regulation, order, or condition imposed in writing by the Commissioner of Banks, and the Commissioner of Banks has determined that immediate corrective action is required, the Commissioner of Banks may issue a temporary cease and desist order. A temporary cease and desist order shall be effective immediately upon issuance for a period of 14 days, and may be extended once for a period of 14 days. Such an order shall state its duration on its face and the words, "Temporary Cease and Desist Order." A hearing before the Commission shall be held within such time as such an order remains effective, at which time a temporary order may be dissolved or made permanent. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-60. Commissioner of Banks to have right of access to books and records of association; right to issue subpoenas, administer oaths, examine witnesses.

(a) The Commissioner of Banks and his agents:

(1) Shall have free access to all books and records of an association, or a service corporation thereof, that relate to its business, and the books and records kept by an officer, agent or employee relating to or upon which any record is kept;

(2) May subpoena witnesses and administer oaths or affirmations in the examination of any director, officer, agent, or employee of an association, or a service corporation thereof or of any other person in relation to its affairs, transactions and conditions;

(3) May require the production of records, books, papers, contracts and other documents; and

(4) May order that improper entries be corrected on the books and records of an association.

(b) The Commissioner of Banks may issue subpoenas duces tecum.

(c) If a person fails to comply with a subpoena so issued or a party or witness refuses to testify on any matters, a court of competent jurisdiction, on the application of the Commissioner of Banks, shall compel compliance by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from such court or a refusal to testify in such court. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-61. Test appraisals of collateral for loans; expense paid.

(a) The Commissioner of Banks may direct the making of test appraisals of real estate and other collateral securing loans made by associations doing business in this State, employ competent appraisers, or prescribe a list from which competent appraisers may be selected, for the making of such appraisals by the Commissioner of Banks, and do any and all other acts incident to the making of such test appraisals.

(b) In lieu of causing such appraisals to be made, the Commissioner of Banks may accept an appraisal caused to be made by the appropriate federal regulatory authority.

(c) The expense and cost of test appraisals made pursuant to this section shall be defrayed by the association subjected to such test appraisals, and each association doing business in this State shall pay all reasonable costs and expenses of such test appraisals when it shall be directed. (1981, c. 282, s. 3; 1989 (Reg. Sess., 1990), c. 806, s. 6; 2001-193, s. 16.)

§ 54B-62. Relationship of savings and loan associations with the Savings Institutions Division.

(a) Except as provided by subsection (b) of this section, a savings and loan association or any director, officer, employee, or representative thereof shall not grant or give to any employee of the Savings Institutions Division, or to their spouses, any loan or gratuity, directly or indirectly.

(b) No person on the staff of the Savings Institutions Division shall:

(1) Hold an office or position in any State association or exercise any right to vote on any State association matter by reason of being a member of the association;

(2) Be interested, directly or indirectly in any savings and loan association organized under the laws of this State; or

(3) Undertake any indebtedness, as a borrower directly or indirectly or endorser, surety or guarantor, or sell or otherwise dispose of any loan or investment to any savings and loan association organized under the laws of this State.

(c) Notwithstanding subsection (b) of this section, any person employed in or by the Savings Institutions Division may be a withdrawable account holder and receive earnings on such account.

(d) Any employee of the Savings Institutions Division shall dispose of any right or interest in a savings and loan association, held either directly or indirectly, that is prohibited under subsection (b) of this section, within 60 days after the date of the employee's appointment or employment. If that person is indebted as borrower directly or indirectly, or is an endorser, surety or guarantor on a note, at the time of his appointment or employment, he may continue in such capacity until such loan is paid off.

(e) If any employee of the Division has a loan or other note acquired by a State savings and loan association through the secondary market, he may continue with the debt until such loan or note is paid off. (1981, c. 282, s. 3; 1989, c. 76, s. 20; 1991, c. 707, s. 3; 2001-193, s. 6.)

§ 54B-63. Confidential information.

(a) The following records or information of the Commission, the Commissioner of Banks or the agent(s) of either shall be confidential and shall not be disclosed:

(1) Information obtained or compiled in preparation of or anticipation of, or during an examination, audit or investigation of any association;

(2) Information reflecting the specific collateral given by a named borrower, the specific amount of stock owned by a named stockholder, or specific withdrawable accounts held by a named member or customer;

(3) Information obtained, prepared or compiled during or as a result of an examination, audit or investigation of any association by an agency of

the United States, if the records would be confidential under federal law or regulation;

(4) Information and reports submitted by associations to federal regulatory agencies, if the records or information would be confidential under federal law or regulation;

(5) Information and records regarding complaints from the public received by the Division which concern associations when the complaint would or could result in an investigation, except to the management of those associations;

(6) Any other letters, reports, memoranda, recordings, charts or other documents or records which would disclose any information of which disclosure is prohibited in this subsection.

(b) A court of competent jurisdiction may order the disclosure of specific information.

(c) The information contained in an application shall be deemed to be public information. Disclosure shall not extend to the financial statement of the incorporators nor to any further information deemed by the Commissioner of Banks to be confidential.

(d) Nothing in this section shall prevent the exchange of information relating to associations and the business thereof with the representatives of the agencies of this State, other states, or of the United States, or with reserve or insuring agencies for associations. The private business and affairs of an individual or company shall not be disclosed by any person employed by the Savings Institutions Division, any member of the Commission, or by any person with whom information is exchanged under the authority of this subsection.

(e) Any official or employee violating this section shall be liable to any person injured by disclosure of such confidential information for all damages sustained thereby. Penalties provided shall not be exclusive of other penalties. (1981, c. 282, s. 3; 1989, c. 76, s. 21; 2001-193, s. 16.)

§ 54B-63.1. Confidential records.

(a) As used in this section:

(1) "Compliance review committee" means:
  a. An audit, loan review, or compliance committee appointed by the board of directors of an association or any other person to the extent the person acts at the direction of or reports to a compliance review committee; and
  b. Whose functions are to audit, evaluate, report, or determine compliance with any of the following:
    1. Loan underwriting standards;
    2. Asset quality;
    3. Financial reporting to federal or State regulatory agencies;
    4. Adherence to the association's investment, lending, accounting, ethical, and financial standards; or
    5. Compliance with federal or State statutory requirements.

(2) "Compliance review documents" means documents prepared for or created by a compliance review committee.

(3) "Loan review committee" means a person or group of persons who, on behalf of an association, reviews assets, including loans held by the association, for the purpose of assessing the credit quality of the loans or the loan application process, compliance with the association's investment and loan policies, and compliance with applicable laws and regulations.

(4) "Person" means an individual, group of individuals, board, committee, partnership, firm, association, corporation, or other entity.

(b) Associations chartered under the laws of North Carolina or of the United States shall maintain complete records of compliance review documents, and the documents shall be available for examination by any federal or State association regulatory agency having supervisory jurisdiction. Notwithstanding Chapter 132 of the General Statutes, compliance review documents in the custody of an association or regulatory agency are confidential, are not open for public inspection, and are not discoverable or admissible in evidence in a civil action against an association, its directors, officers, or employees, unless the court finds that the interests of justice require that the documents be discoverable or admissible in evidence. (1995, c. 408, s. 2.)

§ 54B-64. Civil penalties; State associations.

(a) Except as otherwise provided in this Article, any association which is found to have violated any provision of this Article may be ordered to forfeit and pay a civil penalty of up to twenty thousand dollars ($20,000). Any association which is found to have violated or failed to comply with any cease and desist order issued under the authority of this Article may be ordered to forfeit or pay a civil penalty of up to twenty thousand dollars ($20,000) for each day that the violation or failure to comply continues.

The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) To enforce the provisions of this section, the Commissioner of Banks is authorized to assess such a penalty and to appear in a court of competent jurisdiction and to move the court to order payment of the penalty. Prior to the assessment of the penalty, a hearing shall be held by the Commissioner of Banks which shall comply with the provisions of Article 3 of Chapter 150B of the General Statutes.

(c) If the Commissioner of Banks determines that, as a result of a violation of any provision of this Article, or of a failure to comply with any cease and desist order issued under the authority of this Article, a situation exists requiring immediate corrective action, the Commissioner of Banks may impose the civil penalty in this section on the association without a prior hearing, and said penalty shall be effective as of the date of notice to the association. Imposition of such penalty may be directly appealed to the Wake County Superior Court.

(d) Nothing in this section shall prevent anyone damaged by a State association from bringing a separate cause of action in a court of competent jurisdiction. (1981, c. 282, s. 3; 1987, c. 827, s. 1; 1998-215, s. 36; 2001-193, s. 16.)

§ 54B-65. Civil penalties; directors, officers and employees.

(a) Any person, whether a director, officer or employee, who is found to have violated any provision of this Article, whether willfully or as a result of gross negligence, gross incompetency, or recklessness, may be ordered to forfeit and pay a civil penalty of up to five thousand dollars ($5,000) per violation. Any person who is found to have violated or failed to comply with any cease and desist order issued under the authority of this Article, may be ordered to forfeit and pay a civil penalty of up to five thousand dollars ($5,000) per violation for each day that the violation or failure to comply continues.

The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) To enforce the provisions of this section, the Commissioner of Banks is authorized to assess such a penalty and to appear in a court of competent jurisdiction and to move the court to order payment of the penalty. Prior to the assessment of the penalty, a hearing shall be held by the Commissioner of Banks which shall comply with the provisions of Article 3 of Chapter 150B of the General Statutes.

(c) Whenever the Commissioner of Banks shall determine that an emergency exists which requires immediate corrective action, the Commissioner of Banks, either before or after instituting any other action or proceeding authorized by this Article, may request the Attorney General to institute a civil action in a court of competent jurisdiction, in the name of the State upon the relation of the Commissioner of Banks seeking injunctive relief to restrain or enjoin the violation or threatened violation of this Article and for such other and further relief as the court may deem proper. Instituting an action for injunctive relief shall not relieve any party to such proceedings from any civil or criminal penalty prescribed for violation of this Article.

(d) Nothing in this section shall prevent anyone damaged by a director, officer or employee of a State association from bringing a separate cause of action in a court of competent jurisdiction. (1981, c. 282, s. 3; 1987, c. 827, s. 1; 1998-215, s. 37; 2001-193, s. 16.)

§ 54B-66. Criminal penalties.

(a) The provisions of this section shall in no event extend to persons who are found to have acted only with gross negligence, simple negligence, recklessness or incompetence.

(b) In addition to any of the other penalties or remedies provided by this Article, the following shall be deemed to be Class 1 misdemeanors:

(1) The willful or knowing violation of the provisions of this Article by any employee of the Savings Institutions Division.

(2) The willful or knowing violation of a cease and desist order which has become final in that no further administrative or judicial appeal is available.

(c) In addition to any of the other penalties or remedies provided by this Article, the willful omission, making, or concurrence in making or publishing a written report, exhibit, or entry in a financial statement on the books of the association, which contains a material statement known to be false shall be deemed to be a Class 1 misdemeanor. For purposes of this section, "material" shall mean "so substantial and important as to influence a reasonable and prudent businessman or investor."

(d) The Commissioner of Banks is authorized to enforce this section in a court of competent jurisdiction. (1981, c. 282, s. 3; 1989, c. 76, s. 22; 1993, c. 539, s. 433; 1994, Ex. Sess., c. 24, s. 14(c); 2001-193, s. 16.)

§ 54B-67. Primary jurisdiction.

Whenever an agency of the United States government shall defer to the Commissioner of Banks, or notify the Commissioner of Banks of pending action against an association chartered by this State or fail to exercise its authority over any State- or federally-chartered association doing business in this State, the Commissioner of Banks shall have the authority to exercise jurisdiction over such association. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-68. Supervisory control.

(a) Whenever the Commissioner of Banks determines that an association is conducting its business in an unsafe or unsound manner or in any fashion which threatens the financial integrity or sound operation of the association, the Commissioner of Banks may serve a notice of charges on the association, requiring it to show cause why it should not be placed under supervisory control. Such notice of charges shall specify the grounds for supervisory control, and set the time and place for a hearing. A hearing before the Commission pursuant to such notice shall be held within 15 days after issuance of the notice of charges, and shall comply with the provisions of Article 3 of Chapter 150B of the General Statutes.

(b) If, after the hearing provided above, Commission determines that supervisory control of the association is necessary to protect the association's members, customers, stockholders or creditors, or the general public, the Commissioner of Banks shall issue an order taking supervisory control of the association. An appeal may be filed in the Wake County Superior Court.

(c) If the order taking supervisory control becomes final, the Commissioner of Banks may appoint an agent to supervise and monitor the operations of the association during the period of supervisory control. During the period of supervisory control, the association shall act in accordance with such instructions and directions as may be given by the Commissioner of Banks directly or through his supervisory agent and shall not act or fail to act except when to do so would violate an outstanding cease and desist order.

(d) Within 180 days of the date the order taking supervisory control becomes final, the Commissioner of Banks shall issue an order approving a plan for the termination of supervisory control. The plan may provide for:

(1) The issuance by the association of capital stock;
(2) The appointment of one or more officers and/or directors;
(3) The reorganization, merger, or consolidation of the association;
(4) The dissolution and liquidation of the association.

The order approving the plan shall not take effect for 30 days during which time period an appeal may be filed in the Wake County Superior Court.

(e) The costs incident to this proceeding shall be paid by the association, provided such costs are found to be reasonable.

(f) For the purposes of this section, an order shall be deemed final if:

(1) No appeal is filed within the specific time allowed for the appeal, or
(2) After all judicial appeals are exhausted. (1981, c. 282, s. 3; 1987, c. 827, s. 1; 2001-193, s. 16.)

§ 54B-69. Removal of directors, officers and employees.

(a) If, in the Commissioner of Banks' opinion, one or more directors, officers or employees of any association has participated in or consented to any violation of this Chapter, or any other law, rule, regulation or order, or any unsafe or unsound business practice in the operation of any association; or any insider loan not specifically authorized by or pursuant to this Chapter; or any repeated violation of or failure to comply with any association's bylaws, the Commissioner of Banks may serve a written notice of charges upon the director, officer or employee in question, and the association, stating his intent to remove said director, officer or employee. Such notice shall specify the conduct and place for the hearing before the Commission to be held. A hearing shall be held no earlier than 15 days and no later than 30 days after the notice of charges is served, and it shall comply with the provisions of Article 3 of Chapter 150B of the General Statutes. If, after the hearing, the Commission determines that the charges asserted have been proven by a preponderance of the evidence, the Commissioner of Banks may issue an order removing the director, officer or employee in question. Such an order shall be effective upon issuance and may include the entire board of directors or all of the officers of the association.

(b) If it is determined that any director, officer or employee of any association has knowingly participated in or consented to any violation of this Chapter, or any other law, rule, regulation or order, or engaged in any unsafe or unsound business practice in the operation of any association, or any repeated violation of or failure to comply with any association's bylaws, and that as a result, a situation exists requiring immediate corrective action, the Commissioner of Banks may issue an order temporarily removing such person or persons pending a hearing. Such an order shall state its duration on its face and the words, "Temporary Order of Removal," and shall be effective upon issuance, for a period of 15 days, and may be extended once for a period of 15 days. A hearing must be held within 10 days of the expiration of a temporary order, or any extension thereof, at which time a temporary order may be dissolved or converted to a permanent order.

(c) Any removal pursuant to subsections (a) or (b) of this section shall be effective in all respects as if such removal had been made by the board of directors, the members or the stockholders of the association in question.

(d) Without the prior written approval of the Commissioner of Banks, no director, officer or employee permanently removed pursuant to this section shall be eligible to be elected, reelected or appointed to any position as a director, officer or employee of that association, nor shall such a director, officer or employee be eligible to be elected to or retain a position as a director, officer or employee of any other State association. (1981, c. 282, s. 3; 1987, c. 827, s. 1; 2001-193, s. 16.)

§ 54B-70. Involuntary liquidation.

(a) The Commissioner of Banks with prior approval of the Commission may take custody of the books, records and assets of every kind and character of any association organized and operated under the provisions of this Chapter for any of the purposes hereinafter enumerated, if it reasonably appears from examinations or from reports made to the Commissioner of Banks that:

(1) The directors, officers, or liquidators have neglected, failed or refused to take such action which the Commissioner of Banks may deem necessary for the protection of the association, or have impeded or obstructed an examination; or

(2) The withdrawable capital of the association is impaired to the extent that the realizable value of its assets is insufficient to pay in full its creditors and holders of withdrawable accounts; or its liquidity fund or general reserve account is impaired; or

(3) The business of the association is being conducted in a fraudulent, illegal or unsafe manner, or that the association is in an unsafe or unsound condition to transact business; (any association which, except as authorized in writing by the Commissioner of Banks, fails to make full payment of any withdrawal when due is in an unsafe or unsound condition to transact business, notwithstanding such provisions of the certificate of incorporation or such statutes or regulations with respect to payment of withdrawals in event an association does not pay all withdrawals in full); or

(4) The officers, directors, or employees have assumed duties or performed acts in excess of those authorized by statute or regulation or charter, or without supplying the required bond; or,

(5) The association has experienced a substantial dissipation of assets or earnings due to any violation or violations of statute or regulation, or due to any unsafe or unsound practice or practices; or

(6) The association is insolvent, or is in imminent danger of insolvency or has suspended its ordinary business transactions due to insufficient funds; or

(7) The association is unable to continue operations.

(b) Unless the Commissioner of Banks finds that such an emergency exists which may result in loss to members, withdrawable account holders, stockholders, or creditors, and which requires that he take custody immediately, he shall first give written notice to the directors and officers specifying the conditions criticized and allowing a reasonable time in which corrections may be made before a receiver shall be appointed as outlined in subsection (d) below.

(c) The purposes for which the Commissioner of Banks may take custody of an association include examination or further examination; conservation of its assets; restoration of impaired capital; the making of any reasonable or equitable adjustment deemed necessary by the Commissioner of Banks under any plan of reorganization.

(d) If the Commissioner of Banks after taking custody of an association, finds that one or more of the reasons for having taken custody continue to exist through the period of his custody, with little or no likelihood of amelioration of the situation, then he shall appoint as receiver or co-receiver any qualified person, firm or corporation for the purpose of liquidation of the association, which receiver shall furnish bond in form, amount and with surety as the Commissioner of Banks may require. The Commissioner of Banks may appoint the association's withdrawable account insurance corporation or its nominee as the receiver, and such insuring corporation shall be permitted to serve without posting bond.

(e) In the event the Commissioner of Banks appoints a receiver for an association, he shall mail a certified copy of the appointment order by certified mail to the address of the association as it shall appear on the records of the Division, and to any previous receiver or other legal custodian of the association, and to any court or other authority to which such previous receiver or other legal custodian is subject. Notice of such appointment shall be published in a newspaper of general circulation in the county where such association has its principal office.

(f) Whenever a receiver for an association is appointed pursuant to subsection (d) above the association may within 30 days thereafter bring an action in the Superior Court of Wake County, for an order requiring the Commissioner of Banks to remove such receiver.

(g) The duly appointed and qualified receiver shall take possession promptly of the association for which he or it has been so appointed, in accordance with the terms of such appointment, by service of a certified copy of the Commissioner of Banks' appointment order upon the association at its principal office through the officer or employee who is present and appears to be in charge. Immediately upon taking possession of the association, the receiver shall take possession and title to books, records and assets of every description of such association. The receiver, by operation of law and without any conveyance or other instrument, act or deed, shall succeed to all the rights, titles, powers and privileges of the association, its members or stockholders, holders of withdrawable accounts, its officers and directors or any of them; and to the titles to the books, records and assets of every description of any previous receiver or other legal custodian of such association. Such members, stockholders, holders of withdrawable accounts, officers or directors, or any of them, shall not thereafter, except as hereinafter expressly provided, have or exercise any such rights, powers or privileges or act in connection with any assets or property of any nature of the association in receivership: Provided however, that any officer, director, member, stockholder, withdrawable account holder, or borrower of such association shall have the right to communicate with the Commissioner of Banks with respect to such receivership. The Commissioner of Banks, with the approval of the Commission, may at any time, direct the receiver to return the association to its previous or a newly constituted management. The Commissioner of Banks may provide for a meeting or meetings of the members or stockholders for any purpose, including, without any limitation on the generality of the foregoing, the election of directors or an increase in the number of directors, or both, or the election of an entire new board of directors; and may provide for a meeting or meetings of the directors for any purpose including, without any limitation on the generality of the foregoing, the filling of vacancies on the board, the removal of officers and the election of new officers, or for any of such purposes. Any such meeting of members or stockholders, or of directors, shall be supervised or conducted by a representative of the Commissioner of Banks.

(h) A duly appointed and qualified receiver shall have power and authority to:

(1) Demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description of the association;
(2) Foreclose mortgages, deeds of trust, and other liens executed to the association to the extent the association would have had such right;
(3) Institute suits for the recovery of any estate, property, damages, or demands existing in favor of the association, and he shall, upon his own application, be substituted as party plaintiff in the place of the association in any suit or proceeding pending at the time of his appointment;
(4) Sell, convey, and assign all the property rights and interest owned by the association;
(5) Appoint agents to serve at his pleasure;
(6) Examine and investigate papers and persons, and pass on claims as provided in the regulations as prescribed by the Commissioner of Banks;
(7) Make and carry out agreements with the insuring corporation or with any other financial institution for the payment or assumption of the association liabilities, in whole or in part, and to sell, convey, transfer, pledge, or assign assets as security or otherwise and to make guarantees in connection therewith; and
(8) Perform all other acts which might be done by the employees, officers and directors.

Such powers shall be continued in effect until liquidation and dissolution or until return of the association to its prior or newly constituted management.

(i) A receiver may at any time during the receivership and prior to final liquidation be removed and a replacement appointed by the Commissioner of Banks.

(j) The Commissioner of Banks may determine that such liquidation proceedings should be discontinued. He shall then remove the receiver and restore all the rights, powers, and privileges of its members and stockholders, customers, employees, officers and directors, or restore such rights, powers, and privileges to its members, stockholders and customers, and grant such rights, powers and privileges to a newly constituted management, all as of the time of such restoration of the association to its management unless another time for such restoration shall be specified by the Commissioner of Banks. The return of an association to its management or to a newly constituted management from the possession of a receiver shall, by operation of law and without any conveyance or other instrument, act or deed, vest in such association the title to all property held by the receiver in his capacity as receiver for such association.

(k) A receiver may also be appointed under the authority of G.S. 1-502. No judge or court, however, shall appoint a receiver for any State association unless five days' advance notice of the motion, petition or application for appointment of a receiver shall have been given to such association and to the Commissioner of Banks.

(*l*) Following the appointment of a receiver, the Commissioner of Banks shall request the Attorney General to institute an action in the name of the Commissioner of Banks in the superior court against the association for the orderly liquidation and dissolution of the association, and for an injunction to restrain the officers, directors and employees from continuing the operation of the association.

(m) Claims against a State association in receivership shall have the following order of priority for payment:

(1) Costs, expenses and debts of the association incurred on or after the date of the appointment of the receiver, including compensation for the receiver;
(2) Claims of holders of special purpose or thrift accounts;
(3) Claims of holders of withdrawable accounts;
(4) Claims of general creditors;
(5) Claims of stockholders of a stock association;
(6) All remaining assets to members and stockholders in an amount proportionate to their holdings as of the date of the appointment of the receiver.

(n) All claims of each class described within subsection (m) above shall be paid in full so long as sufficient assets remain. Members of the class for which the receiver cannot make payment in full because assets will be depleted during payment to such class shall be paid an amount proportionate to their total claims.

(o) The Commissioner of Banks shall have the authority to direct the payment of claims for which no provision is herein made, and may direct the payment of claims within a class. The Commissioner of Banks shall have the authority to promulgate rules and regulations governing the payment of claims by an association in receivership.

(p) When all assets of the association have been fully liquidated, and all claims and expenses have been paid or settled, and the receiver shall recommend a final distribution, the dissolution of the association in receivership shall be accomplished in the following manner:

(1) The receiver shall file with the Commissioner of Banks a detailed report, in a form to be prescribed by the Commissioner of Banks, of his acts and proposed final distribution, and dissolution.
(2) Upon the Commissioner of Banks' approval of the final report of the receiver, the receiver shall provide such notice and thereafter shall make such final distribution, in such manner as the Commissioner of Banks may direct.
(3) When a final distribution has been made except as to any unclaimed funds, the receiver shall deposit such unclaimed funds with the Commissioner of Banks and shall deliver to the Commissioner of Banks all books and records of the dissolved association.
(4) Upon completion of the foregoing procedure, and upon the joint petition of the Commissioner of Banks and receiver to the superior court, the court may find that the association should be dissolved, and following such publication of notice of dissolution as the court may direct, the court may enter a decree of final resolution and the association shall thereby be dissolved.
(5) Upon final dissolution of the association in receivership or at such time as the receiver shall be otherwise relieved of his duties, the Commissioner of Banks shall cause an audit to be conducted, during which the receiver shall be available to assist in such. The accounts of the

receiver shall then be ruled upon by the Commissioner of Banks and Commission and if approved, the receiver shall thereupon be given a final and complete discharge and release. (1981, c. 282, s. 3; 1987, c. 237, s. 4; 2001-193, s. 16.)

§ 54B-71. Judicial review.

Any person or State association against whom a cease and desist order is issued or a fine is imposed may have such order or fine reviewed by a court of competent jurisdiction. Except as otherwise provided, an appeal may be made only within 30 days of the issuance of the order or the imposition of the fine, whichever is later. (1981, c. 282, s. 3.)

§ 54B-72. Indemnity.

No person who is fined or penalized for a violation of any criminal provision of this Article shall be reimbursed or indemnified in any fashion by the association for such fine or penalty. (1981, c. 282, s. 3.)

§ 54B-73. Cumulative penalties.

All penalties, fines, and remedies provided by this Article shall be cumulative. (1981, c. 282, s. 3.)

§ 54B-74. Annual license fees.

All State associations shall pay an annual license fee set by the Commissioner of Banks, subject to the advice and consent of the Commission. Such license fee shall be used to defray the expenses incurred by the Division in supervising State associations. The Commissioner of Banks may license each State association upon receipt of the license fee and filing of an application in such form as the Commissioner of Banks may prescribe. (1981, c. 282, s. 3; 1985, c. 659, s. 11; 2001-193, s. 16.)

§ 54B-75. Statement; fees.

Every State association shall file in the office of the Commissioner of Banks, on or before the first day of February in each year, in such form as the Commissioner of Banks shall prescribe, a statement of the business standing and financial condition of such association on the preceding 31st day of December. This statement shall be signed and sworn to by the secretary or other officer duly authorized by the board of directors of the association before a notary public. The statement shall be accompanied by a filing fee set by the Commissioner of Banks, subject to the advice and consent of the Commission. The filing fees shall be used to defray the expenses incurred by the Division in supervising State associations. (1981, c. 282, s. 3; 1985, c. 659, s. 12; 1993, c. 163, s. 1; 2001-193, s. 16.)

§ 54B-76. Statement examined, approved, and published.

It shall be the duty of the Commissioner of Banks to receive and thoroughly examine each annual statement required by G.S. 54B-75, and if made in compliance with the requirements thereof, each State association shall at its own expense, publish an abstract of the same in a newspaper having general circulation within each market area of the association as selected by the managing officer. (1981, c. 282, s. 3; 1993, c. 163, s. 2; 2001-193, s. 16.)

§ 54B-77. Certain powers granted to State associations.

(a) In addition to the powers granted under this Chapter, any savings and loan association incorporated or operated under the provisions of this Chapter is herein authorized to:

(1) Establish off the premises of any principal office or branch a customer communications terminal, point-of-sale terminal, automated teller machine, automated or other direct or remote information-processing device or machine, whether manned or unmanned, through or by means of which funds or information relating to any financial service or transaction rendered to the public is stored and transmitted, instantaneously or otherwise to or from an association terminal or terminals controlled or used by or with other parties; and the establishment and use of such a device or machine shall not be deemed to constitute a branch office and the capital requirements and standards for approval of a branch office as set forth in the statutes and regulations, shall not be applicable to the establishment of any such off-premises terminal, device or machine; and associations may through mutual consent share on-premises unmanned automated teller machines and cash dispensers. The Commissioner of Banks may prescribe rules and regulations with regard to the application for permission for use, maintenance and supervision of said terminals, devices and machines;

(2) Subject to such regulations as the Commissioner of Banks may prescribe, a state-chartered association is authorized to issue credit cards, extend credit in connection therewith, and otherwise engage in or participate in credit card operations;

(3) Subject to such regulations as the Commissioner of Banks may prescribe, a state-chartered association may act as a trustee, executor, administrator, guardian or in any other fiduciary capacity permitted for federal savings and loan associations;

(4)a. In accordance with rules and regulations issued by the Commissioner of Banks, mutual capital certificates may be issued by state-chartered associations and sold directly to subscribers or through underwriters, and such certificates shall constitute part of the general reserve and net worth of the issuing association. The Commissioner of Banks, in the rules and regulations relating to the issuance and sale of mutual capital certificates, shall provide that such certificates:

1. Shall be subordinate to all savings accounts, savings certificates, and debt obligations;
2. Shall constitute a claim in liquidation on the general reserves, surplus and undivided profits of the association remaining after the payment of all savings accounts, savings certificates, and debt obligations;
3. Shall be entitled to the payment of dividends; and
4. May have a fixed or variable dividend rate.

b. The Commissioner of Banks shall provide in the rules and regulations for charging losses to the mutual capital certificate, reserves, and other net worth accounts.

(b) To such extent as the Commissioner of Banks may authorize by regulation or advice in writing, a State association may issue notes, bonds, debentures, or other obligations or securities. (1981, c. 282, s. 3; 1983, c. 144, s. 16; 1989 (Reg. Sess., 1990), c. 806, s. 7; 2001-193, s. 16.)

§ 54B-78. Prohibited practices.

Any person or association who shall engage in any of the following acts or practices shall be guilty of a Class 1 misdemeanor:

(1) Defamation: Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting, or encouraging the making, publishing, disseminating, or circulating of any oral, written, or printed statement which is false regarding the financial condition of any association.

(2) False information and advertising: Making, publishing, disseminating, or circulating or causing, directly or indirectly, to be made published, disseminated, circulated, or otherwise placed before the public in any publication, media, notice, pamphlet, letter, poster, or any other way, an advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the savings and loan business or with respect to any person in the conduct of the savings and loan business which is untrue, deceptive, or misleading. (1985, c. 659, s. 13; 1993, c. 539, s. 434; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 54B-79 through 54B-99: Reserved for future codification purposes.

Article 5.

Corporate Administration.

§ 54B-100. Membership of a mutual association.

The membership of a mutual association organized or operated under the provisions of this Chapter shall consist of:

(1) Those who hold withdrawable accounts in an association; and

(2) Those who borrow funds and those who become obligated on a loan from the association, for such time as the loan remains unpaid and the borrower remains liable to the association for the payment thereof.

Any person in his own right, or in a trust or other fiduciary capacity, or any partnership, association, corporation, political subdivision or public or governmental unit or entity may become a member of a mutual association. Members shall be possessed of such voting rights and such other rights as are provided by an association's certificate of incorporation and bylaws as approved by the Commissioner of Banks. Members are the owners of a mutual association. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-101. Directors.

(a) The directors of a mutual association shall be elected by the members at an annual meeting, held pursuant to the terms of G.S. 54B-106, for such terms as the bylaws of the association may provide. Directors' terms may be classified in the certificate of incorporation. Voting for directors by withdrawable account holders shall be weighted according to the total amount of withdrawable accounts held by such members, subject to any maximum number of votes per member which an association may choose to prescribe in the bylaws of the association. Such requirements shall be fully prescribed in a detailed manner in the bylaws of the association.

(b) The directors of a stock association shall be elected by the stockholders at an annual meeting, held pursuant to the terms of G.S. 54B-106, for such terms as the bylaws of the association may provide. Directors' terms may be classified in the certificate of incorporation.

(c) Every State association shall have no less than five directors. (1981, c. 282, s. 3; 1983, c. 144, s. 17; 1991, c. 707, s. 4.)

§ 54B-102. Employment policies.

Employment policies appropriate for the transaction of the business of a State association may be set forth in the bylaws or established by resolution of the board of directors. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 22.)

§ 54B-103. Duties and liabilities of officers and directors to their associations.

Officers and directors of a State association shall act in a fiduciary capacity towards the association and its members or stockholders. They shall discharge duties of their respective positions in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions. (1981, c. 282, s. 3.)

§ 54B-104. Conflicts of interest.

Each director, officer and employee of a State association has a fundamental duty to avoid placing himself in a position which creates, or which leads to or could lead to a conflict of interest or appearance of a conflict of interest having adverse effects on the interests of members, customers or stockholders of the association, the soundness of the association, and the provision of economical home financing for this State. (1981, c. 282, s. 3.)

§ 54B-105. Voting rights.

Voting rights in the affairs of a State association may be exercised by members and stockholders by voting either in person or by proxy. The Commissioner of Banks shall promulgate rules and regulations governing forms of proxies, holders of proxies and proxy solicitation. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-106. Annual meetings; notice required.

(a) Each association shall hold an annual meeting of its members or stockholders. The annual meeting shall be held at a time and place as shall be provided in the bylaws or determined by the board of directors.

(b) The board of directors of a mutual association shall cause to be published once a week for two weeks preceding such meeting, in a newspaper of general circulation published in the county where such association has its principal office, a notice of the meeting, signed by the association's secretary, and stating the time and place where it is to be held. In addition to the foregoing notice, each association shall disseminate additional notice of any annual meeting by notice made available to all members entering the premises of any office or branch of the association in the regular course of business by posting therein, in full view of the public and such members, one or more conspicuous signs or placards announcing the pending meeting, the time, date and place of the meeting and the availability of additional information. Printed matter shall be freely available to said members containing any information as may be prescribed in rules and regulations issued by the Commissioner of Banks. Such additional notice shall be given at any time within the period of 60 days prior to and 14 days prior to the meeting and shall continue through the time of the meeting.

(c) The board of directors of a stock association shall cause a written or printed notice signed by the association's secretary, and stating the time and place of the annual meeting to be delivered not less than 10 days nor more than 50 days before the date of the meeting, either personally or by mail to each stockholder of record entitled to vote at the meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States postal service addressed to the stockholder at his address as it appears on the record of stockholders of the corporation, with postage thereon prepaid. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-107. Special meetings; notice required.

(a) Special meetings of members or stockholders of an association may be called by the president or the board of directors or by such other officers or persons as may be provided for in the charter or bylaws of the association.

(b) Notice of any special meeting of members or stockholders shall be given in the same manner as provided for annual meetings under G.S. 54B-106. (1981, c. 282, s. 3.)

§ 54B-108. Quorum.

Unless otherwise provided in the association's charter or bylaws, 50 holders of withdrawable accounts in a mutual association or 50 stockholders or a majority of shares eligible to vote in a stock association, present in person or represented by proxy, shall constitute a quorum at any annual or special meeting. (1981, c. 282, s. 3.)

§ 54B-109. Indemnification.

(a) An association shall maintain a blanket indemnity bond of at least a minimum amount as prescribed by the Commissioner of Banks.

(b) An association which employs collection agents, who for any reason are not covered by the bond as hereinabove required, shall provide for the bonding of each such agent in an amount equal to at least twice the average monthly collections of such agent. Such agents shall be required to make settlement with the association at least once monthly. No such coverage by bond will be required of any agent which is a federally insured depository institution. The amount and form of such bonds and the sufficiency of the surety thereon shall be approved by the board of directors and the Commissioner of Banks before such is valid. All such bonds shall provide that a cancellation thereof either by the surety or by the insured shall not become effective unless and until 30 days' notice in writing shall have been given to the Commissioner of Banks.

(c) The Commissioner of Banks may require every member of the board of directors, officer or employee of an association who shall knowingly make, approve, participate in, or assent to, or who knowingly shall permit any of the officers or agents of the association to make investments not authorized by this Chapter, to deposit with the association an indemnity bond, insurance or collateral of a kind and amount sufficient to indemnify the association against damage which the association or its members or stockholders sustain in consequence of such unauthorized investment.

(d) The amount considered sufficient to indemnify the association shall, in the case of an unauthorized loan, be the difference between the book value of the loan and the amount that could legally have been made under the provisions of this Chapter. The amount considered sufficient to indemnify the association shall, in the case of an unauthorized other investment, be the difference between the book value and the market value of the investment at the time when the Commissioner of Banks makes his determination that such investment is unauthorized. Whenever an unauthorized investment has been sold or disposed of without recourse, the Commissioner of Banks shall release such part of the indemnity as remains after deducting any loss, which amount shall be retained by the association. Whenever the balance of an unauthorized loan has been reduced to an amount which would permit such loan to be made in compliance with the provisions of this Chapter, the indemnity shall be released. The Commissioner of Banks, in making such determination may require an independent appraisal of the security.

(e) The Commissioner of Banks shall cause to be examined annually all such bonds and pass on their sufficiency and either the board of directors or the Commissioner of Banks may require new or additional bonds at any time.

(f) The Commissioner of Banks is empowered to promulgate rules and regulations with respect to litigation expenses and other indemnity matters. (1981, c. 282, s. 3; 1989 (Reg. Sess., 1990), c. 806, s. 8; 2001-193, s. 16.)

§ 54B-110. Days and hours of operation.

Any association may operate on such days and during such hours, and may observe such holidays, as the association's board of directors shall designate. (1987, c. 853, s. 3; 1995 (Reg. Sess., 1996), c. 556, s. 3.)

§§ 54B-111 through 54B-120: Reserved for future codification purposes.

ARTICLE 6.

Withdrawable Accounts.

§ 54B-121. Creation of withdrawable accounts.

(a) Every State association shall be authorized to raise capital through the solicitation of investments from any person, natural or corporate, except as restricted or limited by law, or by such regulations as the Commissioner of Banks may prescribe.

(b) Such funds obtained through the solicitation of investments shall be held by an association in accounts designated generally as withdrawable accounts.

(c) An association may establish as many classes of withdrawable accounts as may be provided for in its certificate of incorporation or bylaws, subject to such regulations and limitations as the Commissioner of Banks may prescribe.

(1) At least one class of withdrawable accounts shall be established by which the holder, upon notice to the association, shall be able to withdraw the entire balance of such account without any penalty. The required period of notice, not to exceed 30 days, shall be determined by the board of directors of each association.

(2) For any additional classes of withdrawable accounts that may be established, the board may require a fixed minimum amount of money and a fixed minimum term, at the end of which, the account holder, without any notice on his part, shall be entitled to payment of the final balance of the funds in such account. Such minimum amount and minimum term and the rate of dividends on withdrawable accounts shall be agreed upon prior to the transfer to the association of any

funds by the account holder and shall be evidenced by an executed contract.

a. An association may impose a penalty upon the holder of such account to be assessed at the time of any withdrawal from the account prior to the date of termination of the minimum term for which the account holder contracted.

b. An association may require that the holder of such an account provide the association with not less than 30 days' notice of an intended withdrawal prior to the date of the termination of the account contract.

c. When the date of termination of such an account is passed and the account is mature and payable, all payments thereon by the holder and all dividends on withdrawable account credits thereto by the association shall cease. However, if the holder shall notify the association, prior to the termination date of the account, that he wishes to extend the life of the account, the association shall renew the account and continue to accept payments and/or make dividends on withdrawable account credits or cancel the account as provided under the original contract.

d. Unless the association receives notification within the proper time period and renews the account, then upon the date of termination, it shall either pay to the holder of the account the final value thereof, or mail a notice to the holder at his last address as it appears on the records of the association to the effect that he is entitled to receive payment for the account.

e. If the association does not make payment to the holder of the account upon the date of termination and instead mails a notice to him as provided in paragraph d above, then until such time as the holder is paid, the account shall earn dividends on withdrawable accounts at a rate not less than the rate which the association is paying on its account or accounts established under subdivision (1) above, unless provided otherwise by the account contract.

f. Whenever an association has funds in an amount insufficient to make immediate payment upon the date of termination of an account, or upon an application for withdrawal, the maturity shall be paid in accordance with the provisions of G.S. 54B-124. Whenever such a situation arises, dividends on withdrawable accounts shall be credited to the account at a rate not less than the rate provided for in the account contract.

(3) An association may establish demand deposit accounts as a class of withdrawable accounts. The association shall not permit any overdraft, including an intraday overdraft, on behalf of an affiliate or incur any overdraft in the association's account at a federal reserve bank or federal home loan bank on behalf of an affiliate. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 12; 1989 (Reg. Sess., 1990), c. 806, s. 9; 2001-193, s. 16.)

§ 54B-122. Additional requirements.

Withdrawable accounts shall be:

(1) Withdrawable upon demand, subject to the requisite advance notice to the association by the holder, as listed in G.S. 54B-121(c)(2)b and by such regulations as the Commissioner of Banks may prescribe;

(2) Entitled to dividends as provided herein or in such regulations as the Commissioner of Banks may prescribe;

(3) Evidenced by an executed contract setting forth any special terms and provisions applicable to the account and the conditions upon which withdrawal may be made. The form of such contract shall be subject to the prior approval of the Commissioner of Banks and shall be held by the association as part of its records pertaining to the account. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 13; 2001-193, s. 16.)

§ 54B-123. Dividends on withdrawable accounts.

(a) An association shall compute and pay dividends on withdrawable accounts in accordance with such terms and conditions as are herein prescribed, and subject to additional limitation and restrictions as shall be set forth in its bylaws, or certificate of incorporation and resolutions of its board of directors.

(b) Notwithstanding any other provisions of the General Statutes, savings and loan associations shall not be limited in the amount of dividends they may pay on withdrawable accounts. The Commissioner of Banks shall have the authority to insure that no association pays dividends on withdrawable accounts inconsistent with the association's continued solvency, and safe and proper operation. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-124. Withdrawals from withdrawable accounts.

(a) A withdrawable account holder may at any time make written application for withdrawal of all or any part of the withdrawal value thereof except to the extent the same may be pledged as security for a loan, as recorded by the association. The association shall number, date, and file every unpaid withdrawal application in the order of actual receipt.

(b) An association shall pay the total amount of the withdrawal value of a withdrawable account upon application from the holder of the account, except as otherwise provided in this section. Payment shall be made in full, without exception, to holders of withdrawable accounts whose withdrawable account totals one hundred dollars ($100.00) or less.

(c) If an association has funds in the treasury and from current receipts in an amount insufficient to pay all long term withdrawable accounts which are mature and due and all applications for withdrawal, then within seven days after such accounts mature or payment is due, the board of directors of such association shall provide by resolution:

(1) A statement of the amount of money available in each calendar month to pay maturities and withdrawals, in accordance with safe and required operating procedures; provided, that after making provision for expenses, debts, obligations and cash dividends on withdrawable accounts, not less than one hundred percent (100%) of the remainder of cash treasury funds and current receipts shall be made available for the payment of outstanding applications for withdrawal and maturities;

(2) A list of matured withdrawable accounts in order of their maturity, and if in the same series, in order of issuance within such series; and a list of applications for withdrawal in order of actual receipt;

(3) For a maximum sum, set by the Commissioner of Banks which shall be paid to any one holder of a withdrawable account, for which a maturity or an application for withdrawal has not been paid, in any one month; and if the maturity or withdrawal due shall exceed the sum so fixed, then the holder shall be paid such sum in his turn according to the due date of the maturity or the filing date of the

application; and his application shall be deemed refiled for payment in order in the next month; and such limited payment shall be made on a fixed date in each month for so long as any application or maturity remains unpaid.

(d) A withdrawable account pledged by the holder as sole security or partial security for a loan shall be subject to the withdrawal provisions of this section, but an application for withdrawal from such account shall be paid only if the resulting balance in such account would equal or exceed the outstanding loan balance, or portion thereof, secured by the withdrawable account. However, withdrawal of any additional amount from the account may be permitted, provided that such payment of such withdrawal application shall be applied first to the outstanding balance of the loan.

(e) The contents of a withdrawable account may be accepted by an association in payment or partial payment for any real property or other assets owned by the association and being sold.

(f) The holder of a withdrawable account which is mature and payable or for which application for withdrawal has been made does not become a creditor of the association merely by reason of such payment due to him.

(g) Any such resolution adopted by an association's board of directors pursuant to this section shall be submitted to the Commissioner of Banks for his approval or rejection. If he finds such to be fair to all affected parties, he shall approve it. If he determines otherwise, such resolution shall be rejected and the association shall not implement any of its provisions. The Commissioner of Banks shall issue his findings within 10 days after receipt of the resolution.

(h) The membership in a mutual association of a withdrawable account holder who has filed an application for withdrawal or whose account is mature and due shall remain unimpaired for so long as any withdrawal value remains to his credit upon the books of the association.

(i) An association may not obligate itself to pay maturities and withdrawals under any provisions other than the ones set forth in this section without prior approval of the Commissioner of Banks. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-125. Emergency limitations.

The Commissioner of Banks, with the approval of the Governor, may impose a limitation upon the amounts withdrawable or payable from withdrawable accounts of State associations during any specifically defined period when such limitation is in the public interest and welfare. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-126. Forced retirement of withdrawable accounts.

(a) At any time that funds may be on hand and available for such a purpose, and the bylaws of an association and withdrawable account contracts so provide, an association shall have the authority and right to redeem all or any portion of its withdrawable accounts which have not been pledged as security for loans by forcing the retirement thereof. The number of and total amount of such withdrawable accounts to be retired by an association shall be determined by the board of directors.

(b) An association shall give notice by certified mail to the last address of each holder of an affected withdrawable account of at least 30 days. The redemption price of withdrawable accounts so retired shall be the full withdrawal value of the account, as determined on the last dividend date, plus all dividends on withdrawable accounts credited or paid as of the effective retirement date. Dividends shall continue to accrue and be paid or credited by the association to the withdrawable accounts to be retired up to and including the effective retirement date.

(c) If the required notice has been properly given, and if on the effective retirement date the funds necessary for payment have been set aside so as to be available, and shall continue to be available therefor, dividends on those withdrawable accounts called for forced retirement shall cease to accrue after the effective retirement date. All rights with respect to such account shall, after the effective retirement date, terminate, except only the right of the holder of the retired withdrawable account to receive the full redemption price.

(d) No association may redeem withdrawable accounts by forced retirement whenever it has on file applications for withdrawal, or maturities which have not yet been acted upon and paid. No association may redeem withdrawable accounts by forced retirement until the maturity of any fixed minimum term which may be required for the class of withdrawable accounts to be retired. (1981, c. 282, s. 3.)

§ 54B-127. Negotiable orders of withdrawal.

Notwithstanding any other provisions of law, the Commissioner of Banks shall by regulation, authorize associations to accept deposits to withdrawable accounts which may be withdrawn or transferred on or by negotiable or transferable order or authorization to the association. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-128. Option on nonnegotiable orders of withdrawal.

Notwithstanding any other provisions of law, the Commissioner of Banks may by regulation authorize State associations to establish nonnegotiable orders or authorizations of withdrawal. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-129. Joint accounts.

(a) Any two or more persons may open or hold a withdrawable account or accounts. The withdrawable account and any balance thereof shall be held by them as joint tenants, with or without right of survivorship, as the contract shall provide; the account may also be held pursuant to G.S. 41-2.1 and have incidents set forth in that section, provided, however, if the account is held pursuant to G.S. 41-2.1 the contract shall set forth that fact as well. Unless the persons establishing the account have agreed with the association that withdrawals require more than one signature, payment by the association to, or on the order of, any persons holding an account authorized by this section shall be a total discharge of the association's obligation as to the amount so paid. Funds in a joint account established with right of survivorship shall belong to the surviving joint tenant or tenants upon the death of a joint tenant, and the funds shall be subject only to the personal representative's right of collection as set forth in G.S. 28A-15-10(a)(3), or as provided in G.S. 41-2.1 if the account is established pursuant to the provisions of that section. Payment by the association of funds in the joint account to a surviving joint tenant or tenants shall terminate the personal representative's authority under G.S. 28A-15-10(a)(3) to collect against the association for the funds so paid, but the personal representative's authority to collect such funds from the surviving joint tenant or tenants is not terminated. A pledge of such account by any holder or holders shall, unless otherwise specifically agreed upon, be a valid pledge and transfer of such account, or of the amount so pledged, and shall not operate to sever or terminate the joint ownership of all or any part of the account. Persons establishing an account under this section shall sign a statement showing their election of the right of survivorship in the account, and containing language set forth in a conspicuous manner and substantially similar to the following:

"SAVINGS AND LOAN (or name of institution)
JOINT ACCOUNT WITH RIGHT OF SURVIVORSHIP
G.S. 54B-129

We understand that by establishing a joint account under the provisions of North Carolina General Statute 54B-129 that:

1. The savings and loan association (or name of institution) may pay the money in the account to, or on the order of, any person named in the account unless we have agreed with the association that withdrawals require more than one signature; and
2. Upon the death of one joint owner the money remaining in the account will belong to the surviving joint owners and will not pass by inheritance to the heirs of the deceased joint owner or be controlled by the deceased joint owner's will.

We DO elect to create the right of survivorship in this account.

______________________________________"

(a1) This section shall not be deemed exclusive. Deposit accounts not conforming to this section shall be governed by other applicable provisions of the General Statutes or the common law as appropriate.

(b) This section does not repeal or modify any provisions of law relating to estate taxes. This section regulates and protects the association in its relationships with joint owners of deposit accounts.

(c) No addition to such account, nor any withdrawal or payment shall affect the nature of the account as a joint account, or affect the right of any tenant to terminate the account. (1981, c. 282, s. 3; 1987 (Reg. Sess., 1988), c. 1078, s. 5; 1989, c. 164, s. 1; 1989 (Reg. Sess., 1990), c. 866, s. 1; 1998-69, s. 16.)

Editor's Note. — Session Laws 1987 (Reg. Sess., 1988), c. 1078, which rewrote subsections (a) and (b), in s. 9 provided that all accounts opened pursuant to any statute amended by c. 1078 before July 1, 1989 would continue to be governed by the provisions of those statutes as they read prior to July 1, 1989.

CASE NOTES

Intent to Create. — Where signature cards for CD accounts did not expressly reveal the parties' intention to establish joint accounts with rights of survivorship, rights of survivorship were not created, and parol evidence of their intent to do so was not admissible. Mutual Community Savs. Bank v. Boyd, 125 N.C. App. 118, 479 S.E.2d 491 (1996).

Cited in Napier v. High Point Bank & Trust Co., 100 N.C. App. 390, 396 S.E.2d 620 (1990).

§ 54B-130. Payable on Death (POD) accounts.

(a) If any person or persons establishing a withdrawable account shall execute a written agreement with the association containing a statement that it is executed pursuant to the provisions of this section and providing for the account to be held in the name of the person or persons as owner or owners for one or more persons designated as beneficiaries, the account and any balance thereof shall be held as a Payable on Death account with the following incidents:

(1) Any owner during the owner's lifetime may change any designated beneficiary by a written direction to the association.

(1a) If there are two or more owners of a Payable on Death account, the owners shall own the account as joint tenants with right of survivorship and, except as otherwise provided in this section, the account shall have the incidents set forth in G.S. 54B-129.

(2) Any owner may withdraw funds by writing checks or otherwise, as set forth in the account contract, and receive payment in cash or check payable to the owner's personal order.

(3) If only one beneficiary is living and of legal age at the death of the last surviving owner, the beneficiary shall be the holder of the account, and payment by the association to the holder shall be a total discharge of the association's obligation as to the amount paid. If two or more beneficiaries are living at the death of the last surviving owner, they shall be owners of the account as joint tenants with right of survivorship as provided in G.S. 54B-129, and payment by the association to the owners or to any of the owners shall be a total discharge of the association's obligation as to the amount paid.

(4) If one or more owners survive the last surviving beneficiary, the account shall become an individual account of the owner, or a joint account with right of survivorship of the owners, and shall have the legal incidents of an individual account in the case of a single owner or a joint account with right of survivorship, as provided in G.S. 54B-129, in the case of multiple owners.

(5) If only one beneficiary is living and that beneficiary is not of legal age at the death of the last surviving owner, the association shall transfer the funds in the account to the general guardian or guardian of the estate, if any, of the minor beneficiary. If no guardian of the minor beneficiary has been appointed, the association shall hold the funds in a similar interest bearing account in the name of the minor until the minor reaches the age of majority or until a duly appointed guardian withdraws the funds.

(6) Prior to the death of the last surviving owner, no beneficiary shall have any ownership interest in a Payable on Death account. Funds in a Payable on Death account established pursuant to this subsection shall belong to the beneficiary or beneficiaries upon the death of the last surviving owner and the funds shall be subject only to the personal representative's right of collection as set forth in G.S. 28A-15-10(a)(1). Payment by the association of funds in the Payable on Death account to the beneficiary or beneficiaries shall terminate the personal representative's authority under G.S. 28A-15-10(a)(1) to collect against the association for the funds so paid, but the personal representative's authority to collect such funds from the beneficiary or beneficiaries is not terminated.

The person or persons establishing an account under this subsection shall sign a statement containing language set forth in a conspicuous manner and substantially similar to the following:

"SAVINGS AND LOAN (or name of institution)
PAYABLE ON DEATH ACCOUNT
G.S. 54B-130(A)

I (or we) understand that by establishing a Payable on Death account under the provisions of North Carolina General Statute 54B-130(a) that:

1. During my (or our) lifetime I (or we), individually or jointly, may withdraw the money in the account; and
2. By written direction to the savings and loan association (or name of institution) I (or we), individually or jointly, may change the beneficiary; and

3. Upon my (or our) death the money remaining in the account will belong to the beneficiaries, and the money will not be inherited by my (or our) heirs or be controlled by will.

____

______________________________"

(a1) This section shall not be deemed exclusive. Deposit accounts not conforming to this section shall be governed by other applicable provisions of the General Statutes or the common law, as appropriate.

(b) Repealed by Session Laws 2001-267, s. 3, effective October 1, 2001.

(c) No addition to such accounts, nor any withdrawal, payment, or change of beneficiary shall affect the nature of such accounts as Payable on Death accounts, or affect the right of any owner to terminate the account.

(d) This section does not repeal or modify any provisions of laws relating to estate taxes. (1981, c. 282, s. 3; 1987 (Reg. Sess., 1988), c. 1078, s. 6; 1989, c. 164, s. 4; 1989 (Reg. Sess., 1990), c. 866, s. 2; 1998-69, s. 17; 2001-267, s. 3.)

Editor's Note. — Session Laws 1987 (Reg. Sess., 1988), c. 1078, which rewrote this section, in s. 9 provided that all accounts opened pursuant to any statute amended by c. 1078 before July 1, 1989 would continue to be governed by the provisions of those statutes as they read prior to July 1, 1989.

CASE NOTES

A purported trust agreement did not comply with this section, although it did establish a valid trust pursuant to the common law, where it failed to reference this section, purported to name three beneficiaries rather than one, and did not contain a change of beneficiary provision, or a provision indicating that the funds in the account were not to be inherited by the grantor's heirs or controlled by the grantor's will. Bland v. Branch Banking & Trust Co., 143 N.C. App. 282, 547 S.E.2d 62, 2001 N.C. App. LEXIS 268 (2001).

A person who opened a savings account and signed a document indicating that she was the trustee, but who never created the discretionary revocable trust agreement on the reverse side, did not create a trust pursuant to the terms of this section, although a common-law trust may have been created. Shatley v. Southwestern Technical College, 75 N.C. App. 343, 330 S.E.2d 827 (1985).

§ 54B-131. Right of setoff on withdrawable accounts.

(a) Every association shall have a right of setoff, without further agreement or pledge, upon all withdrawable accounts owned by any member or customer to whom or upon whose behalf the association has made an unsecured advance of money by loan; and upon the default in the repayment or satisfaction thereof the association may cancel on its books all or any part of the withdrawable accounts owned by such member or customer, and apply the value of such accounts in payment on account of such obligation.

(b) An association which exercises the right of setoff provided in this section shall first give 30 days' notice to the member or customer that such right will be exercised. Such accounts may be held or frozen, with no withdrawals permitted, during the 30-day notice period. Such accounts may not be canceled and the value thereof may not be applied to pay such obligation until the 30-day period has expired without the member or customer having cured the default on the obligation. The amount of any member's or customer's interest in a joint account or other account held in the names of more than one person shall be subject to the right of setoff provided in this section.

(c) This section is not exclusive, but shall be in addition to contract, common law and other rights of setoff. Such other rights shall not be governed in any fashion by this section. (1981, c. 282, s. 3; 1991, c. 707, s. 5.)

§ 54B-132. Minors as withdrawable account holders; safe deposit box lessees.

(a) An association may issue a withdrawable account to a minor as the sole and absolute owner, or as a joint owner, and receive payments, pay withdrawals, accept pledges and act in any other manner with respect to such account on the order of the minor with like effect as if he were of full age and legal capacity. Any payment to a minor shall be a discharge of the association to the extent thereof. The account shall be held for the exclusive right and benefit of the minor, and any joint owners, free from the control of all persons, except creditors.

(b) An association may lease a safe deposit box to a minor and, with respect to such lease, may deal with the minor in all regards as if the minor were of full age and legal capacity. A minor entering a lease agreement with an association pursuant to this subsection shall be bound by the terms of the agreement to the same extent as if the minor were of full age and legal capacity. (1981, c. 282, s. 3; 1989, c. 437; 1991, c. 707, s. 6.)

Legal Periodicals. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

§ 54B-133. Withdrawable accounts as deposit of securities.

Notwithstanding any restrictions or limitations contained in any law of this State, the withdrawable accounts of any State association or of any federal association having its principal office in this State, may be accepted by any agency, department or official of this State in any case wherein such agency, department or official acting in its or his official capacity requires that securities be deposited with such agency, department or official. (1981, c. 282, s. 3.)

§ 54B-134. New account books.

A new account book or certificate or other evidence of ownership of a withdrawable account may be issued in the name of the holder of record at any time when requested by such holder or his legal representative upon proof satisfactory to the association that the original account book or certificate has been lost or destroyed. Such new account book or certificate shall expressly state that it is issued in lieu of the one lost or destroyed and that the association shall in no way be liable thereafter on account of the original book or certificate. The association may in its bylaws require indemnification against any loss that might result from the issuance of the new account book or certified certificate. (1981, c. 282, s. 3.)

§ 54B-135. Transfer of withdrawable accounts.

The owner of a withdrawable account may transfer his rights therein absolutely or conditionally to any other person eligible to hold the same but such transfer may be made on the books of the association only upon presentation of evidence of transfer satisfactory to the association, and accompanied by the proper application for transfer by the transferor and transferee, who shall accept such account subject to the terms and conditions of the savings contract, the bylaws of the association, the provisions of its certificate of incorporation, and all rules and regulations of the Commissioner of Banks. Notwithstanding the effectiveness of such a transfer between the parties thereto, the association may treat the holder of record of a withdrawable account as the owner thereof for all purposes, including payment and voting (in the case of a mutual association) until such transfer and assignment has been recorded by the association. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-136. Authority of power of attorney.

An association may continue to recognize the authority of an individual holding a power of attorney in writing to manage or to make withdrawals either in whole or in part from the withdrawable account of a customer or member until it receives written or actual notice of death or of adjudication of incompetency of such member or revocation of the authority of such individual holding such power of attorney. Payment by the association to an individual holding a power of attorney prior to receipt of such notice shall be a total discharge of the association's obligation as to the amount so paid. (1981, c. 282, s. 3.)

§§ 54B-137, 54B-138: Reserved for future codification purposes.

§ 54B-139. Personal agency accounts.

(a) A person may open a personal agency account by written contract containing a statement that it is executed pursuant to the provisions of this section. A personal agency account may be a checking account, savings account, time deposit, or any other type of withdrawable account or certificate. The written contract shall name an agent who shall have authority to act on behalf of the depositor in regard to the account as set out in this subsection. The agent shall have the authority to:

(1) Make, sign or execute checks drawn on the account or otherwise make withdrawals from the account;

(2) Endorse checks made payable to the principal for deposit only into the account; and

(3) Deposit cash or negotiable instruments, including instruments endorsed by the principal, into the account.

A person establishing an account under this section shall sign a statement containing language substantially similar to the following in a conspicuous manner:

"SAVINGS AND LOAN (or name of institution)
PERSONAL AGENCY ACCOUNT
G.S. 54B-139

I understand that by establishing a personal agency account under the provisions of North Carolina General Statute 54B-139 that the agent named in the account may:

1. Sign checks drawn on the account; and
2. Make deposits into the account.

I also understand that upon my death the money remaining in the account will be controlled by my will or inherited by my heirs.

______________________"

(b) An account created under the provisions of this section grants no ownership right or interest in the agent. Upon the death of the principal there is no right of survivorship to the account and the authority set out in subsection (a) terminates.

(c) The written contract referred to in subsection (a) shall provide that the principal may elect to extend the authority of the agent set out in subsection (a) to act on behalf of the principal in regard to the account notwithstanding the subsequent incapacity or mental incompetence of the principal. If the principal so elects to extend such authority of the agent, then upon the subsequent incapacity or mental incompetence of the principal, the agent may continue to exercise such authority, without the requirement of bond or of accounting to any court, until such time as the agent shall receive actual knowledge that such authority has been terminated by a duly qualified guardian of the estate of the incapacitated or incompetent principal or by the duly appointed attorney-in-fact for the incapacitated or incompetent principal, acting pursuant to a durable power of attorney (as defined in G.S. 32A-8) which grants to the attorney-in-fact that authority in regard to the account which is granted to the agent by the written contract executed pursuant to the provisions of this section, at which time the agent shall account to such guardian or attorney-in-fact for all actions of the agent in regard to the account during the incapacity or incompetence of the principal. If the principal does not so elect to extend the authority of the agent, then upon the subsequent incapacity or mental incompetence of the principal, the authority of the agent set out in subsection (a) terminates.

(d) When an account under this section has been established all or part of the account or any interest or dividend thereon may be paid by the association on a check made, signed or executed by the agent. In the absence of actual knowledge that the principal has died or that the agency created by the account has been terminated, such payment shall be a valid and sufficient discharge to the association for payment so made. (1987 (Reg. Sess., 1988), c. 1078, s. 7; 1989, c. 164, s. 7; 1989 (Reg. Sess., 1990), c. 866, s. 3.)

Editor's Note. — Session Laws 1987 (Reg. Sess., 1988), c. 1078, which amended this section, in s. 9 provided that all accounts opened pursuant to any statute amended by c. 1078 before July 1, 1989 would continue to be governed by the provisions of those statutes as they read prior to July 1, 1989.

§§ 54B-140 through 54B-146: Reserved for future codification purposes.

ARTICLE 6A.

Fee for Returned Checks.

§ 54B-147. Collection of processing fee for returned checks.

Notwithstanding any other provision of law, a processing fee may be charged and collected by any association for checks (including negotiable order of withdrawal drafts) on which payment has been refused by the payor depository institution. An association may also collect said fee for checks drawn on that association with respect to an account with insufficient funds. (1981 (Reg. Sess., 1982), c. 1238, s. 14; 1985, c. 224.)

§§ 54B-148, 54B-149: Reserved for future codification purposes.

ARTICLE 7.

Loans.

§ 54B-150. Manner of making loans.

(a) The board of directors shall establish procedures by which loans are to be considered, approved, and made by the association.

(b) All actions on loan applications to the association shall be reported to the board of directors at its next meeting. (1981, c. 282, s. 3; 1983, c. 144, s. 18.)

Cross References. — As to parity of interest rates for savings and loan associations, see G.S. 24-1.4. As to loans on mortgages, etc., issued under the Federal Housing Act, see G.S. 53-45.

§ 54B-151. Permitted loans.

(a) An association may lend funds on the sole security of pledged withdrawable accounts, but no loan so made shall exceed the withdrawal value of the pledged account. However, no such loan shall be made when an association has applications for withdrawals or maturities which have not been paid.

(b) An association may lend funds on the security of real property:

(1) Of such value, determined in accordance with the provisions of this Chapter and the rules and regulations concerning appraisals, sufficient to provide good and ample security for the loan; and

(2) Which has a fee simple title, totally free from encumbrances except as permitted within this Article; or

(3) Which has a leasehold title extending or renewable automatically or at the option of the holder or at the option of the association for a period of at least 10 years beyond the maturity of the loan; and

(4) Which has a clear title established by such evidence of title as is consistent with sound lending practices; and

(5) Where the security interest in such real property is evidenced by an appropriate written instrument creating or constituting a first and prior lien on real property, and the loan is evidenced by a note, bond or similar written instrument; or

(6) Where the security interest in such real property is evidenced by an appropriate written instrument creating or constituting a second or junior lien on real property which is subject only to a mortgage or deed of trust securing a commercial loan or a residential loan made by the association or another lender; and

(7) Where the security property may be subject also to taxes and special assessments not yet due and payable.

(c) An association may lend funds on the security of the whole of the beneficial interest in a trust in which the trust property consists of real property of the type upon which a loan would be permitted under G.S. 54B-151(b).

(d) An association may lend funds on the security of bonds issued as general obligations of or guaranteed by the United States, bonds issued as general obligations of this State, and bonds issued as general obligations of any county, city, town, village, school district, sanitation or park district, or other political subdivision or municipal corporation of this State. The amount of such loan made under the authority of this subsection shall not exceed ninety percent (90%) of the face value of the bonds which serve as security.

(e) An association may invest in construction loans, the proceeds of which, under the terms of a written contract between a lender and a borrower, are to be disbursed periodically as such construction work progresses. Such loans may include advances for the purchase price of the real property upon which such improvements are to be constructed. Any construction loan may be converted into a loan with permanent financing, and the term of the permanent financing shall be considered to begin at the end of the term allowed for construction.

(f) An association may lend funds without requiring security. No unsecured loan shall exceed the maximum amount authorized by regulation by the Commissioner of Banks.

(g) An association may invest in loans secured by a lien on unimproved real property.

(h) An association may invest in loans secured by the cash surrender value of any life insurance policy on the life of the borrower. However, the amount of such loan shall in no event exceed ninety percent (90%) of the cash surrender value of such life insurance policy.

(i) An association may invest in loans, obligations and advances of credit made for the payment of expenses of college or university education. Such loans may be secured, partly secured or unsecured, and the association may require a comaker or comakers, an insurance guarantee under a governmental student loan guarantee plan, or other protection against contingencies. The borrower shall certify to the association that the proceeds of the loan are to be used by a full-time student solely for the payment of expenses of college or university education or community college education.

(j) An association may lend funds on any collateral deemed sufficient by the board of directors to properly secure loans. Loans made solely upon security of collateral consisting of stock or equity securities which are not listed on a national stock exchange or regularly quoted and offered for trade on an over-the-counter market, shall be considered loans without security.

(k) An association may lend funds on the security of a mobile home subject to such rules and regulations governing such loans as may be promulgated by the Commissioner of Banks. (1981, c. 282, s. 3; 1983, c. 144, s. 19; 1987, c. 564, s. 14; 2001-193, s. 16.)

§ 54B-152. Real property encumbrances.

(a) Real property is deemed unencumbered within the meaning of this Chapter unless the security instrument thereon establishes a first lien upon such real property or interest therein.

(b) Notwithstanding the provisions of the immediately preceding subsection, real property is not deemed encumbered within the meaning of this Chapter merely by reason of the existence of:

(1) An instrument reserving a right-of-way, sewer rights, or rights in wells; or
(2) Building restrictions or other restrictive covenants; or
(3) A lease under which rents or profits are reserved by the owner; or
(4) Current taxes or assessments not yet payable; or
(5) Other encumbrances which, in accordance with sound lending practices in the locality, are not regarded as constituting defects in title to real property. (1981, c. 282, s. 3; 1999-179, s. 1.)

§ 54B-153. Prohibited security.

No association may accept its own capital stock or its own mutual capital certificates as security for any loan made by such association. (1981, c. 282, s. 3.)

§ 54B-154. Insider loans.

The Commissioner of Banks may promulgate rules and regulations no less stringent than the requirements of the appropriate federal regulatory authority, and as he deems necessary, to govern the making of loans to officers and directors, and their associates, and companies or other business entities controlled by them. (1981, c. 282, s. 3; 1983, c. 144, s. 20; 1989 (Reg. Sess., 1990), c. 806, s. 10; 2001-193, s. 16.)

§ 54B-155. Rule-making power of Commissioner of Banks.

The Commissioner of Banks shall, from time to time, promulgate such rules and regulations in respect to loans permitted to be made by State associations as may be reasonably necessary to assure that such loans are in keeping with sound lending practices and to promote the purposes of this Chapter; provided, that such rules and regulations shall not prohibit an association from making any loan which is a permitted loan for federal associations under federal regulatory authority. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-156. Loan expenses and fees.

(a) Subject to the provisions of N.C.G.S. Chapter 24, an association may require borrowers to pay all reasonable expenses incurred by the association in connection with making, closing, disbursing, extending, adjusting or renewing loans. Such charges may be collected by the association from the borrower and paid to any persons, including any director, officer or employee of the association who may render services in connection with the loan, or such charges may be paid directly by the borrower.

(b) An association may require a borrower to pay a reasonable charge for late payments made during the course of repayment of a loan. Subject to the provisions of G.S. 24-10.1, such payments may be levied only upon such terms and conditions as shall be fixed by the association's board of directors and agreed to by the borrower in the loan contract. (1981, c. 282, s. 3; 1989 (Reg. Sess., 1990), c. 806, s. 16.)

Cross References. — As to interest and usury laws in general, see G.S. 24-1 et seq.

CASE NOTES

Editor's Note. — *The cases cited below were decided under former statutory provisions.*

Application of Usury Laws to Building and Loan Associations. — See Mills v. Salisbury Bldg. & Loan Ass'n, 75 N.C. 292 (1876); Commissioners of Craven v. Atlantic & N.C.R.R., 77 N.C. 289 (1877); Dickerson v. Raleigh Co-op. Land & Bldg. Ass'n, 89 N.C. 37 (1883); Rowland v. Old Dominion Bldg. & Loan Ass'n, 115 N.C. 825, 18 S.E. 965 (1894); Rowland v. Old Dominion Bldg. & Loan Ass'n, 116 N.C. 877, 22 S.E. 8 (1895); Meroney v. Atlanta Bldg. & Loan Ass'n, 116 N.C. 882, 21 S.E. 924 (1895); Rowland v. Old Dominion Bldg. & Loan Ass'n, 118 N.C. 173, 24 S.E. 366 (1896); Smith v. Old Dominion Bldg. & Loan Ass'n, 119 N.C. 249, 26 S.E. 41 (1896); Hollowell v. Southern Bldg. & Loan Ass'n, 120 N.C. 286, 26 S.E. 781 (1897); Williams v. Maxwell, 123 N.C. 586, 31 S.E. 821 (1898); Cheek v. Iron Belt Bldg. & Loan Ass'n, 126 N.C. 242, 35 S.E. 463 (1900).

§ 54B-157. Loans conditioned on certain transactions prohibited.

No association or service corporation thereof shall require as a condition of making a loan that the borrower contract with any specific person or organization for particular services. (1981, c. 282, s. 3.)

§ 54B-158. Insured or guaranteed loans.

An association may make insured or guaranteed loans in accordance with the provisions of G.S. 53-45. (1981, c. 282, s. 3.)

§ 54B-159. Purchase of loans.

An association may invest any funds on hand in the purchase of loans of a type which the association could make in accordance with the provisions of this Chapter. (1981, c. 282, s. 3.)

§ 54B-160. Participation in loans.

An association may invest in a participating interest in loans of a type which the association would be authorized to originate. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 15.)

§ 54B-161. Sale of loans.

An association may sell any loan, including any participating interest in a loan. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 16.)

§ 54B-162. Power to borrow money.

An association, in its certificate of incorporation or in its bylaws, may authorize the board of directors to borrow money and the board of directors may by resolution adopted by a vote of at least two thirds of the entire board duly recorded in the minutes may authorize the officers of the association to borrow money for the association on such terms and conditions as it may deem proper. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 17.)

§ 54B-163. Methods of loan repayment.

Subject to such rules and regulations as the Commissioner of Banks may prescribe, an association shall agree in writing with borrowers as to the method or plan by which an indebtedness shall be repaid. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-164. Loans to one borrower.

(a) The aggregate amount of mortgage loans outstanding granted by an association to any one borrower shall not exceed ten percent (10%) of the net withdrawal value of such association's withdrawable accounts or an amount equal to the total net worth of such association, whichever amount is less.

(b) Notwithstanding any other provision of law, in order to protect the public, including members, depositors, and stockholders of a State association, the Commissioner of Banks may establish limits on loans to any one borrower if he finds that a State association is operating with unsafe and unsound lending practices. The Commissioner of Banks shall promulgate rules and regulations to govern the establishment of the limits authorized by this section. (1981, c. 282, s. 3; 1985, c. 659, s. 14; 2001-193, s. 16.)

§ 54B-165. Professional services.

(a) A State association or service corporation thereof must notify borrowers prior to the loan commitment of their right to select the attorney or law firm rendering legal services in connection with the loan, and the person or organization rendering insurance services in connection with the loan. Such persons or organizations must be approved by the association's board of directors, pursuant to such rules and regulations as the Commissioner of Banks may prescribe.

(b) A State association or service corporation thereof may require borrowers to reimburse such association for legal services rendered to it by its own attorney only when the fee is limited to legal services required by the making of such loan. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-166. Nonconforming investments.

Unless otherwise provided, every loan or other investment made in violation of this Chapter shall be due and payable according to its terms and the obligation thereof shall not be impaired; provided, that such violation consists only of the lending of an excessive sum on authorized security or of investing in an unauthorized investment. (1981, c. 282, s. 3.)

§ 54B-167. Scope of Article.

Nothing in this Article shall be construed to modify Chapter 24 of the General Statutes, or other applicable law, or to allow fees, charges, or interest beyond that permitted by Chapter 24 or other applicable law. (1981, c. 282, s. 3.)

§§ 54B-168 through 54B-179: Reserved for future codification purposes.

ARTICLE 8.

Other Investments.

§ 54B-180. Other investments.

In addition to the loans and investments permitted under Article 7 of this Chapter, the assets of a State association in excess of the demands of its members or customers may be invested subject to the approval of the board of directors only as described under the provisions of this Article. (1981, c. 282, s. 3.)

§ 54B-181. Business property of a State association.

A State association may invest in real property and equipment necessary for the conduct of its business and in real property to be held for its future use. Such association may invest in an office building or buildings, and appurtenances for the purpose of the transaction of such association's business or for rental. No such investment may be made without the prior written approval of the Commissioner of Banks if the total amount of such investments exceeds the association's net worth. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-182. United States obligations.

A State association may invest in any obligation issued and fully guaranteed in principal and interest by the United States government or any instrumentality thereof. (1981, c. 282, s. 3.)

Cross References. — As to investment in bonds guaranteed by United States, see G.S. 53-44.

§ 54B-183. North Carolina obligations.

A State association may invest in any obligation issued and fully guaranteed in principal and interest by the State of North Carolina or any instrumentality thereof. (1981, c. 282, s. 3.)

§ 54B-184. Federal Home Loan Bank obligations.

A State association may invest in the stock of the Federal Home Loan Bank of which such association is a member, and in bonds or other evidences of indebtedness or obligation of any Federal Home Loan Bank. (1981, c. 282, s. 3.)

§ 54B-185. Deposits in banks.

A State association may invest in certificates of deposit, time insured deposits, savings accounts, or demand deposits of such banks as are approved by the board of directors of the association. (1981, c. 282, s. 3.)

§ 54B-186. Deposits in other associations.

A State association may invest in withdrawable accounts of any association as approved by the board of directors. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 18.)

§ 54B-187. Fannie Mae obligations.

A State association may invest in stock or other evidences of indebtedness or obligations of Fannie Mae, or any successor thereto. (1981, c. 282, s. 3; 2001-487, s. 14(d).)

§ 54B-188. Municipal and county obligations.

A State association may invest in bonds or other evidences of indebtedness which are direct general obligations of any county, city, town, village, school district, sanitation or park district, or other political subdivision or municipal corporation of this State; or in bonds or other evidences of indebtedness which are payable from revenues or earnings specifically pledged therefor, which are issued by the county or an adjoining county or a political subdivision or municipal corporation of a county in this State. (1981, c. 282, s. 3.)

§ 54B-189. Stock in education agency.

A State association may invest in stock or obligations of any corporation doing business in this State, or of any agency of this State or of the United States, where the principal business of such corporation or agency is to make loans for the financing of a college or university education, or education at a community college in this State. (1981, c. 282, s. 3; 1987, c. 564, s. 14.)

§ 54B-190. Industrial development corporation stock.

A State association may invest in stock or other evidence of indebtedness or obligations of business or industrial development corporations chartered by this State or by the United States. (1981, c. 282, s. 3.)

§ 54B-191. Urban renewal investment corporation stock.

A State association may invest in stock or other evidence of indebtedness or obligations of an urban renewal investment corporation chartered under the laws of this State or of the United States. (1981, c. 282, s. 3.)

§ 54B-192. Urban renewal projects.

(a) A State association may invest in the initial purchase and development, or the purchase or commitment to purchase after completion, of unimproved residential real property or improved residential real property for sale or rental, including projects for the reconstruction, rehabilitation or rebuilding of residential properties to meet the minimum standards of health and occupancy prescribed by appropriate local authorities, and the provision of accommodations for retail stores, shops and other community services which are reasonably incident to such housing projects. No such investment shall be made under the provisions of this section without the prior approval of the Commissioner of Banks. The Commissioner of Banks may approve such investment under the provisions of this section only when the association shows:

(1) That the association has adequate assets available for such an investment;
(2) That the amount of the proposed investment does not exceed ninety percent (90%) of the reasonable market value of the property or interest therein; and
(3) Reserved.
(4) That the proposed project is to be located in an area, including any contiguous area acquired incidentally thereto, determined by the Commissioner of Banks to be an urban renewal, redevelopment, blighted or conservation area, or any similar area provided for by the laws of this State or of the United States, or local ordinances for slum clearance, conservation, blighted area clearance, redevelopment, urban renewal or of a similar nature or purpose.

(b) Nothing herein contained shall prohibit a State association from developing or building on land acquired by it under any other provisions of this Chapter; nor shall a State association be prohibited from completing the construction of buildings pursuant to any construction loan contract where the borrower has failed to comply with the terms of such contract. (1981, c. 282, s. 3; 2001-193, s. 16.)

§ 54B-193. Loans on sufficient collateral; other investments.

(a) A State association may invest in loans secured by any collateral deemed sufficient by the board of directors to properly secure loans; however, if the collateral consists of stock or equity securities of any kind, the stock or securities must be listed on a national stock exchange or regularly quoted and offered for trade on an over-the-counter market.

(b) Subject to such limitations as the Commissioner of Banks may prescribe by regulation, a State association may invest in any investment deemed appropriate by its board of directors. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 19; 2001-193, s. 16.)

§ 54B-194. Service corporations.

(a) Any association or group of associations whose principal offices are located within this State, may establish service corporations under the provisions of Chapter 55 for corporate organization, provided that the Commissioner of Banks receives copies of the proposed articles of incorporation and bylaws for approval, prior to filing them with the Secretary of State. Any such association may also invest in the capital stock, obligations or other securities of existing service corporations.

(b) No State association may make any investment in service corporations if its aggregate investment would exceed ten percent (10%) of its total assets.

(c) Service corporations shall be subject to audit and examination by the Commissioner of Banks, and the cost of examination shall be paid by the service corporation.

(d) The permitted activities of a service corporation shall be described in the rules and regulations as promulgated by the Commissioner of Banks. In addition, a service corporation may engage in those activities which are approved for service corporations owned solely by federal associations who have their principal offices in this State, unless such activities are prohibited by the Commissioner of Banks.

(e) The location of the principal and branch offices of a service corporation must be approved by the Commissioner of Banks. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 20; 1989 (Reg. Sess., 1990), c. 806, s. 11; 2001-193, s. 16.)

§ 54B-195. Any loan or investment permitted for federal associations.

Subject to such limitations and restrictions as the Commissioner of Banks may prescribe through rules and regulations, any State association is authorized and permitted to make any loan or investment, or engage in any activity, which may be permitted for federal associations whose principal offices are located within this State. Every loan or investment made by a State association prior to the enactment of this Chapter shall for all purposes be considered to have been permitted loans or investments if federal associations were authorized to make such loans or investments at the time they were made by the State association. (1981, c. 282, s. 3; 1983, c. 144, s. 21; 1989 (Reg. Sess., 1990), c. 806, s. 12; 2001-193, s. 16.)

§ 54B-196: Reserved for future codification purposes.

Editor's Note. — The section enacted as G.S. 54B-196 by Session Laws 1981, c. 282 has been codified as G.S. 24-1.4.

§ 54B-197. Effect of change in law or regulation.

Any loan or investment made by a State association which was in compliance with the law or regulations in effect at the time such loan or investment was made will remain a legal loan or investment even though the power to make such loans or investments in the future is amended or revoked. (1981, c. 282, s. 3.)

§§ 54B-198 through 54B-209: Reserved for future codification purposes.

Article 9.

Liquidity Fund.

§ 54B-210. Components of liquidity fund.

(a) Every State association shall establish and maintain a regulatory capital account in an amount and in such funds and investments that comply with the requirements of the appropriate federal regulatory authorities.

(b) The failure of a State association to maintain the required level and type of regulatory capital may be grounds for supervisory action by the Commissioner of Banks.

(c) The Commissioner of Banks may adopt rules to implement this section. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 21; 1983, c. 144, s. 22; 1989, c. 76, s. 10; 1989 (Reg. Sess., 1990), c. 806, s. 13; 2001-193, s. 16.)

§ 54B-211. Renewal of liquidity fund.

If the liquidity fund falls below the amount required by the Commission, the association shall make no new real property loans until the required level has been attained. The refinancing, recasting or renewal of loans previously made and loans made as a result of foreclosure sales under instruments held by the association shall not be considered as new loans, within the meaning of this section. (1981, c. 282, s. 3.)

§§ 54B-212 through 54B-215: Reserved for future codification purposes.

ARTICLE 10.

General Reserve.

§ 54B-216. General reserve.

(a) Every State association shall establish and maintain general valuation allowances and specific loss reserves in compliance with the requirements of the appropriate federal regulatory authorities.

(b) The failure of a State association to maintain the required level of general valuation allowances or specific loss reserves may be grounds for supervisory action by the Commissioner of Banks.

(c) The Commissioner of Banks may adopt rules to implement this section.

(d) to (f) Repealed by Session Laws 1989, c. 76, s. 11. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 2; 1989, c. 76, s. 11; 1989 (Reg. Sess., 1990), c. 806, s. 14; 2001-193, s. 16.)

§§ 54B-217 through 54B-220: Reserved for future codification purposes.

ARTICLE 11.

Foreign Associations.

§§ 54B-221 through 54B-235: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1087, s. 6.

Cross References. — For the North Carolina Regional Reciprocal Savings and Loan Acquisition Act, and the effective date thereof, see G.S. 54B-48.1 et seq.

ARTICLE 12.

Mutual Deposit Guaranty Associations.

§ 54B-236. Definitions.

The term "institution" as used in this Article shall mean savings and loan associations organized or operated under the provisions of this Chapter, or credit unions organized or operated under the provisions of Articles 14A to 14L of Chapter 54 of the General Statutes, or any institution that is eligible for insurance by the Federal Deposit Insurance Corporation or the National Credit Union Administration. (1981, c. 282, s. 3; 1983, c. 144, s. 23; 1985, c. 659, s. 15; 1989 (Reg. Sess., 1990), c. 806, s. 15.)

§ 54B-237. Organization of a mutual deposit guaranty association.

(a) Any number of institutions, not less than 25, may become incorporated as a mutual deposit guaranty association without capital stock subject to the limitations prescribed in this Article. A mutual deposit guaranty association shall be governed by a board of directors or board of trustees of which a majority shall be representatives of the public and shall not be employees or directors of any insured member institution or have an interest in any insured member institution other than as a result of being a depositor or borrower.

(b) Articles of incorporation of a guaranty association shall be filed in the office of the Secretary of State. The Secretary of State shall, upon receipt of such articles, transmit a copy of them to the Secretary of Commerce and shall not record them until authorized to do so by the Secretary of Commerce. (1981, c. 282, s. 3; 1983, c. 719, s. 2; 1989, c. 751, s. 9(c); 1991 (Reg. Sess., 1992), c. 959, s. 7.)

§ 54B-238. Examination and certification by Secretary of Commerce.

(a) Upon receipt from the Secretary of State of a copy of the articles of incorporation of a proposed guaranty association, the Secretary of Commerce shall at once examine all the facts connected with the formation of the proposed corporation. If the articles of incorporation are correct in form and substance and the examination shows that such corporation, if formed, would be entitled to commence the business of a guaranty association, the Secretary of Commerce shall so certify to the Secretary of State.

(b) The Secretary of Commerce may refuse to make such certification if upon examination he has reason to believe the proposed corporation is to be formed for any business other than assuring the liquidity of member institutions and guaranteeing deposits therein, if upon examination he has reason to believe that the character and general fitness of the incorporators are not such as to command the confidence of the general public or if the best interests of the public will not be promoted by its establishment. (1981, c. 282, s. 3; 1983, c. 719, s. 2; 1989, c. 751, s. 8(3); 1991 (Reg. Sess., 1992), c. 959, s. 8.)

§ 54B-239. Recordation of articles of incorporation.

Upon receipt of the certification provided for in G.S. 54B-238, the Secretary of State shall record the articles of incorporation of such guaranty association and furnish a certified copy thereof to the incorporators and to the Secretary of

Commerce. Upon such recordation, such association shall be deemed a corporation. All papers thereafter filed in the office of the Secretary of State relating to such corporation shall be recorded as provided by law and a certified copy forwarded to the Secretary of Commerce. (1981, c. 282, s. 3; 1983, c. 719, s. 2; 1989, c. 751, s. 9(c); 1991 (Reg. Sess., 1992), c. 959, s. 9.)

§ 54B-240. Proposed amendments submitted to Secretary of Commerce.

Any proposed amendments to the articles of incorporation of a mutual deposit guaranty association shall be filed in the office of the Secretary of State, who shall forward a copy thereof to the Secretary of Commerce, and shall not record the amendments until authorized to do so by certification of the Secretary of Commerce. (1981, c. 282, s. 3; 1983, c. 719, s. 2; 1989, c. 751, s. 8(4); 1991 (Reg. Sess., 1992), c. 959, s. 10.)

§ 54B-241. Examination and certification of amendments.

(a) Upon receipt from the Secretary of State of a copy of proposed amendments to the articles of incorporation of a mutual deposit guaranty association, the Secretary of Commerce shall at once examine the proposed amendments to determine their effect on the operation of the guaranty association.

(b) In the event the proposed amendments are correct in form and substance and the examination shows that if adopted they would not change the character or principal business of the guaranty association, the Secretary of Commerce shall so certify to the Secretary of State.

(c) The Secretary of Commerce may refuse to make certification if upon examination he has reason to believe that the proposed amendments would change the character of the business of the guaranty association or that the best interests of the public will not be promoted by their adoption. (1981, c. 282, s. 3; 1983, c. 719, s. 2; 1989, c. 751, s. 8(5); 1991 (Reg. Sess., 1992), c. 959, s. 11.)

§ 54B-242. Recordation of amendments.

Upon receipt of the certification provided for in G.S. 54B-241, the Secretary of State shall record the amendments to the articles of incorporation and furnish a certified copy thereof to the mutual deposit guaranty association and to the Secretary of Commerce. (1981, c. 282, s. 3; 1983, c. 719, s. 2; 1989, c. 751, s. 9(c); 1991 (Reg. Sess., 1992), c. 959, s. 12.)

§ 54B-243. Reserve for losses.

A mutual deposit guaranty association shall maintain at all times an amount of funds equal to no less than one percent (1%) of its insured liability to cover losses of its members. These funds may include cash, investments, and reinsurance. (1981, c. 282, s. 3.)

§ 54B-244. Purposes and powers of mutual deposit guaranty associations.

(a) The purposes of a mutual deposit guaranty association incorporated in accordance with the provisions of this Article are to:

(1) Assure the liquidity of a member institution;

(2) Guarantee the withdrawable accounts, shares of deposits of member institutions;

(3) Serve, when appointed, as receiver of a member institution.

(b) A mutual deposit guaranty association incorporated in accordance with the provisions of this Article may:

(1) Lend money to a member institution for the purpose of assuring its liquidity and withdrawable accounts, shares or deposits therein;

(2) Purchase any assets owned by a member institution for the purpose of assuring its liquidity and withdrawable accounts, shares or deposits therein;

(3) Invest any of its funds in:

a. Bonds or interest-bearing obligations of the United States or for which the faith and credit of the United States are pledged for the payment of principal and interest;

b. Bonds or interest-bearing obligations of this State;

c. Farm loans issued under the Federal Farm Loan Act and amendments thereto;

d. Notes, debentures, and bonds of a federal home loan bank issued under the Federal Home Loan Bank Act and any amendments thereto;

e. Bonds or other securities issued under the Home Owners' Loan Act of 1933 and any amendments thereto;

f. Securities acceptable to the United States to secure government deposits in national banks;

g. Deposits in any financial institution that is subject to examination and supervision by the United States or by this State;

h. Bonds or other evidences of indebtedness of counties and municipalities of the State of North Carolina, provided, that said bonds or other evidences of indebtedness of the counties and municipalities shall have a rating by Moody's Investors Services, Inc., of not less than AA, and a rating by the North Carolina Municipal Council, Inc., of not less than 90 points out of 100 points;

i. Stock in banking institutions licensed to do business in this State;

j. Securities and other investments authorized as liquid investments for any financial institution that is subject to examination and supervision by the United States or by this State;

k. Notes, bonds, debentures or securities rated in one of the four highest grades by a nationally recognized investment rating service.

l. Stock in banking institutions not licensed to do business in this State provided such investment is made in conjunction with any merger or other fundamental change approved by the Commissioner of Banks under the provisions of G.S. 54B-44.

(4) Issue its capital notes or debentures to member institutions, provided the holders of these capital notes or debentures shall not be individually responsible for any debts, contracts, or engagements of the guaranty association issuing the notes or debentures;

(5) Borrow money;

(6) Exercise any corporate power or powers not inconsistent with, and which may be necessary or convenient to, the accomplishment of its purposes of assuring liquidity of member institutions and guaranteeing withdrawable accounts, shares or deposits therein;

(7) Serve as receiver of a member institution;

(8) Make or cause to be made examinations or audits or member institutions. (1981, c. 282, s. 3; 1983, c. 144, s. 24; 2001-193, s. 16.)

§ 54B-245. Filing of semiannual financial reports; fees.

Each mutual deposit guaranty association shall on the 30th day of June and the 31st day of December of each year, or within 40 days thereafter, file with the Secretary of Commerce a report for the preceding half year, showing its financial condition at the end thereof. Such reports shall be in such form and contain such information as may be prescribed by the Secretary of Commerce. Each guaranty association doing business in this State shall pay to the Secretary of Commerce, at the time of filing each semiannual report required by this section, the sum of five dollars ($5.00). All such fees shall be paid into the State treasury to the credit of the general fund. (1981, c. 282, s. 3; 1983, c. 719, s. 2; 1989, c. 751, s. 9(c); 1991 (Reg. Sess., 1992), c. 959, s. 13.)

§ 54B-246. Supervision by Secretary of Commerce.

(a) In addition to any and all other powers, duties and functions vested in the Secretary of Commerce under the provisions of this Article, and for the protection of member institutions and the general public, the Secretary of Commerce shall have general control and supervision over all mutual deposit guaranty associations doing business in this State. Mutual deposit guaranty associations shall be subject to the control and supervision of the Secretary of Commerce as to their conduct, organization, management, business practices, reserve requirements and their financial and fiscal matters. The grant of general control and supervision over mutual deposit guaranty associations to the Secretary of Commerce by this Article shall in no way be deemed to affect the existing powers, duties and responsibilities of the Credit Union Commission, the Commissioner of Banks, or the State Banking Commission except for the removal herein of general control and supervision over mutual deposit guaranty associations from the Administrator of the Savings Institutions Division to the Secretary of Commerce.

(b) The Secretary of Commerce shall have the right, and is hereby empowered to issue rules and regulations whenever he deems it necessary for the administration of this Article as well as rules and regulations with respect to:

(1) Types of financial records to be maintained by mutual deposit guaranty associations;
(2) Retention periods of various financial records;
(3) Internal control procedures of mutual deposit guaranty associations;
(4) Conduct and management of mutual deposit guaranty associations;
(5) Additional reports which may be required by the Secretary of Commerce.

It shall be the duty of the board of directors or board of trustees of the mutual deposit guaranty association to put into effect and to carry out such rules and regulations.

(c) At least once each year the Secretary of Commerce shall make or cause to be made an examination into the affairs of each mutual deposit guaranty association doing business in this State. The Administrator of the Credit Union Division of this State, in his capacity as supervisor of state-chartered credit unions, if he deems it necessary, may designate agents to participate in such examination. The Commissioner of Banks, in his capacity as supervisor of State chartered savings and loan associations, may designate agents to participate in such examination. The expenses of such yearly examination shall be paid by the mutual deposit guaranty association so examined. (1981, c. 282, s. 3; 1983, c. 719, s. 2; 1989, c. 76, s. 23; c. 751, s. 8(6); 1991 (Reg. Sess., 1992), c. 959, s. 14; 2001-193, ss. 13, 16.)

§ 54B-247. Special examinations.

Whenever the Secretary of Commerce deems it necessary, he may make or cause to be made a special examination or audit of any mutual deposit guaranty association doing business in this State, in addition to the regular examination provided for by this Article. The expenses of such a special examination or audit shall be paid by the mutual deposit guaranty association so examined. (1981, c. 282, s. 3; 1983, c. 719, s. 2; 1989, c. 751, s. 8(7); 1991 (Reg. Sess., 1992), c. 959, s. 15.)

§ 54B-248. Right to enter and to conduct investigations.

The Secretary of Commerce or any examiner appointed by him shall have access to and may compel the production of all books, papers, securities, moneys, and other property of a mutual deposit guaranty association under examination by him. He may administer oaths to and examine the officers and agents of such association as to its affairs. (1981, c. 282, s. 3; 1983, c. 719, s. 2; 1989, c. 751, s. 8(8); 1991 (Reg. Sess., 1992), c. 959, s. 16.)

§ 54B-249. Removal of officers or employees.

The Secretary of Commerce shall have the right, and is hereby empowered, to require the board of directors or board of trustees of any guaranty association to immediately remove from office any officer, director, trustee or employee of any mutual deposit guaranty association doing business in this State, who shall be found by the Secretary of Commerce to be dishonest, incompetent, or reckless in the management of the affairs of the mutual deposit guaranty association, or in violation of the lawful orders, rules and regulations issued by the Secretary of Commerce, or who violates any of the laws set forth in Chapter 54B of the General Statutes. (1981, c. 282, s. 3; 1983, c. 719, s. 2; 1989, c. 751, s. 8(9); 1991 (Reg. Sess., 1992), c. 959, s. 17.)

§§ 54B-250 through 54B-260: Reserved for future codification purposes.

ARTICLE 13.

Savings and Loan Holding Companies.

§ 54B-261. Savings and loan holding companies.

(a) Notwithstanding any other provision of law, any stock association may simultaneously with its incorporation or conversion to a stock association provide for its ownership by a savings and loan holding company. In the case of a conversion, members of the converting association shall have the right to purchase capital stock of the holding company in lieu of capital stock of the converted association in accordance with G.S. 54B-33(c)(6).

(a1) Notwithstanding any other provision of law, any stock association may reorganize its ownership, to provide for ownership by a savings and loan holding company, upon adoption of a plan of reorganization by a favorable vote of not less than two-thirds of the members of the board of directors of the association and approval of such plan of reorganization by the holders of not less than a majority of the issued and outstanding shares of stock of the association. The plan of reorganization shall provide that (i) the resulting ownership shall be vested in a North Carolina corporation, (ii) all stockholders of the stock association shall have the right to exchange shares, (iii) the exchange of stock shall not be subject to State or federal income taxation, (iv) stockholders not wishing to exchange shares shall be entitled to dissenters' rights as provided under Article 13 of Chapter 55 of the General Statutes and (v) the plan of reorganization is fair and equitable to all stockholders.

(a2) Notwithstanding any other provision of law, a mutual association may reorganize its ownership to provide for ownership by a savings and loan holding company upon adoption of a plan of reorganization by a favorable vote of not less than two-thirds of the members of the board of directors of the association and approval of the plan of reorganization by a majority of the voting members of the association. The plan of reorganization shall provide that (i) the resulting ownership shall be vested in a North Carolina corporation, (ii) the resulting ownership of one or more subsidiary associations shall be evidenced by stock shares, (iii) the substantial portion of the assets and all of the insured deposits and part or all of the other liabilities shall be transferred to one or more subsidiary associations, (iv) the reorganization shall not be subject to State or federal income taxation, and (v) the plan of reorganization is fair and equitable to all members of the association. The Commissioner of Banks shall promulgate rules regarding the formation of the subsidiary associations and the holding company, including the rights of members, levels of investment in the holding company subsidiaries, and stock sales.

(b) Repealed by Session Laws 1983, c. 144, s. 8.

(c) A savings and loan holding company may invest in any investment authorized by its Board of Directors, except as limited by regulations promulgated by the Commissioner of Banks pursuant to this Article.

(d) Any entity which controls a state stock association, or acquires control of a state stock association, is a savings and loan holding company. (1981, c. 282, s. 3; 1983, c. 144, s. 8; 1983 (Reg. Sess., 1984), c. 1087, ss. 4, 5; 1985, c. 659, s. 16; 1989, c. 76, s. 12; 1989 (Reg. Sess., 1990), c. 806, s. 21; 2001-193, s. 16.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 7, made ss. 1 through 5, which sections, among other things, amended subsection (c) and added subsection (d) of this section, effective on the earlier of: (1) The date on which registration became effective in one of the states listed in G.S. 54B-48.2(16) which authorizes regional acquisitions of savings and loan associations and savings and loan holding companies on a reciprocal basis and which applies to savings and loan associations and savings and loan holding companies in North Carolina; or (2) July 1, 1986. Sections 1 through 5 of Session Laws 1983 (Reg. Sess., 1984), c. 1087, became effective July 1, 1985, the date on which the legislation became effective in Virginia.

§ 54B-262. Supervision of savings and loan holding companies.

Savings and loan holding companies shall be under the supervision of the Commissioner of Banks. The Commissioner of Banks shall exercise all powers and responsibilities with respect to savings and loan holding companies which he exercises with respect to associations. (1981, c. 282, s. 3; 2001-193, s. 16.)

§§ 54B-263, 54B-264: Reserved for future codification purposes.

ARTICLE 14.

Savings and Loan Interstate Branches.

§ 54B-265. Title.

This Article shall be known and may be cited as the North Carolina Savings and Loan Interstate Branch Act. (1993, c. 191, s. 2.)

§ 54B-266. Definitions.

As used in this Article, unless the context clearly requires otherwise, the following definitions apply:

(1) Repealed by Session Laws 2004-203, s. 35(a), effective August 17, 2004.
(2) "Association" means a savings and loan association and includes a State association or a federal association unless limited by use of the words "State" or "federal".
(3) "Branch" means a full-service office of an association through which it renders a savings and loan service other than its principal office. An association may engage in any authorized function or service through an authorized branch office.
(4) "Commission" means the State Banking Commission.
(5) "Home state" means (i) as to a state association, the state which granted the association its charter, and (ii) as to a federal association, the state in which the association has its principal office.
(6) "Out-of-state association" means an association chartered by any state other than this State and whose principal office is not within this State.
(7) "State association" means an association chartered under the laws of this State.
(8) "Supervisor" means the state association supervisor or equivalent state official having primary regulatory authority over an out-of-state association. (1993, c. 191, s. 2; 2001-193, ss. 16, 17; 2004-203, s. 35(a).)

§ 54B-267. Establishment of branches by out-of-state associations.

Any out-of-state association that meets the requirements of this Article may establish a branch within North Carolina either by (i) de novo entry; (ii) the purchase of an existing branch; (iii) the purchase of all or substantially all of the assets of a State association located in North Carolina; or (iv) merger or consolidation. (1993, c. 191, s. 2.)

§ 54B-268. Application requirements.

(a) Any out-of-state association desiring to establish a branch office under this Article shall file with the Commissioner of Banks a written application meeting the following requirements:

(1) The out-of-state association shall agree to comply with all the applicable rules and regulations, and informational filing requirements contained in the laws and rules of this State that would apply to a State association engaging in an equivalent form of transaction. Additionally, the Commissioner of Banks shall apply the same standards of approval to the application of the out-of-state association as would apply to an application by a State association for an equivalent form of transaction.
(2) The out-of-state association shall provide the Commissioner of Banks, in the manner prescribed by the Commissioner of Banks, with such additional information as the Commissioner of Banks deems necessary, to fully evaluate the application.
(3) The out-of-state association shall pay an application fee established by the Commissioner of Banks pursuant to G.S. 54B-9.
(4) The out-of-state association shall not commence operations of the branch office until it has received the written approval of the Commissioner of Banks.

(b) The Commissioner of Banks shall act on the application within 90 days of receipt of the completed application. (1993, c. 191, s. 2; 2001-193, s. 16.)

§ 54B-269. Conditions for approval.

No application by an out-of-state association received under this Article may be finally approved by the Commissioner of Banks unless:

(1) The Commissioner of Banks has received in writing approval of the proposed transaction from the supervisor of the out-of-state association;

(2) The supervisor of the out-of-state association agrees in writing to share with the Commissioner of Banks examination reports prepared by the supervisor and any other information deemed necessary by the Commissioner of Banks regarding the out-of-state association;

(3) The out-of-state association agrees in writing to make available to the Commissioner of Banks all information that may be required to effectively examine the association;

(4) The out-of-state association agrees in writing that so long as it maintains a branch in North Carolina, it will meet the conditions set forth in this Article and comply with all applicable North Carolina laws and any rules issued thereunder, as well as any orders or directives issued to the association by the Commissioner of Banks;

(5) The home state of the out-of-state association permits associations chartered under the laws of this State to establish branches within its border; and

(6) The out-of-state association designates and files with the Office of the Secretary of State a document appointing an agent in this State to receive service of judicial process. (1993, c. 191, s. 2; 2001-193, s. 16.)

§ 54B-270. Special conditions.

(a) The Commissioner of Banks may require an out-of-state association to designate one of its branches in North Carolina as a "headquarters branch" and may, by rule, require that reports, books, and records required of associations doing business under this Article be available at the designated headquarters branch.

(b) Once an out-of-state association has established at least one branch in North Carolina pursuant to this Article, subsequent applications to establish additional branches shall be considered on the same basis as an application of a State association to establish an additional branch pursuant to G.S. 54B-22.

(c) If an out-of-state association establishes a branch or branches by merger with or purchase from an association located in this State, and the out-of-state association and the association located in this State are both owned by the same holding company, any conditions, limitations, or restrictions placed on the holding company, pursuant to Articles 3A and 13 of this Chapter, shall continue to apply to both the acquiring out-of-state association and its holding company. (1993, c. 191, s. 2; 2001-193, s. 16.)

§ 54B-271. Powers.

An out-of-state association that establishes a branch in North Carolina may engage in all the activities authorized by North Carolina law for a State association except to the extent that such activities have been expressly prohibited by the state supervisor of the out-of-state association or the laws of the out-of-state association's home state. (1993, c. 191, s. 2.)

§ 54B-272. Establishment of out-of-state branches by state associations.

With the prior consent of the Commissioner of Banks, any association chartered under the laws of North Carolina may establish a branch in any other state in accordance with the laws of such other state. (1993, c. 191, s. 2; 2001-193, s. 16.)

§ 54B-273. Regulatory and supervisory oversight.

(a) The Commissioner of Banks may enter into such agreements as necessary regarding the scope, timing, coordination, and frequency of examinations and other supervisory matters, including the sharing of information gathered in such examinations, with other supervisors and federal association regulators. This authority applies to both out-of-state associations and their holding companies.

(b) The Commissioner of Banks may require periodic reports on the financial condition of any out-of-state association or its holding company that maintains a branch within North Carolina and may from time to time require from any such out-of-state associations other reports under oath in such scope and detail as the Commissioner of Banks may reasonably determine to be necessary for the purpose of assuring continuing compliance with the provisions of this Article.

(c) The Commissioner of Banks may, if necessary, conduct full-scope, on-site examinations of any branch established pursuant to this Article.

(d) Out-of-state associations shall be assessed and required to pay supervisory and examination fees in accordance with G.S. 54B-57 and the rules issued thereunder. (1993, c. 191, s. 2; 2001-193, s. 16.)

§ 54B-274. Enforcement.

(a) Any enforcement authority available to the Commissioner of Banks for use against a State association may, subject to the provisions of Chapter 150B of the General Statutes, be used against a branch established under this Article and against the out-of-state association or its parent holding company establishing such branch.

(b) The Commissioner of Banks may suspend or revoke the authority of an out-of-state association to establish or maintain a branch in North Carolina upon a finding of fact or condition or circumstance that is grounds for denial of an application to establish and maintain a branch under this Article.

(c) The Commissioner of Banks may enforce the provisions of this Article through an action in any court of North Carolina or any other state or any court of the United States as provided in G.S. 54B-64, 54B-65, 54B-66, and 54B-68 for the purpose of obtaining an appropriate remedy for violation of any provisions of this Article.

(d) The Commissioner of Banks may enter into joint actions with other supervisors or federal association regulators, or both, having concurrent jurisdiction over any out-of-state association that has a branch in North Carolina or over any State association that has a branch in another state, or may take such action independently to carry out the Commissioner of Banks' responsibilities under this Article and assure compliance with the provisions of this Article and the applicable association laws of this State. (1993, c. 191, s. 2; 2001-193, s. 16.)

§ 54B-275. Branch closings.

An out-of-state association that is subject to an order or written agreement revoking its authority to establish or maintain a branch in North Carolina and any State association that is subject to an order or written agreement revoking its authority to establish or maintain a branch in another state shall wind up the business of that branch in an orderly manner that protects the depositors, customers, and creditors of the branch, and that complies with all North Carolina laws and all other applicable laws regarding the closing of the branch. (1993, c. 191, s. 2.)

§ 54B-276. Rules.

The Commission may adopt rules as necessary to carry out the provisions of this Article. (1993, c. 191, s. 2.)

§ 54B-277. Appeal of Commissioner of Banks' decision.

Any aggrieved party in a proceeding under this Article may, within 30 days after final decision of the Commissioner of Banks, appeal such decision to the Commission. The Commission, within 30 days of receipt of the notice of appeal, shall approve, disapprove, or modify the Commissioner of Banks' decision. Failure of the Commission to act within 30 days of receipt of notice of appeal shall constitute a final decision of the Commission approving the decision of the Commissioner of Banks. Notwithstanding any other provision of law, any aggrieved party to a decision of the Commission shall be entitled to an appeal pursuant to G.S. 54B-16. (1993, c. 191, s. 2; 2001-193, s. 16.)

§ 54B-278. Severability.

If any provision of this Article or the application of such provision to any persons or circumstances is found invalid, the remainder of this Article and its application to persons or circumstances other than those as to which it is held invalid, shall not be affected. (1993, c. 191, s. 2.)

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ARTICLE 1.

General Provisions.

§ 54C-1. Title.

This Chapter shall be known and may be cited as "Savings Banks." (1991, c. 680, s. 1.)

Editor's Note. — Session Laws 2001-193, s. 15, provides: "All (i) statutory authority, powers, duties, and functions, including rule making, budgeting, and purchasing, (ii) records, (iii) personnel, personnel positions, and salaries, (iv) property, and (v) unexpended balances of appropriations, allocations, reserves, support costs, and other funds of the Savings Institutions Division of the Department of Commerce are transferred to and vested in the Office of Commissioner of Banks authorized by Article 8 of Chapter 53 of the General Statutes. Though transferred to the Office of Commissioner of Banks pursuant to this section, the Savings Institutions Division shall continue to function under that name. All statutory authority, powers, duties, and functions of the Administrator of the Savings Institutions Division are transferred to and vested in the Commissioner of Banks. This transfer has all the elements of a Type I transfer, as defined in G.S. 143A-6."

Session Laws 2004-171, s. 17, provides: "The Legislative Research Commission shall undertake a comprehensive study of those laws, including Chapters 53, 54B, and 54C of the General Statutes, which affect the establishment and operation of banks in North Carolina and shall make recommendations to the 2005 General Assembly, prior to the convening of the 2006 Regular Session as to which laws (i) are obsolete, unnecessary, or duplicative, (ii) are unnecessarily inconsistent in the treatment of banks, savings and loan associations, and savings banks, and (iii) unnecessarily restrict, impede, or prohibit activities of banks, savings and loan associations, and savings banks or the ability of the Commissioner of Banks to regulate banks and savings institutions in an effective, efficient, and equitable manner.

"In preparing its recommendations, the Commission shall actively solicit and consider information received from representatives of banks, savings and loan associations, savings banks, the State Banking Commission, the Commissioner of Banks and the Commissioner's staff, other interested parties, and the general public."

§ 54C-2. Purpose.

The purposes of this Chapter are:

(1) To provide for the safe and sound conduct of the business of savings banks, the conservation of their assets, and the maintenance of public confidence in savings banks.
(2) To provide for the protection of the interests of customers and members.
(3) To provide the opportunity for savings banks to remain competitive with each other and with other depository institutions existing under other laws of this and other states and the United States.
(4) To provide for an increase in the savings base of the State and local control of the means of finance and accumulation of capital.
(5) To provide the opportunity for the management of savings banks to exercise prudent business judgment in conducting the affairs of savings banks to the extent compatible with the purposes recited in this section.

(6) To provide adequate rulemaking power and administrative discretion so that the regulation and supervision of savings banks are readily responsive to changes in local economic conditions and depository institution practices. (1991, c. 680, s. 1.)

§ 54C-3. Applicability of Chapter.

This Chapter, unless the context otherwise specifies, shall apply to all State savings banks. (1991, c. 680, s. 1.)

§ 54C-4. Definitions and application of terms.

(a) Except with respect to this Chapter and Chapter 54B, the term "savings and loan association" when used in the General Statutes shall include savings banks chartered under this Chapter.

(b) Unless the context otherwise requires, the following definitions apply in this Chapter:

(1) Repealed by Session Laws 2001-193, s. 7, effective July 1, 2001.

(2) Affiliate. — Any person or corporation that controls, is controlled by, or is under common control with a savings institution.

(3) Associate. — Any person's relationship with (i) any corporation or organization, other than the applicant or a majority-owned subsidiary of the applicant, of which the person is an officer or partner or is, directly or indirectly, the beneficial owner of ten percent (10%) or more of any class of equity securities, (ii) any trust or other estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar fiduciary capacity, and (iii) any relative or spouse who lives in the same house as that person, or any relative of that person's spouse who lives in the same house as that person, or who is a director or officer of the applicant or any of its parents or subsidiaries.

(4) Association. — A savings and loan association as defined by G.S. 54B-4(b)(5).

(5) Branch office. — An office of a savings bank, other than its principal office, that renders savings institution services.

(6) Capital stock. — Securities that represent ownership of a stock savings bank.

(7) Certificate of incorporation or charter. — The document that represents the corporate existence of a State savings bank.

(8) Commission. — The State Banking Commission.

(8a) Commissioner. — The Commissioner of Banks authorized pursuant to G.S. 53-92.

(9) Conflict of interest. — A matter before the board of directors in which one or more of the directors, officers, or employees has a direct or indirect financial interest in its outcome.

(10) Control. — The power, directly or indirectly, to direct the management or policies of a savings bank or to vote twenty-five percent (25%) or more of any class of voting securities for a savings bank.

(11) Depository institution. — A person, firm, or corporation engaged in the business of receiving, soliciting, or accepting money or its equivalent on deposit, or of lending money or its equivalent, or of both.

(12) Disinterested directors. — Those directors who have absolutely no direct or indirect financial interest in the matter before them.

(13) Dividends on stock. — The earnings of a savings bank paid out to holders of capital stock in a stock savings bank.

(14) Division. — The Savings Institutions Division.

(15) Examination and investigation. — A supervisory inspection of a savings bank or proposed savings bank that may include inspection of every relevant piece of information including subsidiary or affiliated businesses.

(16) Immediate family. — One's spouse, father, mother, children, brothers, sisters, and grandchildren; and the father, mother, brothers, and sisters of one's spouse; and the spouse of one's child, brother, or sister.

(17) Insurance of deposit accounts. — Insurance on a savings bank's deposit accounts when the beneficiary is the holder of the insured account.

(18) Loan production office. — An office of a savings bank other than the principal or branch offices whose activities are limited to the generation of loans.

(19) Members. — Deposit account holders and borrowers in a State mutual savings bank.

(20) Mutual savings bank. — A savings bank owned by members of the savings bank and organized under this Chapter.

(21) Net worth. — A savings bank's total assets less total liabilities as defined by generally accepted accounting principles plus unallocated, general loan loss reserves.

(22) Original incorporators. — One or more natural persons who are the organizers of a State savings bank responsible for the business of a proposed savings bank from the filing of the application to the Commission's final decision on the application.

(23) Plan of conversion. — A detailed outline of the procedure of the conversion of a savings institution from one to another regulatory authority, from one to another form of ownership, or from one to another charter.

(24) Principal office. — The office that houses the headquarters of a savings bank.

(25) Proposed savings bank. — An entity in organizational procedures before the Commission's final decision on its charter application.

(26) Registered agent. — The person named in the certificate of incorporation upon whom service of legal process is deemed binding upon the savings bank.

(27) Savings bank. — A State savings bank or a federal savings bank, unless limited by use of the words "State" or "federal".

(28) Savings institution. — Either an association or a savings bank.

(29) Service corporation. — A corporation operating under Article 7 of this Chapter that engages in activities determined by the rules of the Administrator to be incidental to the conduct of a depository institution business as provided in this Chapter, or engages in activities that further or facilitate the corporate purposes of a savings bank, or furnishes services to a savings bank or subsidiaries of a savings bank, the voting stock of which is owned directly or indirectly by one or more savings institutions.

(30) State savings bank. — A depository institution organized and operated under this Chapter; or a corporation organized under federal law and so converted as to be operated under this Chapter.

(31) Stock savings bank. — A savings bank owned by holders of capital stock and organized under this Chapter.

(32) Voluntary dissolution. — The dissolution and liquidation of a savings bank initiated by its ownership. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 4; 2001-193, ss. 7, 8, 17.)

§ 54C-5: Reserved for future codification purposes.

Article 2.
Incorporation and Organization.

§ 54C-6. Hearings.

Any hearing required to be held by this Chapter shall be conducted in accordance with Article 3A of Chapter 150B of the General Statutes. (1991, c. 680, s. 1.)

§ 54C-7. Application of Chapter on business corporations.

All law relating to private corporations, and particularly the North Carolina Business Corporation Act, Chapter 55 of the General Statutes, that is not inconsistent with this Chapter or with the proper business of depository institutions is applicable to all State savings banks. (1991, c. 680, s. 1.)

§ 54C-8. Scope and prohibitions; existing charters; injunctions.

(a) Nothing in this Chapter shall be construed to invalidate any charter that was valid before the enactment of this Chapter. Any savings banks so chartered on October 1, 1991, may continue operation in accordance with the Chapter under which it was chartered. However, after October 1, 1991, no depository institution may be qualified as a savings bank except in accordance with this Chapter.

(b) Except as provided in subsection (a) of this section, no person, corporation, company, or savings bank, except one incorporated and licensed in accordance with this Chapter or federal law to operate a savings bank, shall operate as a savings bank. Unless so authorized as a State or federal savings bank and engaged in transacting a depository institution business, no person, corporation, company, or savings bank domiciled and doing business in this State shall:

(1) Use in its name the term "savings bank" or words of similar import or connotation that lead the public reasonably to believe that the business so conducted is that of a savings bank; or

(2) Use any sign, or circulate or use any letterhead, billhead, circular, or paper whatsoever, or advertise or communicate in any manner that would lead the public reasonably to believe that it is conducting the business of a savings bank.

(c) Upon application by the Commissioner of Banks or by any savings bank, a court of competent jurisdiction may issue an injunction to restrain any person or entity from violating or from continuing to violate subsection (b) of this section. (1991, c. 680, s. 1; 1997-241, s. 1; 2001-193, s. 16.)

§ 54C-9. Application to organize a savings bank.

(a) The original incorporators, a majority of whom shall be domiciled in this State, may organize and establish a savings bank in order to promote the purposes of this Chapter, subject to approval as provided in this Chapter. The original incorporators shall file with the Commissioner of Banks a preliminary application to organize a State savings bank in the form to be prescribed by the Commissioner of Banks, together with the proper nonrefundable application fee.

(b) The Commissioner of Banks shall receive the application to organize a State savings bank not less than 60 days before the scheduled consideration of the application by the Commission. The application shall contain the following:

(1) The original of the certificate of incorporation, which shall be signed by the original incorporators, or a majority of them, and shall be properly acknowledged by a person duly authorized by this State to take proof or acknowledgment of deeds; and two conformed copies;

(2) The names and addresses of the incorporators; and the names and addresses of the initial members of the board of directors;

(3) Statements of the anticipated receipts, expenditures, earnings, and financial condition of the savings bank for its first three years of operation, or any longer period as the Commissioner of Banks may require;

(4) A showing satisfactory to the Commission that:

a. The public convenience and advantage will be served by the establishment of the proposed savings bank;

b. There is a reasonable demand and necessity in the community that will be served by the establishment of the proposed savings bank;

c. The proposed savings bank will have a reasonable probability of sustaining profitable and beneficial operations within a reasonable time in the community in which the proposed savings bank intends to locate;

d. The proposed savings bank, if established, will promote healthy and effective competition in the community in the delivery to the public of savings institution services;

(5) The proposed bylaws; and

(6) Statements, exhibits, maps, and other data that may be prescribed or requested by the Commissioner of Banks, which data shall be sufficiently detailed and comprehensive so as to enable the Commissioner of Banks to pass upon the criteria set forth in this Article.

(c) The application shall be signed by the original incorporators, or a majority of them, and shall be properly acknowledged by a person duly authorized by this State to take proof and acknowledgment of deeds. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 5; 2001-193, s. 16.)

§ 54C-10. Certificate of incorporation.

(a) The certificate of incorporation of a proposed mutual savings bank shall set forth the following:

(1) The name of the savings bank, which shall not so closely resemble the name of an existing depository institution doing business under the laws of this State as to be likely to mislead the public.

(2) The county and city or town where its principal office is to be located in this State; and the name of its registered agent and the address of its registered office, including county and city or town, and street and number.

(3) The period of duration, which may be perpetual. When the certificate of incorporation fails to state the period of duration, it is considered perpetual.

(4) The purposes for which the savings bank is organized that are limited to purposes permitted under the laws of this State for savings banks.

(5) The amount of the entrance fee per deposit account based upon the amount pledged.

(6) The minimum amount on deposit in deposit accounts before it shall commence business.

(7) Any provision not inconsistent with this Chapter and the proper operation of a savings bank, which the incorporators shall set forth in the certificate of incorporation for the regulation of the internal affairs of the savings bank.

(8) The number of directors, which shall not be less than seven, constituting the initial board of directors, which may be classified in the certificate of incorporation, and the name and address of each person who is to serve as a director until the first meeting of members, or until a successor is elected and qualified.

(9) The names and addresses of the incorporators.

(b) The certificate of incorporation of a proposed stock savings bank shall set forth the following:

(1) The name of the savings bank, which shall not so closely resemble the name of an existing depository institution doing business under the laws of this State as to be likely to mislead the public.

(2) The county and city or town where its principal office is to be located in this State; and the name of its registered agent and the address of its registered office, including county and city or town, and street and number.

(3) The period of duration, which may be perpetual. When the certificate of incorporation fails to state the period of duration, it is considered perpetual.

(4) The purposes for which the savings bank is organized, which shall be limited to purposes permitted under the laws of this State for savings banks.

(5) With respect to the shares of stock which the savings bank shall have authority to issue:

a. If the stock is to have a par value, the number of the shares of stock and the par value of each.

b. If the stock is to be without par value, the number of the shares of stock.

c. If the stock is to be of both kinds mentioned in sub-subdivisions a. and b. of this subdivision, particulars in accordance with those sub-subdivisions.

d. If the stock is to be divided into classes, or into series within a class of preferred or special shares of stock, the certificate of incorporation shall also set forth a designation of each class, with a designation of each series within a class, and a statement of the preferences, limitations, and relative rights of the stock of each class or series.

(6) The minimum amount of consideration to be received for its shares of stock before it shall commence business.

(7) A statement as to whether stockholders have preemptive rights to acquire additional or treasury shares of the savings bank.

(8) Any provision not inconsistent with this Chapter or the proper operation of a savings bank, which the incorporators shall set forth in the certificate of incorporation for the regulation of the internal affairs of the savings bank.

(9) The number of directors, which shall not be less than seven, constituting the initial board of directors, which may be classified in accordance with the certificate of incorporation, and the name and address of each person who is to serve as a director until the first meeting of the stockholders, or until a successor is elected and qualified.

(10) The names and addresses of the incorporators. (1991, c. 680, s. 1.)

§ 54C-11. Commissioner of Banks to consider application.

Upon receipt of an application to organize and establish a savings bank, the Commissioner of Banks shall examine or cause to be examined all the relevant facts connected with the formation of the proposed savings bank. If it appears to the Commissioner of Banks that the proposed savings bank has complied with all the requirements set forth in this Chapter and the rules for the formation of a savings bank and is otherwise lawfully entitled to be organized and established as a savings bank, the Commissioner of Banks shall present the application to the Commission for its consideration. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-12. Criteria to be met before the Commissioner of Banks may recommend approval of an application.

(a) The Commissioner of Banks may recommend approval of an application to form a mutual savings bank only when all of the following criteria are met:

(1) The proposed savings bank has an operational expense fund, from which to pay organizational and incorporation expenses, in an amount determined by the Commissioner of Banks to be sufficient for the safe and proper operation of the savings bank, but in no event less than seventy-five thousand dollars ($75,000). The moneys remaining in the expense fund shall be held by the savings bank for at least one year from its date of licensing. No portion of the fund shall be released to an incorporator or director who contributed to it, nor to any other contributor, nor to any other person, and no dividends shall be accrued or paid on the funds without the prior approval of the Commissioner of Banks.

(2) The proposed savings bank has pledges for deposit accounts in an amount to be determined by the Commissioner of Banks to be sufficient for the safe and proper operation of the savings bank, but in no event less than four million dollars ($4,000,000).

(3) All entrance fees for deposit accounts of the proposed savings bank have been made with legal tender of the United States.

(4) The name of the proposed savings bank will not mislead the public and is not the same as an existing depository institution or so similar to the name of an existing depository institution as to mislead the public.

(5) The character, general fitness, and responsibility of the incorporators and the initial board of directors of the proposed savings bank, a majority of whom shall be residents of North Carolina, will command the confidence of the community in which the proposed savings bank intends to locate.

(6) There is reasonable demand and necessity in the community that will be served by the establishment of the proposed savings bank.

(7) The public convenience and advantage will be served by the establishment of the proposed savings bank.

(8) The proposed savings bank will have a reasonable probability of sustaining profitable and beneficial operations in the community.

(9) The proposed savings bank, if established, will promote healthy and effective competition in the community in the delivery to the public of savings institution services.

(b) The Commissioner of Banks may recommend approval of an application to form a stock savings bank only when all of the following criteria are met:

(1) The proposed savings bank has prepared a plan to solicit subscriptions for capital stock in an amount determined by the Commissioner of Banks to be sufficient for the safe and proper operation of the savings bank, but in no event less than three million dollars ($3,000,000).

(2) The name of the proposed savings bank will not mislead the public and is not the same as an existing depository institution or so similar to

the name of an existing depository institution as to mislead the public; and contains the wording "corporation," "incorporated," "limited," "company," or an abbreviation of one of these words or other words sufficient to distinguish stock savings banks from mutual savings banks.

(3) The character, general fitness, and responsibility of the incorporators, initial board of directors, and initial stockholders of the proposed savings bank will command the confidence of the community in which the proposed savings bank intends to locate.
(4) All subscriptions for capital stock of the proposed savings bank have been purchased with legal tender of the United States.
(5) There is a reasonable demand and necessity in the community that will be served by the establishment of the proposed savings bank.
(6) The public convenience and advantage will be served by the establishment of the proposed savings bank.
(7) The proposed savings bank will have a reasonable probability of sustaining profitable and beneficial operations in the community.
(8) The proposed savings bank, if established, will promote healthy and effective competition in the community in the delivery to the public of savings institution services.

(c) The minimum amount of pledges for deposit accounts or subscriptions for capital stock may be adjusted if the Commissioner of Banks determines that a greater requirement is necessary or that a smaller requirement will provide a sufficient capital base. The Commissioner of Banks' findings and recommendations to the Commission shall be based upon due consideration of (i) the population of the proposed trade area, (ii) the total deposits of the depository institutions operating in the proposed trade area, (iii) the economic conditions of and projections for the proposed trade area, (iv) the business experience and reputation of the proposed management, (v) the business experience and reputation of the proposed incorporators and directors, and (vi) the projected deposit growth, capitalization, and profitability of the proposed savings bank. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-13. Commission to review findings and recommendations of Commissioner of Banks.

(a) If the Commissioner of Banks does not have the completed application within 120 days of the filing of the preliminary application, the application shall be returned to the applicants.

(b) When the Commissioner of Banks has completed the examination and investigation of the facts relevant to the establishment of the proposed savings bank, the Commissioner of Banks shall present the findings and recommendations to the Commission at a public hearing. The Commission shall approve or reject an application within 180 days of the submission of the preliminary application.

(c) Not less than 45 days before the public hearing held for the consideration of the application to establish a savings bank, the incorporators shall cause to be published a notice in a newspaper of general circulation in the area to be served by the proposed savings bank. The notice shall contain:

(1) A statement that the application has been filed with the Commissioner of Banks;
(2) The name of the community where the principal office of the proposed savings bank intends to locate;
(3) A statement that a public hearing shall be held to consider the application; and
(4) A statement that any interested or affected party may file a written statement either favoring or protesting the creation of the proposed

savings bank. The statement shall be filed with the Commissioner of Banks within 30 days of the date of publication.

(d) The Commission, at the public hearing, shall consider the findings and recommendations of the Commissioner of Banks and shall hear oral testimony that the Commissioner of Banks may wish to give or be called upon to give, and shall also receive information and hear testimony from the original incorporators of the proposed savings bank and from any and all other interested or affected parties. The Commission shall hear only testimony and receive only information that is relevant to the consideration of the application and the operation of the proposed savings bank. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-14. Grounds for approval or denial of application.

(a) After consideration of the findings, recommendations, and any oral testimony of the Commissioner of Banks, and the consideration of any other information and evidence, either written or oral, as has come before it at the public hearing, the Commission shall approve or disapprove the application within 30 days after the public hearing. The Commission shall approve the application if it finds that the certificate of incorporation is in compliance with G.S. 54C-10 and that there is compliance with all the criteria set out in G.S. 54C-12, the remainder of this Chapter, rules, and the General Statutes.

(b) If the Commission approves the application, the Commissioner of Banks shall notify the Secretary of State with a certificate of approval, accompanied by the original of the certificate of incorporation and the two conformed copies.

(c) Upon receipt of the certificate of approval, the original of the certificate of incorporation, and the two conformed copies and upon the payment by the newly chartered savings bank of the appropriate organization tax and fees, the Secretary of State shall file the certificate of incorporation in accordance with G.S. 55-1-20. The Secretary of State shall certify, under official seal, the two conformed copies of the certificate of incorporation, one of which shall be forwarded immediately to the original incorporators or their representatives, the other of which shall be forwarded to the office of the Commissioner of Banks for filing. Upon the recordation of the certificate of incorporation by the Secretary of State, the savings bank is a body politic and corporate under the name stated in the certificate, and may begin the savings bank business when duly licensed by the Commissioner of Banks.

(d) The certificate of incorporation, or a copy, duly certified by the Secretary of State, by the register of deeds of the county where the savings bank is located, or by the Commissioner of Banks, under their respective seals, is evidence in all courts and places, and is, in all judicial proceedings, deemed prima facie evidence of the complete organization and incorporation of the savings bank purporting thereby to have been established.

(e) After approval of the application, the Commissioner of Banks shall supervise and monitor the organization process. The Commissioner of Banks shall ensure that sufficient pledges for deposit accounts or subscriptions for capital stock as well as insurance of deposit accounts have been secured by the organizers. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-15. Final decision.

The Commission shall present the Commissioner of Banks with a final decision that is in accordance with Chapter 150B of the General Statutes. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-16. Appeal.

The final decision of the Commission may be appealed in accordance with Chapter 150B of the General Statutes. (1991, c. 680, s. 1.)

§ 54C-17. Insurance of accounts required.

A State savings bank shall obtain and maintain insurance on all members' and customers' deposit accounts from an insurance corporation created by an act of Congress. Before the licensing of a savings bank, a certificate of incorporation duly recorded under G.S. 54C-14(c), is deemed to be sufficient certification to the insuring corporation that the savings bank is a legal corporate entity. The insurance shall be obtained within the time limit prescribed in G.S. 54C-19. Subject to the rules of the Commissioner of Banks, a State savings bank may obtain or participate in efforts to obtain insurance of deposits that is in excess of the amount eligible for federal insurance of accounts. This insurance is known as "excess insurance". (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-18: Repealed by Session Laws 1999-179, s. 2, effective June 14, 1999.

§ 54C-19. Time allowed to commence business.

A newly chartered savings bank shall commence business within one year after the date upon which its corporate existence began. A savings bank that does not commence business within this time, shall forfeit its corporate existence, unless the Commissioner of Banks, before the expiration of the one year period, approves an extension of the time within which the association may commence business, upon a written request stating the reasons for the request. Upon forfeiture, the certificate of incorporation shall expire, and any and all action taken in connection with the incorporation and chartering of the savings bank, with the exception of fees paid to the Division, shall become null and void. The Commissioner of Banks shall determine if a savings bank has failed to commence business within one year, without extension as provided in this section, and shall notify the Secretary of State and the register of deeds in the county in which the savings bank is located that the certificate of incorporation has expired. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-20. Licensing.

A newly chartered savings bank is entitled to a license to operate upon payment to the Division of the appropriate license fee as prescribed by the Commissioner of Banks, when it shows to the satisfaction of the Commissioner of Banks evidence of capable, efficient, and equitable management, that the organization of the savings bank has been conducted lawfully and is complete, and when it passes a final inspection by the Commissioner of Banks or the Commissioner of Banks' representative preceding the opening of its doors for business. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-21. Amendments to certificate of incorporation.

(a) An amendment to the certificate of incorporation of a State savings bank shall be made at any annual or special meeting of the savings bank, held in accordance with G.S. 54C-106 and G.S. 54C-107, by a majority of votes or shares cast by members or stockholders present in person or by proxy at the meeting. Any amendment shall be certified by the appropriate corporate official, submitted to the Commissioner of Banks for approval or rejection, and if approved, then certified by the Commissioner of Banks and recorded as provided in G.S. 54C-14 for certificates of incorporation.

(b) Notwithstanding subsection (a) of this section, a State savings bank may change its registered office or its registered agent, or both, in accordance with

G.S. 55D-31. The savings bank shall file a copy of the statement or certificate certified by the Secretary of State in the office of the Commissioner of Banks. (1991, c. 680, s. 1; 2001-193, s. 16; 2001-358, s. 47(h); 2001-387, s. 173; 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§ 54C-22. List of stockholders to be maintained.

A stock savings bank organized and operated under this Chapter shall, at all times, keep a current list of the names of all its stockholders. Whenever called upon by the Commissioner of Banks, a stock savings bank shall file in the office of the Commissioner of Banks a correct list of all its stockholders, the resident address of each, the number of shares of stock held by each, and the dates of issue. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-23. Branch offices.

(a) A State savings bank may apply to the Commissioner of Banks for permission to establish a branch office. The application shall be in the form prescribed by the Commissioner of Banks and shall be accompanied by the proper branch application fee. The Commissioner of Banks shall approve or deny branch applications within 120 days of filing.

(b) The Commissioner of Banks shall approve a branch application when all of the following criteria are met:

(1) The applicant has gross assets of at least ten million dollars ($10,000,000).
(2) The applicant has evidenced financial responsibility.
(3) The applicant has a net worth equal to or exceeding the amount required by the insurer of deposit accounts.
(4) The applicant has an acceptable internal control system that includes certain basic internal control requirements essential to the protection of assets and the promotion of operational efficiency regardless of the size of the applicant.

(c) Upon receipt of a branch application, the Commissioner of Banks shall examine or cause to be examined all the relevant facts connected with the establishment of the proposed branch office. If it appears to the satisfaction of the Commissioner of Banks that the applicant has complied with all the requirements set forth in this section and the regulations for the establishment of a branch office and that the savings bank is otherwise lawfully entitled to establish the branch office, then the Commissioner of Banks shall approve the branch application.

(d) Not more than 10 days following the filing of the branch application with the Commissioner of Banks, the applicant shall cause a notice to be published in a newspaper of general circulation in the area to be served by the proposed branch office. The notice shall contain:

(1) A statement that the branch application has been filed with the Commissioner of Banks;
(2) The proposed address of the branch office, including city or town and street; and

(3) A statement that any interested or affected party may file a written statement with the Commissioner of Banks, within 30 days of the date of the publication of the notice, protesting the establishment of the proposed branch office and requesting a hearing before the Commissioner of Banks on the application.

(e) Any interested or affected party may file a written statement with the Commissioner of Banks within 30 days of the date of initial publication of the branch application notice, protesting the establishment of the proposed branch office and requesting a hearing before the Commissioner of Banks on the application. If a hearing is held on the branch application, the Commissioner of Banks shall receive information and hear testimony only from the applicant and from any interested or affected party that is relevant to the branch application and the operation of the proposed branch office. The Commissioner of Banks shall issue the final decision on the branch application within 30 days following the hearing. The final decision shall be in accordance with Chapter 150B of the General Statutes.

(f) If a hearing is not held on the branch application, the Commissioner of Banks shall issue the final decision within 120 days of the filing of the application. The final decision shall be in accordance with Chapter 150B of the General Statutes.

(g) A party to a branch application may appeal the final decision of the Commissioner of Banks to the Commission at any time after the final decision, but not later than 30 days after a written copy of the final decision is served upon the party and the party's attorney of record by personal service or by certified mail. Failure to file an appeal within the time stated shall operate as a waiver of the right of the party to review by the Commission and by a court of competent jurisdiction in accordance with Chapter 150B of the General Statutes, relating to judicial review. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-24. Request to change location of a branch or principal office.

The board of directors of a State savings bank may change the location of a branch office or the principal office of the savings bank with the prior written approval of the Commissioner of Banks. The Commissioner of Banks may request, and the savings bank shall provide, any information that the Commissioner of Banks determines is necessary to evaluate the request. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-25. Approval revoked; branch office.

The Commission may, for good cause and after a hearing, order the closing of a branch office. The order shall be made in writing to the savings bank and shall fix a reasonable time after which the savings bank shall close the branch office. (1991, c. 680, s. 1.)

§ 54C-26. Branch offices closed.

The Board of a State savings bank may discontinue the operation of a branch office upon giving at least 90 days prior written notice to the Commissioner of Banks and depositors, the notice to include the date upon which the branch office shall be closed. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 6; 2001-193, s. 16.)

§ 54C-27. Loan production office.

A State savings bank may open or close a loan production office with the prior written approval of the Commissioner of Banks. The Commissioner of

Banks may request, and the savings bank shall provide, any information that the Commissioner of Banks determines is necessary to evaluate the request. (1991, c. 680, s. 1; 2001-193, s. 16.)

§§ 54C-28, 54C-29: Reserved for future codification purposes.

ARTICLE 3.

Corporate Changes.

§ 54C-30. Conversion to savings bank.

(a) An association or State or national bank, upon a majority vote of its board of directors, may apply to the Commissioner of Banks for permission to convert to a State savings bank and for certification of appropriate amendments to its certificate of incorporation to effect the change. Upon receipt of an application to convert to a State savings bank, the Commissioner of Banks shall examine all facts connected with the conversion. The depository institution applying for permission to convert shall pay all the expenses and cost of the examination.

(b) The converting depository institution shall submit a plan of conversion as a part of the application to the Commissioner of Banks. The Commissioner of Banks may approve it with or without amendment. If the Commissioner of Banks approves the plan, then the plan shall be submitted to the members or stockholders as provided in subsection (c) of this section. If the Commissioner of Banks refuses to approve the plan, the objections shall be stated in writing and the converting depository institution shall be given an opportunity to amend the plan to obviate the objections or to appeal the Commissioner of Banks' decision to the Commission.

(c) After lawful notice to the members or stockholders of the converting depository institution and full and fair disclosure, the substance of the plan shall be approved by a majority of the votes or shares present, in person or by proxy. Following the vote of the members or stockholders, the results of the vote certified by an appropriate officer of the converting depository institution shall be filed with the Commissioner of Banks. The Commissioner of Banks shall then either approve or disapprove the requested conversion to a State savings bank. After approval of the conversion, the Commissioner of Banks shall supervise and monitor the conversion process and shall ensure that the conversion is conducted lawfully and under the approved plan of conversion. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 7; 2001-193, s. 16.)

§ 54C-31. Conversion from State to federal charter.

A State savings bank, stock or mutual, organized and operated under this Chapter, may convert to a federal charter in accordance with the laws and regulations of the United States and with the same force and effect as though originally incorporated under these laws. The procedure to effect this conversion is as follows:

(1) The savings bank shall submit a plan of conversion to the Commissioner of Banks, who may approve the plan, with or without amendment, or refuse to approve the plan. If the Commissioner of Banks approves the plan, then the plan shall be submitted to the members or stockholders as provided in the subdivision (2) of this section. If the Commissioner of Banks refuses to approve the plan, the objections shall be stated in writing and the converting savings bank shall be

given an opportunity to amend the plan to obviate the objections or to appeal the Commissioner of Banks' decision to the Commission.

(2) A meeting of the members or stockholders shall be held upon not less than 15 days' notice to each member or stockholder. Notice of the meeting may be mailed to each member or stockholder, postage prepaid, to the last known address, or the board of directors may cause notice of the meeting to be published, once a week for two weeks preceding the meeting, in a newspaper of general circulation in the county where the savings bank has its principal office. It is regarded as sufficient notice of the purpose of the meeting if the notice contains substantially the following statement: "The purpose of this meeting is to consider the conversion of this State chartered savings bank to a federal charter, under the laws of the United States." An appropriate officer of the savings bank shall make proof by affidavit at the meeting of due service of the notice or call for the meeting.

(3) At the meeting of the members or stockholders of the savings bank, the members or stockholders may, by affirmative vote of a majority of votes or shares present, in person or by proxy, resolve to convert the savings bank to a federal charter. A copy of the minutes of the meeting of the members or stockholders certified by an appropriate officer of the savings bank shall be filed in the office of the Commissioner of Banks. The certified copy when so filed is prima facie evidence of the holding and the action of the meeting.

(4) Within a reasonable time after the receipt of a certified copy of the minutes, the Commissioner of Banks shall either approve or disapprove the proceedings of the meeting for compliance with the procedure set forth in this section. If the Commissioner of Banks approves the proceedings, the Commissioner of Banks shall issue a certificate of approval of the conversion. The savings bank shall record the certificate in the office of the Secretary of State. If the Commissioner of Banks disapproves the proceedings, the Commissioner of Banks shall provide a written explanation of the disapproval and notify the savings bank of the disapproval. The savings bank may appeal a disapproval to the Commission.

(5) The savings bank shall file an application, in the manner prescribed or authorized by the laws and regulations of the United States, to consummate the conversion to a federal charter. A copy of the charter or authorization issued to the savings bank by the appropriate federal regulatory authority shall be filed with the Commissioner of Banks. Upon filing with the Commissioner of Banks, the savings bank shall cease to be a State savings bank and shall be a federal depository institution.

(6) Whenever any savings bank converts to a federal charter it shall cease to be a savings bank under the laws of this State, except that its corporate existence is deemed to be extended for the purpose of prosecuting or defending suits by or against it and of enabling it to close its business affairs as a State savings bank and to dispose of and convey its property. At the time when the conversion becomes effective all the property of the State savings bank including all its rights, title, and interest in and to all property of whatever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest, and asset of any conceivable value or benefit then existing, belonging or pertaining to it, or which would inure to it, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of the federal depository institution, which shall have, hold

and enjoy the same in its own right as fully and to the same extent as the same was possessed, held, and enjoyed by the savings bank; and the federal depository institution as of the effective time of the conversion shall succeed to all the rights, obligations, and relations of the State savings bank. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-32. Simultaneous charter and ownership conversion.

(a) In the event of a State charter to federal charter conversion, when the form of ownership will also simultaneously be changed from stock to mutual, or from mutual to stock, the conversion shall proceed initially as if it involves only a charter conversion, under G.S. 54C-31. After the savings bank becomes a federal depository institution, then the federal regulatory authority shall govern the continuing conversion of the form of ownership of the newly converted depository institution.

(b) In the event of a federal charter to State charter conversion, when the form of ownership will also simultaneously be changed from stock to mutual or from mutual to stock, the conversion shall proceed initially as if it involves only a charter conversion under G.S. 54C-30. After the federal depository institution becomes a State savings bank, G.S. 54C-33 or G.S. 54C-34 shall govern the continuing conversion of the form of ownership of the newly converted savings bank.

(c) This section shall not apply to any simultaneous charter and ownership conversion accomplished in conjunction with a merger under G.S. 54C-39. (1991, c. 680, s. 1.)

§ 54C-33. Conversion of mutual to stock savings bank.

(a) A mutual savings bank may convert from mutual to the stock form of ownership as provided in this section.

(b) A mutual savings bank may apply to the Commissioner of Banks for permission to convert to a stock savings bank and for certification of appropriate amendments to the savings bank's certificate of incorporation. Upon receipt of an application to convert from mutual to stock form the Commissioner of Banks shall examine all facts connected with the requested conversion. The savings bank applying for permission to convert shall pay all expenses and cost of the examination, monitoring, and supervision.

(c) The savings bank shall submit a plan of conversion as a part of the application to the Commissioner of Banks. The Commissioner of Banks may approve it with or without amendment, if it appears that:

(1) After conversion the savings bank will be in sound financial condition and will be soundly managed;

(2) The conversion will not impair the capital of the savings bank nor adversely affect the savings bank's operations;

(3) The conversion will be fair and equitable to the members of the savings bank and no person whether member, employee, or otherwise, will receive any inequitable gain or advantage by reason of the conversion;

(4) The savings bank services provided to the public by the savings bank will not be adversely affected by the conversion;

(5) The substance of the plan has been approved by a vote of two-thirds of the board of directors of the savings bank;

(6) All shares of stock issued in connection with the conversion are offered first to the members of the savings bank; except that any one or more tax qualified employee stock benefit plans may first purchase in the

aggregate not more than ten percent (10%) of the total offering of shares;

(7) All stock shall be offered to members of the savings bank and others in prescribed amounts and otherwise under a formula and procedure that is fair and equitable and will be fairly disclosed to all interested persons; and

(8) The plan provides a statement as to whether stockholders shall have preemptive rights to acquire additional or treasury shares of the savings bank.

If the Commissioner of Banks approves the plan, then the plan shall be submitted to the members as provided in subsection (d) of this section. If the Commissioner of Banks refuses to approve the plan, the Commissioner of Banks shall state the objections in writing and give the converting savings bank an opportunity to amend the plan to obviate the objections or to appeal the Commissioner of Banks' decision to the Commission.

(d) After lawful notice to the members of the savings bank and full and fair disclosure, the substance of the plan shall be approved by a majority of the total votes that members of the savings bank are eligible and entitled to cast. The vote by the members may be in person or by proxy. Following the vote of the members, the results of the vote certified by an appropriate officer of the savings bank shall be filed with the Commissioner of Banks. The Commissioner of Banks shall then either approve or disapprove the requested conversion. After approval of the conversion, the Commissioner of Banks shall supervise and monitor the conversion process and shall ensure that the conversion is conducted lawfully and under the savings bank's approved plan of conversion.

(e) Any rules that the Commissioner of Banks may adopt to govern conversions shall equal or exceed the requirements for conversion, if any, imposed by the federal insurer of deposit accounts. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 8; 2001-193, s. 16.)

CASE NOTES

Notice to Members Sufficient. — Notice by publication and actual mailed notice to a depositor satisfied due process standards, where the notice was provided in connection with final approval of a bank merger by government agencies. Brooks v. Southern Nat'l Corp., 131 N.C. App. 80, 505 S.E.2d 306 (1998).

§ 54C-34. Conversion of stock savings bank to mutual savings bank.

A stock savings bank organized and operating under this Chapter may, subject to the approval of the Commissioner of Banks, convert to a mutual savings bank under this section. Any rules that the Commissioner of Banks may adopt governing the conversion of stock savings banks to mutual savings banks shall include requirements that:

(1) The conversion neither impair the capital of the converting savings bank nor adversely affect its operations;

(2) The conversion shall be fair and equitable to all stockholders of the converting savings bank;

(3) The public shall not be adversely affected by the conversion;

(4) Conversion of a savings bank shall be accomplished only under a plan approved by the Commissioner of Banks. The plan shall have been approved by an affirmative vote of two-thirds of the members of the board of directors of the converting savings bank, after a full and fair disclosure to the stockholders, by an affirmative vote of a majority of

the total votes that stockholders of the savings bank are eligible and entitled to cast; and

(5) The plan of conversion provides that:
   a. Deposit accounts be issued in connection with the conversion to the stockholders of the converting savings bank;
   b. A uniform date be fixed for the determination of the stockholders to whom, and the amount to each stockholder of which, deposit accounts shall be made available; and
   c. Deposit accounts so made available to stockholders be based upon a fair and equitable formula approved by the Commissioner of Banks and fully and fairly disclosed to the stockholders of the converting savings bank. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-35. Merger of like savings banks.

Any two or more mutual savings banks or any two or more stock savings banks organized and operating, may merge or consolidate into a single savings bank. The procedure to effect the merger is as follows:

(1) The directors, or a majority of them, of the savings banks that desire to merge may, at separate meetings, enter into a written agreement of merger signed by them and under the corporate seals of the respective savings banks specifying each savings bank to be merged and the savings bank that is to receive into itself the merging savings bank or banks, and prescribing the terms and conditions of the merger and the mode of carrying it into effect. The merger agreement may provide other provisions with respect to the merger as appear necessary or desirable, or as the Commissioner of Banks may require.

(2) The merger agreement together with copies of the minutes of the meetings of the respective boards of directors verified by the secretaries of the respective savings banks shall be submitted to the Commissioner of Banks, who shall cause a careful investigation and examination to be made of the affairs of the savings banks proposing to merge, including a determination of their respective assets and liabilities. Each savings bank that is investigated and examined shall pay the cost and expense for the examination. If, as a result of the investigation, the Commissioner of Banks concludes that the members or stockholders of each of the savings banks proposing to merge will be benefited by the merger, the Commissioner of Banks shall, in writing, approve the merger. If the Commissioner of Banks deems that the proposed merger will not be in the interest of all members or stockholders of the savings banks so merging, the Commissioner of Banks shall, in writing, disapprove the merger. If the Commissioner of Banks approves the merger agreement, then it shall be submitted, within 45 days after notice to the savings banks of the approval, to the members or stockholders of each savings bank, as provided in subdivision (3) of this section. The savings bank may appeal the disapproval of the merger to the Commission.

(3) A special meeting of the members or stockholders of each of the savings banks shall be held separately upon notice of not less than 20 days to members or stockholders of each savings bank. The notice of meeting shall specify the time, place, and purpose of such meeting. Notice shall be given to members of each mutual savings bank in accordance with the methods specified in its charter and bylaws and by one or more of the following methods: (i) personal service or (ii) postage prepaid mail to the last address of each member appearing upon the records of the savings bank. Provided; however, with respect

to a merger of two mutual savings banks, as an alternative to the methods of notice specified above, the mutual savings bank which is to be the surviving savings bank of the proposed merger may provide the notice of meeting by publication of notice at least once a week for four consecutive weeks in one or more newspapers in general circulation in the county or counties in which the savings bank has its principal and any branch offices. Notice shall be given to stockholders of each stock-owned savings bank in accordance with the method specified for a meeting of stockholders in its charter and bylaws. The secretary or other officer of each savings bank shall make proof by certification at such meeting of the due service of the notice or call for said meeting.

(4) At separate meetings of the members or stockholders of the respective savings banks, the members or stockholders may adopt, by an affirmative vote of a majority of the votes or shares present, in person or by proxy, a resolution to merge into a single savings bank upon the terms of the merger agreement as shall have been agreed upon by the directors of the respective savings banks and as approved by the Commissioner of Banks. Upon the adoption of the resolution, a copy of the minutes of the proceedings of the meetings of the members or stockholders of the respective savings banks, certified by an appropriate officer of the merging savings banks, shall be filed in the office of the Commissioner of Banks. Within 15 days after the receipt of a certified copy of the minutes of the meetings, the Commissioner of Banks shall either approve or disapprove the proceedings for compliance with this section. If the Commissioner of Banks approves the proceedings, the Commissioner of Banks shall issue a certificate of approval of the merger. The certificate shall be filed and recorded in the office of the Secretary of State. When the certificate is so filed, the merger agreement shall take effect according to its terms and is binding upon all the members or stockholders of the savings banks merging, and it is deemed to be the act of merger of the constituent savings banks under the laws of this State, and the certificate or certified copy thereof is evidence of the agreement and act of merger of the savings banks and the observance and performance of all acts and conditions necessary to have been observed and performed precedent to the merger. Within 60 days after its receipt from the Secretary of State, the certified copy of the certificate shall be filed with the register of deeds of the county or counties in which the respective savings banks so merged have recorded their original certificates of incorporation. Failure to so file shall subject the savings bank to only a penalty of one hundred dollars ($100.00) to be collected by the Secretary of State. If the Commissioner of Banks disapproves the proceedings, the Commissioner of Banks shall issue a written statement of the reasons for the disapproval and notify the savings banks to that effect. The savings banks may appeal the disapproval to the Commission.

(5) Upon the merger of any savings bank, as above provided, into another:

a. Its corporate existence is merged into that of the receiving savings bank; and all its right, title, interest in and to all property of whatsoever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest or asset of any conceivable value or benefit then existing belonging or pertaining to it, or which would inure to it under an unmerged existence, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of the receiving savings bank, which shall have, hold, and enjoy the same in its own right as fully and to the same extent as if the same were possessed, held, or enjoyed by the savings banks so merged; and the receiving savings bank shall absorb fully and completely the savings bank or banks so merged.

b. Its rights, liabilities, obligations, and relations to any person shall remain unchanged and the savings bank into which it has been merged shall, by the merger, succeed to all the relations, obligations, and liabilities as though it had itself assumed or incurred the same. No obligation or liability of a member, customer, or stockholder in a savings bank that is a party to the merger shall be affected by the merger, but obligations and liabilities shall continue as they existed before the merger, unless otherwise provided in the merger agreement.

c. A pending action or other judicial proceeding to which a savings bank that is so merged is a party, is not deemed to have abated or to have discontinued by reason of the merger, but may be prosecuted to final judgment, order, or decree in the same manner as if the merger had not been made; or the receiving savings bank may be substituted as a party to the action or proceeding, and any judgment, order, or decree may be rendered for or against it that might have been rendered for or against the other savings bank if the merger had not occurred.

(6) Notwithstanding any other provision of this section, the Commissioner of Banks may waive any or all of the foregoing requirements upon finding that waiver would be in the best interest of the members or stockholders of the merging savings banks. (1991, c. 680, s. 1; 1995, c. 479, s. 5; 2001-193, s. 16.)

§ 54C-36. Simultaneous conversion/merger.

(a) The Commissioner of Banks shall not approve any application for the conversion of a savings bank from mutual to stock form and its simultaneous (i) merger into a stock-owned savings institution or bank or (ii) acquisition by an operating financial institution holding company except as authorized in subsection (b) of this section. As used in this section, "simultaneous conversion/merger" shall mean a transaction in which the members of a mutual savings bank proposing to convert to stock form are offered the opportunity to purchase (i) stock in the savings institution or bank into which it will be merged or (ii) stock in the holding company by which it will be acquired.

(b) The Commissioner of Banks shall approve a plan of simultaneous conversion/merger only if:

(1) The transaction is proposed to address supervisory concerns of the Commissioner of Banks as to the safety and soundness of the mutual savings bank; or

(2) The mutual savings bank:

a. Operates in a local market area in which long-term trends make reasonable growth, continued profitability, and safe and sound operation appear unlikely;

b. Furnishes evidence concerning its asset size, capital to assets ratio, and other factors, which may include a cost/benefit analysis, satisfactory to the Commissioner of Banks that a simultaneous conversion/merger is more likely than remaining independent, merging with a mutual institution, converting to stock ownership, or other alternatives available to the savings bank to result in deposit, credit, and other financial services being provided within the local community safely and soundly on a long-term basis; and

c. Furnishes evidence satisfactory to the Commissioner of Banks that no director, officer, or other person associated with the parties to the proposed transaction will receive benefits as a result of the simultaneous conversion/merger which in the aggregate exceed those permitted under the federal regulations governing similar transactions.

(c) The Commissioner of Banks may adopt rules to govern simultaneous conversion/mergers, which rules shall contain restrictions or limitations which equal or exceed the limitations or restrictions contained in the rules of federal regulatory agencies governing similar transactions. No plan of a simultaneous conversion/merger shall be approved by the Commissioner of Banks unless it includes notification by first class mail to the members of the savings bank to be acquired explaining the plan including economic benefits or incentives to be received by officers and directors of the association, if any. Shares of stock in the acquiring entity purchased at a discount or otherwise by members of the savings bank as part of the simultaneous conversion/merger shall be without limitation on subsequent sales by such members: provided, however, rules adopted by the Commissioner of Banks may place limitations of the sale of such stock purchased by officers and directors of the savings bank. (1991, c. 680, s. 1; 1995, c. 479, s. 6; 2001-193, s. 16.)

§ 54C-37. Merger of mutual and stock savings banks.

Any two or more savings banks, when one or more is mutually owned and one or more is stock owned, may merge to form either a mutual or stock savings bank in separate conversion-merger proceedings or in simultaneous conversion-merger proceedings. (1991, c. 680, s. 1.)

§ 54C-38. Simultaneous merger and conversion.

Any combination of associations and State savings banks may merge to form either an association or a State savings bank. (1991, c. 680, s. 1.)

§ 54C-39. Merger of federal charters with State savings banks.

Any two or more depository institutions, when one or more is a State savings bank and one or more is a federal depository institution operating in North Carolina, may merge under either a State savings bank charter or a federal charter. (1991, c. 680, s. 1.)

§ 54C-40. Merger of savings banks with banks and associations.

(a) A State savings bank, upon a majority vote of its board of directors, may apply to the Commissioner of Banks for permission to merge with any bank, as defined in G.S. 53-1, or any association, as defined in G.S. 54B-4.

(b) The State savings bank shall submit a plan of merger as a part of the application to the Commissioner of Banks. The Commissioner of Banks may recommend approval of the plan of merger with or without amendment.

If the Commissioner of Banks approves the plan, then the plan shall be submitted to the stockholders or members as provided in subsection (c) of this section. If the Commissioner of Banks refuses to approve the plan, the Commissioner of Banks shall state the objections in writing and give the merging savings bank an opportunity to amend the plan to obviate the objections or to appeal the Commissioner of Banks' decision to the Commission.

(c) After lawful notice to the stockholders or members of the savings bank and full and fair disclosure, the substance of the plan shall be approved by a majority of the total votes that stockholders or members of the savings bank are eligible and entitled to cast. The vote by the stockholders or members may be in person or by proxy. Following the vote of the stockholders or members, the results of the vote certified by an appropriate officer of the savings bank shall be filed with the Commissioner of Banks. The Commissioner of Banks shall then either approve or disapprove the requested merger.

(d) A merger between a mutual savings bank and a mutual savings and loan association shall be conducted in accordance with the provisions of G.S. 54C-35. (1991, c. 680, s. 1; 1995, c. 479, s. 7; 2001-193, s. 16.)

§ 54C-41. Voluntary dissolution by directors.

A State savings bank may be voluntarily dissolved by a majority vote of the board of directors when substantially all of the assets have been sold for the purpose of terminating the business of the savings bank or as provided in G.S. 55-14-01 and when a certificate of dissolution is recorded in the manner required by this Chapter for the recording of certificates of incorporation. (1991, c. 680, s. 1.)

§ 54C-42. Voluntary dissolution by stockholders or members.

At any annual or special meeting called for the purpose of dissolution, a savings bank may, by an affirmative vote, in person or by proxy, of at least two-thirds of the total number of shares or votes that all members or stockholders of the association are entitled to cast, resolve to dissolve and liquidate the savings bank and adopt a plan of voluntary dissolution. Upon adoption of the resolution and plan of voluntary dissolution, the members or stockholders shall proceed to elect not more than three liquidators who shall post bond as required by the Commissioner of Banks. The liquidators shall have full power to execute the plan; and the procedure thereafter shall be as follows:

(1) A copy of the resolution, certified by an appropriate officer of the savings bank, together with the minutes of the meeting of members or stockholders, the plan of liquidation, and an itemized statement of the savings bank's assets and liabilities, sworn to by a majority of its board of directors, shall be filed with the Commissioner of Banks. The minutes of the meeting of members or stockholders shall be certified by an appropriate officer of the association, and shall set forth the notice given, the time of mailing thereof, the vote on the resolution, the total number of shares or votes that all members of the savings bank were entitled to cast thereon, and the names of the liquidators elected.

(2) If the Commissioner of Banks finds that the proceedings are in accordance with this Chapter, and that the plan of liquidation is not unfair to any person affected, the Commissioner of Banks shall attach a certificate of approval to the plan and shall forward one copy to the liquidators and one copy to the savings bank's federal deposit account insurance corporation. Once the Commissioner of Banks has approved the resolution and the plan of liquidation, it shall thereafter be unlawful for the savings bank to accept any additional deposit accounts or additions to deposit accounts or make any additional loans, but all its income and receipts in excess of actual expenses of liquidation of the savings bank shall be applied to the discharge of its liabilities.

(3) The liquidating savings bank shall pay a reasonable compensation, subject to the approval of the Commissioner of Banks, to the appointed liquidator.

(4) The plan becomes effective upon the recording of the Commissioner of Banks' certificate of approval in the manner required by this Chapter for the recording of the certificate of incorporation.
(5) The liquidation of the savings bank is subject to the supervision and examination of the Commissioner of Banks. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-43. Reports of voluntary dissolution.

Upon completion of liquidation, the liquidator shall file with the Commissioner of Banks a final report and accounting of the liquidation. The Commissioner of Banks' approval of the report shall operate as a complete and final discharge of the liquidator, the board of directors, and each member or stockholder in connection with the liquidation of the savings bank. Upon approval of the report, the Commissioner of Banks shall issue a certificate of dissolution of the savings bank and shall record same in the manner required by this Chapter for the recording of certificates of incorporation. The dissolution is effective upon the recording of the certificates of incorporation. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-44. Stock dividends.

No dividend on stock shall be paid unless the savings bank has the prior written approval of the Commissioner of Banks, except as provided in any rules that the Commissioner of Banks may adopt. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-45. Supervisory mergers, consolidations, conversions, and combination mergers and conversions.

Notwithstanding any other provision of this Chapter, in order to protect the public, including members, depositors, and stockholders of a State savings bank, the Commissioner of Banks, upon making a finding that a State savings bank is unable to operate in a safe and sound manner, may authorize or require a short form merger, consolidation, conversion, or combination merger and conversion of the State savings bank, or any other transaction, as to which the finding is made. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-46. Interim savings banks.

(a) Article 2 of this Chapter shall not apply to applications for permission to organize an interim State savings bank so long as the application is approved by the Commissioner of Banks.

(b) Preliminary approval of an application for permission to organize an interim State savings bank is conditional upon the Commissioner of Banks' approval of an application to merge the interim savings bank and an existing stock savings bank or on the Commissioner of Banks' approval of any other transaction. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-47. Conversion to bank.

(a) A State savings bank, upon a majority vote of its board of directors, may apply to the Commissioner of Banks for permission to convert to a bank, as defined under G.S. 53-1(1), or to a national bank or other form of depository institution and for certification of appropriate amendments to its certificate of incorporation to effect the change. Upon receipt of an application to so convert, the Commissioner of Banks shall examine all facts connected with the conversion, including receipt of approval of the converting institution's plan of conversion by other federal or state regulatory agencies having jurisdiction over the institution upon completion of its conversion. The depository institution applying for permission to convert shall pay all the expenses and costs of examination.

(b) The converting depository institution shall submit a plan of conversion as a part of the application to the Commissioner of Banks. The Commissioner of Banks may approve it with or without amendment. If the Commissioner of Banks approves the plan, then the plan shall be submitted to the members or stockholders as provided in subsection (c) of this section. If the Commissioner of Banks refuses to approve the plan, the Commissioner of Banks' objections shall be stated in writing and the converting depository institution shall be given an opportunity to amend its plan to obviate the objections or to appeal the Commissioner of Banks' decision to the Commission.

(c) After lawful notice to the members or stockholders of the converting depository institution and full and fair disclosure, the substance of the plan shall be approved by the members or the shareholders at a duly called and properly convened meeting of the members or shareholders. Following the meeting of the members or shareholders, the results of the vote certified by an appropriate officer of the converting depository institution shall be filed with the Commissioner of Banks. The Commissioner of Banks shall then either approve or disapprove the requested conversion to a bank, national bank, or other form of depository institution. After approval of the conversion, the Commissioner of Banks shall supervise and monitor the conversion process and shall ensure that the conversion is conducted lawfully and under the approved plan of conversion. (1993, c. 163, s. 6; 2001-193, s. 16.)

§§ 54C-48 through 54C-51: Reserved for future codification purposes.

ARTICLE 4.

Supervision.

§ 54C-52. Supervision.

(a) The Commissioner of Banks shall perform the duties and exercise the powers as to savings banks organized or operated under this Chapter, except as otherwise provided herein.

(b) The Commission may review, approve, disapprove, or modify any action taken by the Commissioner of Banks in the exercise of the powers, duties, and functions granted to the Commissioner of Banks by this Chapter. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-53. Power of Commissioner of Banks to adopt rules and definitions; reproduction of records.

(a) The Commissioner of Banks shall adopt rules, definitions, and forms as may be necessary for the supervision and regulation of savings banks and for the protection of the public investing in savings banks.

(b) Without limiting the generality of subsection (a) of this section, the Commissioner of Banks may adopt rules, definitions, and forms with respect to the following:

(1) Reserve requirements;
(2) Stock ownership and dividends;
(3) Stock transfers;

(4) Original incorporators, stockholders, directors, officers, and employees of a savings bank;
(5) Bylaws;
(6) The operation of savings banks;
(7) Deposit accounts, bonus plans, and contracts for savings programs;
(8) Loans and loan expenses;
(9) Investments and resource management;
(10) Forms of proxies, holders of proxies, and proxy solicitations;
(11) Types of financial records to be maintained by savings banks;
(12) Retention periods of various financial records;
(13) Internal control procedures of savings banks;
(14) Conduct and management of savings banks;
(15) Chartering and branching;
(16) Liquidations, dissolutions, and receiverships;
(17) Mergers, consolidations, conversions, and combination mergers and conversions;
(18) Interim savings banks;
(19) Reports that may be required by the Commissioner of Banks;
(20) Conflicts of interest;
(21) Service corporations; and
(22) Subsidiary savings banks and holding companies, including the rights of members, levels of investment in the subsidiaries, and stock sales.

(c) A savings bank may cause any or all of its records to be recorded, copied, or reproduced by any photographic, photostatic, or miniature photographic process that correctly, accurately, permanently copies, reproduces, or forms a medium for copying or reproducing the original record on a film or other durable material.

(d) A photographic, photostatic, or miniature photographic copy or reproduction is deemed to be an original record in all courts and administrative agencies for the purpose of its admissibility in evidence. A facsimile, exemplification or certified copy of any photographic copy or reproduction is deemed to be a facsimile, exemplification, or certified copy of the original record for all purposes.

(e) This section, with reference to the retention and disposition of records, shall apply to any federal savings bank operating in North Carolina unless in conflict with regulations prescribed by its federal regulatory authority. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-54. Examinations by Commissioner of Banks; report.

(a) It is the Commissioner of Banks' duty, if at any time the Commissioner of Banks deems it prudent, to examine and investigate everything relating to the business of a State savings bank or a holding company thereof, and to appoint a suitable and competent person to make the investigation. The investigator shall file with the Commissioner of Banks a full report of the findings in the case, including any violation of law or any unauthorized or unsafe practices of the savings bank disclosed by the examination.

(b) The Commissioner of Banks shall furnish a copy of the report to the savings bank examined and may, upon request, furnish a copy of, or excerpts from, the report to the insurer of accounts.

(c) No savings bank may willfully delay or willfully obstruct an examination in any fashion. A person failing to comply with this subsection is guilty of a Class 1 misdemeanor.

(d) No person who possesses or controls any books, accounts, or papers of any State savings bank shall refuse to exhibit same to the Commissioner of Banks or the Commissioner of Banks' agent on demand, or shall knowingly or willingly make any false statement in regard to the same. A person failing to comply with this subsection is guilty of a Class 1 misdemeanor. (1991, c. 680, s. 1; 1993, c. 539, ss. 435, 436; 1994, Ex. Sess., c. 24, s. 14(c); 2001-193, s. 16.)

§ 54C-55. Supervision and examination fees authorized; use of funds collected under Chapter.

(a) Every State savings bank, including savings banks in process of voluntary liquidation, or a holding company thereof, shall pay into the office of the Commissioner of Banks each July a supervisory fee. Examination fees shall be paid promptly upon an association's receipt of the examination billing. The Commissioner of Banks, subject to the advice and consent of the Commission, shall, on or before June 1 of each year:

(1) Determine and fix the scale of supervisory and examination fees to be assessed and collected during the next fiscal year; and

(2) Determine and fix the amount of the fee and set the fee collection schedule for the fees to be assessed to and collected from applicants to defray the cost of processing their charter, branch, merger, conversion, holding company acquisition, and name change applications.

(b) All funds and revenue collected by the Division under this section and all other sections of this Chapter that authorize the collection of fees and other funds shall be deposited with the State Treasurer and expended under the terms of the Executive Budget Act, solely to defray expenses incurred by the office of the Commissioner of Banks in carrying out its supervisory and auditing functions.

(c) Notwithstanding subsections (a) and (b) of this section, whenever the Commissioner of Banks under G.S. 54C-54 appoints a suitable and competent person, other than a person employed by the Commissioner of Banks' office, to make an examination and investigation of the business of a State savings bank, the savings bank shall pay all costs and expenses relative to the examination and investigation. (1991, c. 680, s. 1; 1998-215, s. 38(b); 2001-193, s. 16.)

§ 54C-56. Prolonged audit, examination, or revaluation; payment of costs.

(a) If, in the opinion of the Commissioner of Banks, an examination conducted under G.S. 54C-55 fails to disclose the complete financial condition of a savings bank, the Commissioner of Banks may in order to ascertain its complete financial condition:

(1) Make an extended audit or examination of the savings bank or cause an audit or examination to be made by an independent auditor; and

(2) Make an extended revaluation of any of the assets or liabilities of the savings bank or cause an independent appraiser to make a revaluation.

(b) The Commissioner of Banks shall collect from the savings bank a reasonable sum for actual or necessary expenses of an audit, examination, or revaluation. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-57. Commissioner of Banks to have right of access to books and records of the savings bank; right to issue subpoenas, administer oaths, examine witnesses.

(a) The Commissioner of Banks and the Commissioner of Banks' agents:

(1) Shall have free access to all books and records of a savings bank, or a service corporation or holding company thereof, that relate to its business, and the books and records kept by an officer, agent, or employee relating to or upon which any record is kept;

(2) May subpoena witnesses and administer oaths or affirmations in the examination of any director, officer, agent, or employee of a savings bank, or a service corporation or holding company thereof or of any other person in relation to its affairs, transactions, and conditions;

(3) May require the production of records, books, papers, contracts, and other documents; and

(4) May order that improper entries be corrected on the books and records of a savings bank.

(b) The Commissioner of Banks may issue subpoenas duces tecum.

(c) If a person fails to comply with a subpoena so issued or a party or witness refuses to testify on any matters, a court of competent jurisdiction, on the application of the Commissioner of Banks, shall compel compliance by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from the court or a refusal to testify in the court. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-58. Test appraisals of collateral for loans; expense paid.

(a) The Commissioner of Banks may direct the making of test appraisals of real estate and other collateral securing loans made by savings banks doing business in this State, employ competent appraisers, or prescribe a list from which competent appraisers may be selected, for the making of these appraisals by the Commissioner of Banks, and any and all other acts incident to the making of test appraisals.

(b) In lieu of causing an appraisal to be made, the Commissioner of Banks may accept an appraisal caused to be made by the insurer of accounts.

(c) The expense and cost of test appraisals made under this section shall be defrayed by the savings bank subjected to the test appraisals, and each savings bank doing business in this State shall pay all reasonable costs and expenses of the test appraisals when it is directed. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-59. Relationship of savings banks with the Savings Institutions Division.

(a) Except as provided by subsection (b) of this section, a savings bank or any director, officer, employee, or representative thereof shall not grant or give to any employee of the Savings Institutions Division or to their spouses, any loan or gratuity, directly or indirectly.

(b) No employee of the Savings Institutions Division shall:

(1) Hold an office or position in any State savings bank or exercise any right to vote on any State savings bank matter by reason of being a member of the savings bank;

(2) Be interested, directly or indirectly, in any savings bank organized under the laws of this State; or

(3) Undertake any indebtedness as a borrower, directly or indirectly, or act as endorser, surety, or guarantor, or sell or otherwise dispose of any loan or investment to any savings bank organized under the laws of this State.

(c) Notwithstanding subsection (b) of this section, any employee of the Savings Institutions Division may be a deposit account holder and receive earnings on a deposit account.

(d) Any employee of the Savings Institutions Division shall dispose of any right or interest in a savings bank, held either directly or indirectly, that is prohibited under subsection (b) of this section, within 60 days after the date of the employee's appointment or employment. If any employee of the Division is indebted as borrower, directly or indirectly, or is an endorser, surety, or guarantor on a note, at the time of appointment or employment, the employee may continue in that capacity until the loan is paid off.

(e) If any employee of the Savings Institutions Division has a loan or other note acquired by a State savings bank through the secondary market, the employee may continue with the debt until the loan or note is paid off. (1991, c. 680, s. 1; 2001-193, s. 9.)

§ 54C-60. Confidential information.

(a) The following records or information of the Commission, the Commissioner of Banks, or the agent of either shall be confidential and shall not be disclosed:

(1) Information obtained or compiled in preparation of or anticipation of, or during an examination, audit, or investigation of any association;

(2) Information reflecting the specific collateral given by a named borrower, the specific amount of stock owned by a named stockholder, any stockholder list supplied to the Commissioner of Banks under G.S. 54C-22, or specific deposit accounts held by a named member or customer;

(3) Information obtained, prepared, or compiled during or as a result of an examination, audit, or investigation of any savings bank by an agency of the United States, if the records would be confidential under federal law or regulation;

(4) Information and reports submitted by savings banks to federal regulatory agencies, if the records or information would be confidential under federal law or regulation;

(5) Information and records regarding complaints from the public received by the Division that concern savings banks when the complaint would or could result in an investigation, except to the management of those savings banks; and

(6) Any other letters, reports, memoranda, recordings, charts or other documents or records that would disclose any information of which disclosure is prohibited in this subsection.

(b) A court of competent jurisdiction may order the disclosure of specific information.

(c) The information contained in an application is deemed to be public information. Disclosure shall not extend to the financial statement of the incorporators nor to any further information deemed by the Commissioner of Banks to be confidential.

(d) Nothing in this section shall prevent the exchange of information relating to savings banks and the business thereof with the representatives of the agencies of this State, other states, or of the United States, or with reserve or insuring agencies for savings banks. The private business and affairs of an individual or company shall not be disclosed by any person employed by the Division, any member of the Commission, or by any person with whom information is exchanged under the authority of this subsection.

(e) An official or employee of this State violating this section is liable to any person injured by disclosure of the confidential information for all damages sustained thereby. Penalties provided are not exclusive of other penalties. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-60.1. Confidential records.

(a) As used in this section:

(1) "Compliance review committee" means:

a. An audit, loan review, or compliance committee appointed by the board of directors of a savings bank or any other person to the extent the person acts at the direction of or reports to a compliance review committee; and

b. Whose functions are to audit, evaluate, report, or determine compliance with any of the following:

1. Loan underwriting standards;
2. Asset quality;
3. Financial reporting to federal or State regulatory agencies;
4. Adherence to the savings bank's investment, lending, accounting, ethical, and financial standards; or
5. Compliance with federal or State statutory requirements.

(2) "Compliance review documents" means documents prepared for or created by a compliance review committee.

(3) "Loan review committee" means a person or group of persons who, on behalf of a savings bank, reviews assets, including loans held by the savings bank, for the purpose of assessing the credit quality of the loans or the loan application process, compliance with the savings bank's investment and loan policies, and compliance with applicable laws and regulations.

(4) "Person" means an individual, group of individuals, board, committee, partnership, firm, association, corporation, or other entity.

(b) Savings banks chartered under the laws of North Carolina or of the United States shall maintain complete records of compliance review documents, and the documents shall be available for examination by any federal or State savings bank regulatory agency having supervisory jurisdiction. Notwithstanding Chapter 132 of the General Statutes, compliance review documents in the custody of a savings bank or regulatory agency are confidential, are not open for public inspection, and are not discoverable or admissible in evidence in a civil action against a savings bank, its directors, officers, or employees, unless the court finds that the interests of justice require that the documents be discoverable or admissible in evidence. (1995, c. 408, s. 3.)

§ 54C-61. Annual license fees.

A state savings bank shall pay an annual license fee set by the Commissioner of Banks, subject to the advice and consent of the Commission. The license fee shall be used to defray the expenses incurred by the Division in supervising State savings banks. The Commissioner of Banks may license each State savings bank upon receipt of the license fee and filing of an application in the form prescribed by the Commissioner of Banks. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-62. Statement filed by savings bank; fees.

A State savings bank shall file in the office of the Commissioner of Banks, on or before the first day of February in each year, in the form prescribed by the Commissioner of Banks, a statement of the business standing and financial condition of the savings bank on the preceding 31st day of December, signed and sworn to by the secretary or other officer duly authorized by the board of directors of the savings bank before a notary public. The statement shall be accompanied by a filing fee set by the Commissioner of Banks, subject to the advice and consent of the Commission. The filing fees shall be used to defray the expenses incurred by the Division in supervising State savings banks. (1991, c. 680, s. 1; 1993, c. 163, s. 3; 2001-193, s. 16.)

§ 54C-63. Statement examined, approved, and published.

It is the duty of the Commissioner of Banks to receive and thoroughly examine each annual statement required by G.S. 54C-62, and if made in compliance with the requirements thereof, each State savings bank shall at its own expense, publish an abstract of the same in a newspaper having general circulation within each market area of the savings bank as selected by the managing officer. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 9; 1993, c. 163, s. 4; 2001-193, s. 16.)

§ 54C-64. Prohibited practices.

A person who engages in any of the following acts or practices is guilty of a Class 1 misdemeanor:

(1) Defamation: Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting, or encouraging the making, publishing, disseminating, or circulating of any oral, written, or printed statement that is false regarding the financial condition of any savings bank.

(2) False information and advertising: Making, publishing, disseminating, circulating, or otherwise placing before the public in any publication, media, notice, pamphlet, letter, poster, or any other way, an advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the savings bank business or with respect to any person in the conduct of the savings bank business that is untrue, deceptive, or misleading.

(3) Repealed by Session Laws 1997-241, s. 2. (1991, c. 680, s. 1; 1993, c. 539, s. 437; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 767, s. 22; 1997-241, s. 2.)

§§ 54C-65 through 54C-75: Reserved for future codification purposes.

ARTICLE 5.

Enforcement.

§ 54C-76. Cease and desist orders.

(a) If a person or savings bank is engaging in, or has engaged in, any unsafe or unsound practice or unfair and discriminatory practice in conducting the savings bank's business, or of any other law, rule, order, or condition imposed in writing by the Commissioner of Banks, the Commissioner of Banks may issue a notice of charges to the person or association. A notice of charges shall specify the acts alleged to sustain a cease and desist order, and state the time and place at which a hearing shall be held. A hearing before the Commission on the charges shall be held no earlier than seven days, and no later than 15 days after issuance of the notice. The charged institution is entitled to a further extension of seven days upon filing a request with the Commissioner of Banks. The Commissioner of Banks may also issue a notice of charges if there are reasonable grounds to believe that a person or savings bank is about to engage in any unsafe or unsound business practice, or any violation of this Chapter, or any other law, rule, or order. If, by a preponderance of the evidence, it is shown that any person or savings bank is engaged in, or has been engaged in, or is about to engage in, any unsafe or unsound business practice, or unfair and discriminatory practice or any violation of this Chapter, or any other law, rule, or order, a cease and desist order shall be issued. The Commission may issue a temporary cease and desist order to be effective for 15 days and which may be extended once for a period of 15 days.

(b) If a person or State savings bank is engaging in, has engaged in, or is about to engage in any unsafe or unsound practice in conducting the savings bank's business, or any violation of this Chapter or of any other law, rule, order, or condition imposed in writing by the Commissioner of Banks, and the Commissioner of Banks has determined that immediate corrective action is required, the Commissioner of Banks may issue a temporary cease and desist order. A temporary cease and desist order is effective immediately upon issuance for a period of 15 days, and may be extended once for a period of 15 days. The order shall state its duration on its face and the words, "Temporary Cease and Desist Order." A hearing before the Commission shall be held within the time that the order remains effective, at which time a temporary order may be dissolved or made permanent. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-77. Civil penalties; State savings banks.

(a) Except as otherwise provided in this Article, a savings bank that is found to have violated this Article may be ordered to pay a civil penalty of up to twenty thousand dollars ($20,000). A savings bank that is found to have violated or failed to comply with any cease and desist order issued under the authority of this Article may be ordered to pay a civil penalty of up to twenty thousand dollars ($20,000) for each day that the violation or failure to comply continues.

The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) To enforce this section, the Commissioner of Banks may assess the penalty, appear in a court of competent jurisdiction, and move the court to order payment of the penalty. Before the assessment of the penalty, the Commissioner of Banks shall hold a hearing, which shall comply with Article 3A of Chapter 150B of the General Statutes.

(c) If the Commissioner of Banks determines that, as a result of a violation of this Article or of a failure to comply with any cease and desist order issued under the authority of this Article, a situation exists requiring immediate corrective action, the Commissioner of Banks may impose the civil penalty in this section on the savings bank without a prior hearing, and the penalty is effective as of the date of notice to the association. Imposition of the penalty may be directly appealed to the Wake County Superior Court.

(d) Nothing in this section shall prevent anyone damaged by a State savings bank from bringing a separate cause of action in a court of competent jurisdiction. (1991, c. 680, s. 1; 1998-215, s. 38(a); 2001-193, s. 16.)

§ 54C-78. Civil penalties; directors, officers, and employees.

(a) A person, whether a director, officer, or employee, who is found to have violated this Article, whether willfully or as a result of gross negligence, gross incompetency, or recklessness, may be ordered to pay a civil penalty of up to five thousand dollars ($5,000) per violation. A person who is found to have violated or failed to comply with any cease and desist order issued under the authority of this Article, may be ordered to pay a civil penalty of up to five thousand dollars ($5,000) per violation for each day that the violation or failure to comply continues. The clear proceeds of civil penalties provided for in this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) To enforce this section, the Commissioner of Banks may assess the penalty, appear in a court of competent jurisdiction, and move the court to order payment of the penalty. Before the assessment of the penalty, the Commissioner of Banks shall hold a hearing, which shall comply with Article 3A of Chapter 150B of the General Statutes.

(c) Whenever the Commissioner of Banks determines that an emergency exists that requires immediate corrective action, the Commissioner of Banks, either before or after instituting any other action or proceeding authorized by this Article, may request the Attorney General to institute a civil action in a court of competent jurisdiction, in the name of the State upon the relation of the Commissioner of Banks seeking injunctive relief to restrain or enjoin the violation or threatened violation of this Article and for any other and further relief as the court may deem proper. Instituting an action for injunctive relief shall not relieve any party to the proceedings from any civil or criminal penalty prescribed for violation of this Article.

(d) Nothing in this section shall prevent anyone damaged by a director, officer, or employee of a State savings bank from bringing a separate cause of action in a court of competent jurisdiction. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 10; 1998-215, s. 39; 2001-193, s. 16.)

§ 54C-79. Criminal penalties.

(a) This section shall in no event extend to persons who are found to have acted only with gross negligence, simple negligence, recklessness, or incompetence.

(b) In addition to any of the other penalties or remedies provided by this Article, the following are deemed to be Class 1 misdemeanors:

(1) The willful or knowing violation of this Article by any employee of the Division.

(2) The willful or knowing violation of a cease and desist order that has become final in that no further administrative or judicial appeal is available.

(c) In addition to any of the other penalties or remedies provided by this Article, the willful omission, making, or concurrence in making or publishing a written report, exhibit, or entry in a financial statement on the books of the association, which contains a material statement known to be false is deemed to be a Class 1 misdemeanor. For purposes of this section, "material" shall mean "so substantial and important as to influence a reasonable and prudent businessman or investor."

(d) The Commissioner of Banks may enforce this section in a court of competent jurisdiction. (1991, c. 680, s. 1; 1993, c. 539, s. 438; 1994, Ex. Sess., c. 24, s. 14(c); 2001-193, s. 16.)

§ 54C-80. Primary jurisdiction.

Whenever an agency of the United States government defers to the Commissioner of Banks, or notifies the Commissioner of Banks of pending action against a savings bank chartered by this State, or fails to exercise its authority over any State or federally chartered savings bank doing business in this State, the Commissioner of Banks may exercise jurisdiction over the savings bank. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-81. Supervisory control.

(a) Whenever the Commissioner of Banks determines that a savings bank is conducting its business in an unsafe or unsound manner or in any fashion that threatens the financial integrity or sound operation of the savings bank, the Commissioner of Banks may serve a notice of charges on the savings bank, requiring it to show cause why it should not be placed under supervisory control. The notice of charges shall specify the grounds for supervisory control, and set the time and place for a hearing. A hearing before the Commission shall be held within 15 days after issuance of the notice of charges, and shall comply with Article 3A of Chapter 150B of the General Statutes.

(b) If, after the hearing provided in subsection (a) of this section, the Commission determines that supervisory control of the savings bank is necessary to protect the savings bank's members, customers, stockholders, or creditors, or the general public, the Commissioner of Banks shall issue an order taking supervisory control of the savings bank. An appeal may be filed in the Wake County Superior Court.

(c) If the order taking supervisory control becomes final, the Commissioner of Banks may appoint an agent to supervise and monitor the operations of the savings bank during the period of supervisory control. During the period of supervisory control, the savings bank shall act in accordance with any instructions and directions as may be given by the Commissioner of Banks, directly or through a supervisory agent, and shall not act or fail to act except when to do so would violate an outstanding cease and desist order.

(d) Within 180 days of the date the order taking supervisory control becomes final, the Commissioner of Banks shall issue an order approving a plan for the termination of supervisory control. The plan may provide for:

(1) The issuance by the savings bank of capital stock;
(2) The appointment of one or more officers, one or more directors, or one or more officers and directors;
(3) The reorganization, merger, or consolidation of the savings bank; and
(4) The dissolution and liquidation of the savings bank.

The order approving the plan shall not take effect for 30 days during which time period an appeal may be filed in the Wake County Superior Court.

(e) The costs incident to this proceeding shall be paid by the savings bank, provided the costs are found to be reasonable.

(f) For the purposes of this section, an order is deemed final if:

(1) No appeal is filed within the specific time allowed for the appeal, or
(2) After all judicial appeals are exhausted. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-82. Removal of directors, officers, and employees.

(a) If, in the Commissioner of Banks' opinion, one or more directors, officers, or employees of a savings bank has participated in or consented to any violation of this Chapter, or any other law, rule, or order, or any unsafe or unsound business practice in the operation of any savings bank; or any insider loan not specifically authorized by or under this Chapter; or any repeated violation of or failure to comply with any savings bank's bylaws, the Commissioner of Banks may serve a written notice of charges upon the director, officer, and employee in question, and the savings bank, stating the Commissioner of Banks' intent to remove the director, officer, or employee. The notice shall specify the conduct and place for the hearing before the Commission to be held. A hearing shall be held no earlier than 15 days and no later than 30 days after the notice of charges is served, and it shall comply with Article 3A of Chapter 150B of the General Statutes. If, after the hearing, the Commission determines that the charges asserted have been proven by a preponderance of the evidence, the Commissioner of Banks may issue an order removing the director, officer, or employee in question. The order is effective upon issuance and may include the entire board of directors or all of the officers of the savings bank.

(b) If it is determined that a director, officer, or employee of a savings bank has knowingly participated in or consented to any violation of this Chapter, or any other law, rule, or order, or engaged in any unsafe or unsound business practice in the operation of any savings bank, or any repeated violation of or failure to comply with any savings bank's bylaws, and that as a result, a situation exists requiring immediate corrective action, the Commissioner of Banks may issue an order temporarily removing the person pending a hearing. The order shall state its duration on its face and the words, "Temporary Order of Removal," and is effective upon issuance, for a period of 15 days, and may be extended once for a period of 15 days. A hearing shall be held within 10 days of the expiration of a temporary order, or any extension thereof, at which time a temporary order may be dissolved or converted to a permanent order.

(c) Any removal under subsections (a) or (b) of this section is effective in all respects as if the removal had been made by the board of directors and the members or the stockholders of the savings bank in question.

(d) Without the prior written approval of the Commissioner of Banks, no director, officer, or employee permanently removed under this section shall be eligible to be elected, reelected, or appointed to any position as a director, officer, or employee of that savings bank, nor shall that director, officer, or employee be eligible to be elected to or retain a position as a director, officer, or employee of any other State savings bank. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-83. Involuntary liquidation.

(a) The Commissioner of Banks, with prior approval of the Commission, may take custody of the books, records, and assets of every kind and character of any savings bank organized and operated under this Chapter for any of the purposes enumerated in this section, if it reasonably appears from examinations or from reports made to the Commissioner of Banks that:

(1) The directors, officers, or liquidators have neglected, failed, or refused to take action that the Commissioner of Banks may deem necessary for the protection of the savings bank or have impeded or obstructed an examination;

(2) The net worth of the savings bank is impaired to the extent that the realizable value of its assets is insufficient to pay in full its creditors and holders of deposit accounts;

(3) The business of the savings bank is being conducted in a fraudulent, illegal, or unsafe manner, or that the savings bank is in an unsafe or unsound condition to transact business; for purposes of this subdivision, any savings bank that, except as authorized in writing by the Commissioner of Banks, fails to make full payment of any withdrawal when due is in an unsafe or unsound condition to transact business, notwithstanding the certificate of incorporation or the statutes or regulations with respect to payment of withdrawals in event a savings bank does not pay all withdrawals in full;

(4) The officers, directors, or employees have assumed duties or performed acts in excess of those authorized by statute or regulation or charter, or without supplying the required bond;

(5) The savings bank has experienced a substantial dissipation of assets or earnings due to any violation or violation of statute or regulation, or due to any unsafe or unsound practice or practices;

(6) The savings bank is insolvent, or is in imminent danger of insolvency or has suspended its ordinary business transactions due to insufficient funds; or

(7) The savings bank is unable to continue operations.

(b) Unless the Commissioner of Banks finds that an emergency exists that may result in loss to members, deposit account holders, stockholders, or creditors, and that requires that the Commissioner of Banks take custody immediately, the Commissioner of Banks shall first give written notice to the directors and officers specifying the conditions criticized and allowing a reasonable time in which corrections may be made before a receiver shall be appointed as outlined in subsection (d) of this section.

(c) The purposes for which the Commissioner of Banks may take custody of a savings bank include examination or further examination, conservation of its assets, restoration of impaired capital, and the making of any reasonable or equitable adjustment deemed necessary by the Commissioner of Banks under any plan of reorganization.

(d) If the Commissioner of Banks, after taking custody of a savings bank, finds that one or more of the reasons for having taken custody continue to exist through the period of custody, with little or no likelihood of amelioration of the situation, then the Commissioner of Banks shall appoint as receiver or coreceiver any qualified person, firm, or corporation for the purpose of liquidation of the savings bank, which receiver shall furnish bond in form, amount, and with surety as the Commissioner of Banks may require. The Commissioner of Banks may appoint the association's deposit account insurance corporation or its nominee as the receiver, and the insuring corporation shall be permitted to serve without posting bond.

(e) In the event the Commissioner of Banks appoints a receiver for a savings bank, the Commissioner of Banks shall mail a certified copy of the appointment order by certified mail to the address of the savings bank as it appears on the records of the Division, and to any previous receiver or other legal custodian of the savings bank, and to any court or other authority to which the previous receiver or other legal custodian is subject. Notice of the appointment may be published in a newspaper of general circulation in the county where the savings bank has its principal office.

(f) Whenever a receiver for a savings bank is appointed under subsection (d) of this section, the savings bank may within 30 days thereafter bring an action in the Superior Court of Wake County, for an order requiring the Commissioner of Banks to remove the receiver.

(g) The duly appointed and qualified receiver shall take possession promptly of the savings bank for which the receiver has been so appointed, in accordance with the terms of the appointment, by service of a certified copy of the Commissioner of Banks' appointment order upon the savings bank at its principal office through the officer or employee who is present and appears to be in charge. Immediately upon taking possession of the savings bank, the receiver shall take possession and title to books, records, and assets of every description of the savings bank. The receiver, by operation of law and without any conveyance or other instrument, act or deed, shall succeed to all the rights, titles, powers, and privileges of the savings bank, its members or stockholders, holders of deposit accounts, its officers and directors or any of them; and to the titles to the books, records, and assets of every description of any previous receiver or other legal custodian of the savings bank. The members, stockholders, holders of deposit accounts, officers or directors, or any of them, shall not thereafter, except as expressly provided in this section have or exercise any rights, powers or privileges or act in connection with any assets or property of any nature of the savings bank in receivership. The Commissioner of Banks, with the approval of the Commission, may at any time, direct the receiver to return the savings bank to its previous or a newly constituted management. The Commissioner of Banks may provide for a meeting or meetings of the members or stockholders for any purpose, including the election of directors or an increase in the number of directors, or both, or the election of an entire new board of directors; and may provide for a meeting or meetings of the directors for any purpose including the filling of vacancies on the board, the removal of officers and the election of new officers, or for any of these purposes. Any meeting of members or stockholders, or of directors, shall be supervised or conducted by a representative of the Commissioner of Banks.

(h) A duly appointed and qualified receiver may:

(1) Demand, sue for, collect, receive and take into possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, chooses in action, bills, notes and property of every description of the savings bank;
(2) Foreclose mortgages, deeds of trust, and other liens executed to the savings bank to the extent the savings bank would have had this right;
(3) Institute suits for the recovery of any estate, property, damages, or demands existing in favor of the savings bank, and shall, upon the receiver's own application, be substituted as party plaintiff in the place of the savings bank in any suit or proceeding pending at the time of the receiver's appointment;
(4) Sell, convey, and assign all the property rights and interests owned by the savings bank;
(5) Appoint agents;
(6) Examine and investigate papers and persons, and pass on claims as provided in the regulations as prescribed by the Commissioner of Banks;
(7) Make and carry out agreements with the insuring corporation or with any other financial institution for the payment or assumption of the savings bank's liabilities, in whole or in part, and to sell, convey, transfer, pledge, or assign assets as security or otherwise and to make guarantees in connection therewith; and
(8) Perform all other acts that might be done by the employees, officers, and directors.

These powers shall be continued in effect until liquidation and dissolution or until return of the savings bank to its prior or newly constituted management.

(i) A receiver may, at any time during the receivership and before final liquidation, be removed and a replacement appointed by the Commissioner of Banks.

(j) The Commissioner of Banks may determine that the liquidation proceedings should be discontinued. The Commissioner of Banks shall then remove the receiver and restore all the rights, powers, and privileges of its members and stockholders, customers, employees, officers, and directors, or restore these rights, powers, and privileges to its members, stockholders, and customers, and grant these rights, powers, and privileges to a newly constituted management, all as of the time of the restoration of the savings bank to its management unless another time for the restoration is specified by the Commissioner of Banks. The return of a savings bank to its management or to a newly constituted management from the possession of a receiver shall, by operation of law and without any conveyance or other instrument, act or deed, vest in the savings bank the title to all property held by the receiver in the capacity as receiver for the savings bank.

(k) A receiver may also be appointed under the authority of G.S. 1-502. No judge or court, however, shall appoint a receiver for any State savings bank unless five days' advance notice of the motion, petition, or application for appointment of a receiver has been given to the savings bank and to the Commissioner of Banks.

(*l*) Following the appointment of a receiver, the Commissioner of Banks may request the Attorney General to institute an action in the name of the Commissioner of Banks in the superior court against the savings bank for the orderly liquidation and dissolution of the association, and for an injunction to restrain the officers, directors, and employees from continuing the operation of the savings bank.

(m) Claims against the State association in receivership shall have the following order of priority for payment:

(1) Costs, expenses, and debts of the savings bank incurred on or after the date of the appointment of the receiver, including compensation for the receiver.
(2) Claims of holders of special purpose or thrift accounts.
(3) Claims of holders of deposit accounts.
(4) Claims of general creditors.
(5) Claims of stockholders of a stock savings bank.
(6) All remaining assets to members and stockholders in an amount proportionate to their holdings as of the date of the appointment of the receiver.

(n) All claims of each class described within subsection (m) of this section shall be paid in full so long as sufficient assets remain. Members of the class for which the receiver cannot make payment in full because assets will be depleted during payment to that class shall be paid an amount proportionate to their total claims.

(o) The Commissioner of Banks may direct the payment of claims for which no provision is made in this section, and may direct the payment of claims within a class.

(p) When all assets of the savings bank have been fully liquidated, and all claims and expenses have been paid or settled, and the receiver has recommended a final distribution, the dissolution of the savings bank in receivership shall be accomplished in the following manner:

(1) The receiver shall file with the Commissioner of Banks a detailed report, in a form to be prescribed by the Commissioner of Banks, of the receiver's acts and proposed final distribution, and dissolution.
(2) Upon the Commissioner of Banks' approval of the final report of the receiver, the receiver shall provide notice and thereafter shall make the final distribution, in any manner as the Commissioner of Banks may direct.
(3) When a final distribution has been made except as to any unclaimed funds, the receiver shall deposit the unclaimed funds with the Commissioner of Banks and shall deliver to the Commissioner of Banks all books and records of the dissolved association.
(4) Upon completion of the foregoing procedure, and upon the joint petition of the Commissioner of Banks and receiver to the superior court, the court may find that the savings bank should be dissolved, and following publication of notice of dissolution as the court may direct, the court may enter a decree of final resolution and the savings bank shall therefore be dissolved.
(5) Upon final dissolution of the savings bank in receivership or at any time as the receiver shall be otherwise relieved of duties, the Commissioner of Banks shall cause an audit to be conducted, during which the receiver shall be available to assist. The accounts of the receiver shall then be ruled upon by the Commissioner of Banks and Commission and if approved, the receiver shall thereupon be given a final and complete discharge and release. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-84. Judicial review.

A person or State savings bank against whom a cease and desist order is issued or a fine is imposed may have the order or fine reviewed by a court of competent jurisdiction. Except as otherwise provided, an appeal may be made only within 30 days of the issuance of the order or the imposition of the fine, whichever is later. (1991, c. 680, s. 1.)

§ 54C-85. Indemnity.

No person who is fined or penalized for a violation of any criminal provision of this Article shall be reimbursed or indemnified in any fashion by the savings bank for the fine or penalty. (1991, c. 680, s. 1.)

§ 54C-86. Cumulative penalties.

All penalties, fines, and remedies provided by this Article are cumulative. (1991, c. 680, s. 1.)

§ 54C-87. Emergency limitations.

The Commissioner of Banks, with the approval of the Governor, may impose a limitation upon the amounts withdrawable or payable from deposit accounts of savings banks during any specifically defined period when the limitation is in the public interest and welfare. (1991, c. 680, s. 1; 2001-193, s. 16.)

§§ 54C-88 through 54C-99: Reserved for future codification purposes.

ARTICLE 6.

Corporate Administration.

§ 54C-100. Membership of a mutual association.

The membership of a mutual State savings bank shall consist of:

(1) Those who hold deposit accounts in a savings bank, and

(2) Those who borrow funds and those who become obligated on a loan from the savings bank, for as long as the loan remains unpaid and the borrower remains liable to the savings bank for the payment of the loan.

A person, as a matter of right or in a trust or other fiduciary capacity, or any partnership, association, corporation, political subdivision, or public or governmental unit or entity may become a member of a mutual savings bank. Members shall be possessed of voting rights and any other rights as are provided by a savings bank's certificate of incorporation and bylaws as approved by the Commissioner of Banks. Members are the owners of a mutual savings bank. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-101. Directors.

(a) The directors of a mutual savings bank shall be elected by the members at an annual meeting, held under G.S. 54C-106, for any terms as the bylaws of the savings bank may provide. Director's terms may be classified in the certificate of incorporation. Voting for directors by deposit account holders shall be weighted according to the total amount of deposit accounts held by the members, subject to any maximum number of votes per member which a savings bank may choose to prescribe in its bylaws. Voting rights for borrowers shall be fully prescribed in a detailed manner in the bylaws of the savings bank.

(b) The directors of a stock savings bank shall be elected by the stockholders at an annual meeting, held under G.S. 54C-106, for any terms as the bylaws of the savings bank may provide. Director's terms may be classified in the certificate of incorporation.

(c) A director of a State savings bank shall have a significant ownership interest in the State savings bank.

(d) A State savings bank shall have no less than five directors. (1991, c. 680, s. 1.)

§ 54C-102. Bylaws.

The bylaws and any amendments shall be certified by the appropriate corporate official and submitted to the Commissioner of Banks for approval before they may become effective. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-103. Duties and liabilities of officers and directors to their associations.

Officers and directors of a State savings bank shall act in a fiduciary capacity towards the savings bank and its members or stockholders. They shall discharge duties of their respective positions in good faith, and with that diligence and care which ordinarily prudent persons would exercise under similar circumstances in like positions. (1991, c. 680, s. 1.)

§ 54C-104. Conflicts of interest.

Each director, officer, and employee of a State savings bank has a fundamental duty to avoid placing himself in a position which creates, or which leads to or could lead to a conflict of interest or appearance of a conflict of interest having adverse effects on the interests of members, customers, or stockholders of the savings bank, soundness of the savings bank, and the purposes of this Chapter. (1991, c. 680, s. 1.)

§ 54C-105. Voting rights.

Voting rights in the affairs of a State savings bank may be exercised by members and stockholders by voting either in person or by proxy. (1991, c. 680, s. 1.)

§ 54C-106. Annual meetings notice required.

(a) A savings bank shall hold an annual meeting of its members or stockholders. The annual meeting shall be held at a time and place as shall be provided in the bylaws or determined by the board of directors.

(b) The board of directors of a mutual savings bank shall cause to be published once a week for two weeks preceding such meeting, in a newspaper of general circulation in the county where such savings bank has its principal office, a notice of the meeting, signed by the savings bank's secretary, and stating the time and place where it is to be held. In addition to the foregoing notice, a savings bank shall disseminate additional notice of any annual meeting by notice made available to all members entering the premises of any office or branch of the savings bank in the regular course of business by posting therein, in full view of the public and its members, one or more conspicuous signs or placards announcing the pending meeting, the time, date and place of the meeting and the availability of additional information. Printed matter shall be freely available to the members containing any information as may be prescribed in rules issued by the Commissioner of Banks. The additional notice shall be given at any time within the period of 60 days before and 14 days before the meeting and shall continue through the time of the meeting.

(c) The board of directors of a stock savings bank shall cause a written or printed notice, signed by the savings bank's secretary and stating the time and place of the annual meeting, to be delivered not less than 10 days nor more than 50 days before the date of the meeting, either personally or by mail to each stockholder of record entitled to vote at the meeting. If mailed, the notice is deemed to be delivered when deposited in the United States postal service addressed to the stockholder at the address as it appears on the records of the corporation, with postage thereon prepaid. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-107. Special meetings; notice required.

(a) Special meetings of members or stockholders of a savings bank may be called by the president or the board of directors or by any other officers or persons as may be provided for in the charter or bylaws of the savings bank.

(b) Notice of any special meeting of members or stockholders shall be given in the same manner as provided for annual meetings under G.S. 54C-106. (1991, c. 680, s. 1.)

§ 54C-108. Quorum.

Unless otherwise provided in the savings bank's charter or bylaws, 50 holders of deposit accounts in a mutual savings bank or 50 stockholders or a majority of shares eligible to vote in a stock savings bank, present in person or represented by proxy, shall constitute a quorum at any annual or special meeting. (1991, c. 680, s. 1.)

§ 54C-109. Bonding.

(a) A savings bank shall maintain a blanket indemnity bond of at least a minimum amount as prescribed by the Commissioner of Banks.

(b) A savings bank that employs collection agents, who for any reason are not covered by the bond required in this section, shall provide for the bonding of each agent in an amount equal to at least twice the average monthly collections of the agent. The agents shall be required to make settlement with the association at least once monthly. No coverage by bond will be required of any agent that is a bank or an association insured by the Federal Deposit Insurance Corporation. The amount and form of the bonds and the sufficiency of the surety thereon shall be approved by the board of directors and the Commissioner of Banks before it is valid. A bond shall provide that its cancellation, either by the surety or by the insured, shall not become effective unless and until 30 days' notice in writing shall have been given to the Commissioner of Banks. (1991, c. 680, s. 1; 2001-193, s. 16.)

§§ 54C-110 through 54C-120: Reserved for future codification purposes.

ARTICLE 7.

Loans and Investments.

§ 54C-121. Loans.

(a) A savings bank may loan funds as follows:

(1) On the security of deposit accounts, but no loan shall exceed the withdrawal value of the pledged deposit account.

(2) On the security of real property:
  a. Of a value, determined in accordance with this Chapter and any appraisal rules as the Commissioner of Banks may adopt sufficient to provide good and ample security for the loan;
  b. With a fee simple title or a leasehold title of no less duration than 10 years beyond the maturity of the loan;
  c. With the title established by any evidence of title as is consistent with sound lending practices; and
  d. With the security interest in such real estate evidenced by an appropriate written instrument and the loan evidenced by a note, bond, or similar written instrument. A loan on the security of the whole of the beneficial interest in a land trust satisfies the requirements of this sub-subdivision if the title to the land is held by a corporate trustee and if the real estate held in the land trust meets the other requirements of this subdivision.
(3) For the purpose of repair, improvement, rehabilitation, furnishing, or equipment of real estate.
(4) For the purpose of financing or refinancing an existing ownership interest, in certificates of stock, certificates of beneficial interest, or other evidence of an ownership interest in, and a proprietary lease from, a corporation, trust or partnership formed for the purpose of the cooperative ownership of real estate, secured by the assignment or transfer of the certificates or other evidence of ownership of the borrower.
(5) For the purchase of loans that, at the time of purchase, the savings bank could make in accordance with this Chapter.
(6) For the purchase of installment contracts for the sale of real estate, and title thereto that is subject to the contract, but in each instance only if the savings bank, at the time of purchase, could make a mortgage loan of the same amount and for the same length of time on the security of the real estate.
(7) For the purchase of loans guaranteed or insured, wholly or in part, by the United States or any of its instrumentalities.
(8) For secured or unsecured financing for business, corporate, personal, family, or household purposes, or for secured or unsecured loans for agricultural or commercial purposes, subject to any rules as the Commissioner of Banks may adopt.
(9) For the purpose of mobile home financing.
(10) For loans secured by no more that ninety percent (90%) of the cash surrender value of any life insurance policy.
(11) For loans on any collateral that would be a legal investment if made by the savings bank under this Chapter.

(b) Notwithstanding any provision of this Chapter to the contrary, a savings bank may make any loan that the savings bank could make if it were incorporated and operating as a federal association or as a State or national bank. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-122. Lending procedures.

(a) The board of directors shall establish procedures by which loans are to be considered, approved, and made by the savings bank.

(b) All actions on loan applications to the savings bank shall be reported to the board of directors at its next meeting.

(c) Subject to any rules as the Commissioner of Banks deems appropriate, a savings bank may lend funds on any collateral deemed sufficient by the board of directors to properly secure loans. Loans made solely upon security of collateral consisting of stock or equity securities that are not listed on a national stock exchange or regularly quoted and offered for trade on an over-the-counter market are considered loans without security.

(d) A savings bank may lend funds without requiring security. No unsecured loan shall exceed the maximum amount authorized by rules of the Commissioner of Banks.

(e) A savings bank may make insured or guaranteed loans in accordance with G.S. 53-45.

(f) A savings bank may invest any funds on hand in the purchase of loans of a type that the savings bank could make in accordance with this Chapter.

(g) A savings bank may invest in a participating interest in loans of a type that the savings bank could make in accordance with this Chapter.

(h) A savings bank may sell any loan, including any participating interest in a loan. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-123. Prohibited security.

No savings bank may accept its own capital stock or its own mutual capital certificates as security for any loan made by the savings bank. (1991, c. 680, s. 1.)

§ 54C-124. Loans conditioned on certain transactions prohibited.

(a) No savings bank or service corporation thereof shall require, as a condition of making a loan, that the borrower contract with any specific person or organization for particular services.

(b) A savings bank or service corporation thereof shall notify borrowers before the loan commitment of their right to select the attorney or law firm rendering legal services in connection with the loan, and the person or organization rendering insurance services in connection with the loan. These persons or organizations shall be approved by the savings bank's board of directors, under any rules as the Commissioner of Banks may prescribe.

(c) A savings bank or service corporation thereof may require borrowers to reimburse the savings bank for legal services rendered to it by its own attorney only when the fee is limited to legal services required by the making of the loan. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-125. Loan expenses and fees.

(a) Subject to Chapter 24 of the General Statutes, a savings bank may require borrowers to pay all reasonable expenses incurred by the savings bank in connection with making, closing, disbursing, extending, adjusting, or renewing loans. The charges may be collected by the savings bank from the borrower and paid to any persons, including any director, officer, or employee of the savings bank who may render services in connection with the loan, or the charges may be paid directly by the borrower.

(b) A savings bank may require a borrower to pay a reasonable charge for late payments made during the course of repayment of a loan. Subject to G.S. 24-10.1, the payments may be levied only upon the terms and conditions that are fixed by the savings bank's board of directors and agreed to by the borrower in the loan contract.

(c) Nothing in this Article shall be construed to modify Chapter 24 of the General Statutes, or other applicable law, or to allow fees, charges, or interest beyond that permitted by Chapter 24 of the General Statutes or other applicable law. (1991, c. 680, s. 1.)

§ 54C-126. Methods of loan repayment.

Subject to any rules as the Commissioner of Banks may prescribe, a savings bank shall agree in writing with borrowers as to the method or plan by which an indebtedness shall be repaid. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-127. Insider loans.

The Commissioner of Banks may adopt rules no less stringent than the requirements of the appropriate federal regulatory authority to govern the making of loans to officers and directors, and their associates, and companies or other business entities controlled by them. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-128. Rulemaking power of Commissioner of Banks.

Any rule that the Commissioner of Banks may adopt in respect to loans permitted to be made by State savings banks as may be reasonably necessary to assure that the loans are in keeping with sound lending practices and to promote the purposes of this Chapter shall not prohibit a savings bank from making any loan that is a permitted loan for federal savings banks under federal regulatory authority. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-129. Nonconforming loans and investments.

Unless otherwise provided, every loan or other investment made in violation of this Chapter is due and payable according to its terms and the obligation thereof is not impaired; provided, that the violation consists only of the lending of an excessive sum on authorized security or of investing in an unauthorized investment. (1991, c. 680, s. 1.)

§ 54C-130. Limitation on loans to one borrower.

(a) The total loans and extensions of credit, both direct and indirect, by a savings bank to any person, other than a municipal corporation for money borrowed, outstanding at one time and not fully secured, as determined in a manner consistent with subsection (b) of this section, by collateral having a market value at least equal to the amount of the loan or extension of credit shall not exceed fifteen percent (15%) of the net worth of the savings bank. The total liabilities of a firm shall include the liabilities of the members of the firm.

(b) The total loans and extensions of credit, both direct and indirect, by a savings bank to any person outstanding at one time and fully secured by readily marketable collateral having a market value, as determined by reliable and continuously available price quotations, at least equal to the amount of the funds outstanding shall not exceed ten percent (10%) of the net worth of the savings bank. This limitation shall be separate from and in addition to the limitation contained in subsection (a) of this section.

(c) For purposes of this section, the term "person" is deemed to include an individual or a corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity not specifically listed in this subsection. Loans or extensions of credit to one person include loans made to other persons when the proceeds of the loans or extensions of credit are to be used for the direct benefit of the first person or when the persons are engaged in a common enterprise.

(d) The limitations of this section shall not apply to loans or obligations to the extent that they are secured or covered by guarantees or by commitments or agreements to take over or purchase the same, made by any federal reserve bank or by the United States or any instrumentality of the United States, including any corporation wholly owned directly or indirectly by the United States.

(e) The limitations of this section shall not apply to loans or obligations made for the following:

(1) For any purpose otherwise permitted by this Chapter, not to exceed five hundred thousand dollars ($500,000);

(2) To develop domestic residential housing units, not to exceed the lesser of thirty million dollars ($30,000,000) or thirty percent (30%) of the savings bank's net worth if the purchase price of each single family dwelling unit which is financed under this provision does not exceed five hundred thousand dollars ($500,000) and the loans or obligations made under this provision do not, in the aggregate, exceed one hundred fifty percent (150%) of the savings bank's net worth; or

(3) Loans to one borrower to finance the sale of real property acquired in satisfaction of debts previously contracted in good faith, not to exceed fifty percent (50%) of the savings bank's net worth. (1991, c. 680, s. 1.)

§ 54C-131. Investment in banking premises.

A savings bank may invest in real property and equipment and in leasehold improvements to rented facilities necessary for the conduct of its business and in real property to be held for its future use. A savings bank may invest in office buildings and appurtenances for the purpose of the transaction of the savings bank's business. This investment may not be made without the prior written approval of the Commissioner of Banks if the total amount of these investments exceeds fifty percent (50%) of the savings bank's net worth. Facilities, furniture, and fixtures leased for the purpose set forth in this section are not included in this limitation. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-132. United States obligations.

A savings bank may invest in any obligation issued and fully guaranteed in principal and interest by the United States government or any instrumentality of the United States. (1991, c. 680, s. 1.)

§ 54C-133. North Carolina obligations.

A savings bank may invest in any obligation issued and fully guaranteed in principal and interest by the State or any instrumentality of the State. (1991, c. 680, s. 1.)

§ 54C-134. Federal Home Loan Bank obligations.

A savings bank may invest in the stock of the Federal Home Loan Bank of which the association is a member, and in bonds or other evidences of indebtedness or obligation of any Federal Home Loan Bank. (1991, c. 680, s. 1.)

§ 54C-135. Deposits in depository institutions.

A savings bank may invest in certificates of deposit, time-insured deposits, savings accounts, demand deposits, or withdrawable accounts of any banks, associations, or savings banks as are approved by the board of directors of the savings bank. (1991, c. 680, s. 1.)

§ 54C-136. Federal government-sponsored enterprise obligations.

A savings bank may invest in stock or other evidences of indebtedness or obligations of Fannie Mae, the Federal Home Loan Mortgage Corporation, or any other federal government sponsored enterprise, or any successor thereto. (1991, c. 680, s. 1; 2001-487, s. 14(e).)

§ 54C-137. Municipal and county obligations.

A savings bank may invest in bonds or other evidences of indebtedness that are direct general obligations of any county, city, town, village, school district, sanitation, or park district, or other political subdivision or municipal corporation of this State; or in bonds or other evidences of indebtedness that are payable from revenues or earnings specifically pledged therefor, which are issued by a county or a political subdivision or municipal corporation of a county in this State. (1991, c. 680, s. 1.)

§ 54C-138. Stock in education agency.

A savings bank may invest in stock or obligations of any corporation doing business in this State, or of any agency of this State or of the United States, where the principal business of the corporation or agency is to make loans for the financing of a college or university education, or education at an industrial education center, technical institute, or community college. (1991, c. 680, s. 1.)

§ 54C-139. Industrial development corporation stock.

A savings bank may invest in stock or other evidence of indebtedness or obligations of business or industrial development corporations chartered by this State or by the United States. (1991, c. 680, s. 1.)

§ 54C-140. Urban renewal investment corporation stock.

A savings bank may invest in stock or other evidence of indebtedness or obligations of an urban renewal investment corporation chartered under the laws of this State or of the United States. (1991, c. 680, s. 1.)

§ 54C-141. Limitations on investment in stocks and securities.

(a) No savings bank shall make an investment in the capital stock of any other State or federal depository institution that represents more than five percent (5%) of the capital stock of that depository institution.

(b) No savings bank shall invest in stock of other than investment grade. No savings bank shall invest in the aggregate more than fifty percent (50%) of its net worth in the stocks of other corporations, firms, partnerships, or companies, unless the stock is purchased to protect the savings bank from loss. Of this amount, no more than two and one-half percent (2 1/2%) of the savings bank's net worth may be invested in the stock or securities of any one issuer. This limitation shall not apply to stock or ownership interests in corporations, firms, partnerships, or companies that are subsidiaries of the savings bank. The term "invest" is deemed to include operating a business entity acquired by the savings bank, provided, however, that no savings bank shall make any investment resulting in operations that are not closely related to the savings bank business without the prior written approval of the Commissioner of

Banks. Any stocks owned or hereafter acquired in excess of the limitations imposed in this section shall be disposed of at public or private sale within six months after the date of acquiring the same, and if not so disposed of they shall be charged to the profit and loss account, and no longer carried on the books as an asset. The limit of time in which the stocks are disposed of or charged off the books of the savings bank may be extended by the Commissioner of Banks if the Commissioner of Banks determines it is in the best interest of the savings bank that the extension be granted.

(c) This limitation shall not apply with respect to obligations of the government of the United States or its agencies, or to other obligations guaranteed by the United States, North Carolina, or any other state, or of a city, town, township, county, school district, or other political subdivision of this State. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-142. Suspension of investment and loan limitation.

The board of directors of any savings bank may, by resolution duly passed at a meeting of the board, request the Commissioner of Banks to suspend temporarily the limitations on loans and investments as they may apply to any particular loan or investment in excess of the limitations of G.S. 54C-130 and G.S. 54C-141 that the savings bank desires to make. Upon receipt of a duly certified copy of the resolution, the Commissioner of Banks may suspend the limitations on loans and investments insofar as they would apply to the loan or investment that the savings bank desires to make, as long as every loan or investment is amply secured and is for a period not longer than 36 months. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-143. Commercial lending.

A savings bank may lend and invest in commercial loans in an aggregate amount that either (i) does not exceed fifteen percent (15%) of its total assets; or (ii) equals a percentage of its total assets greater than fifteen percent (15%), if approved by the Commissioner of Banks upon written request of the savings bank. In considering a request for an increased limit, the Commissioner of Banks shall take into consideration the commercial lending expertise of the management and the overall risk profile of the savings bank making the request. For the purposes of this section, “commercial loan” means a loan for business, commercial, corporate, or agricultural purposes. (1991, c. 680, s. 1; 1999-179, s. 3; 2001-193, s. 16.)

§ 54C-144. Service corporations.

(a) A savings bank or group of savings banks or associations may establish service corporations under Chapter 55 of the General Statutes, provided that the Commissioner of Banks receives copies of the proposed articles of incorporation and bylaws for approval, before filing them with the Secretary of State. A savings bank may also invest in the capital stock, obligations, or other securities of existing service corporations.

(b) No savings bank may make any investment in service corporations if its aggregate investment would exceed ten percent (10%) of its total assets.

(c) A service corporation is subject to audit and examination by the Commissioner of Banks, and the service corporation shall pay the cost of examination.

(d) The permitted activities of a service corporation shall be described in the rules adopted by the Commissioner of Banks.

(e) The location of the principal and branch offices of a service corporation shall be approved by the Commissioner of Banks. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-145. Parity in loans or investments.

Subject to any limitations and restrictions as the Commissioner of Banks may prescribe through rules, a savings bank may make any loan or investment, or engage in any activity, which may be permitted under State law for banks or under the laws of the United States for federal associations or national banks whose principal offices are located within this State. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-146. Certain powers granted to State savings banks.

(a) In addition to the powers granted under this Chapter, but subject to any rules that the Commissioner of Banks may prescribe, a savings bank incorporated or operated under this Chapter may:

(1) Establish off the premises of any principal office or branch a customer communications terminal, point of sale terminal, automated teller machine, automated or other direct or remote information processing device or machine, whether manned or unmanned, through or by means of which funds or information relating to any financial service or transaction rendered to the public is stored and transmitted, instantaneously or otherwise to or from a savings bank terminal or terminals controlled or used by or with other parties. The establishment and use of a device or machine is not deemed to constitute a branch office, and the capital requirements and standards for approval of a branch office as set forth in the statutes and regulations are not applicable to the establishment of any off-premises terminal, device or machine. Savings banks may, through mutual consent, share on-premises, unmanned, automated teller machines and cash dispensers.

(2) Issue credit cards, extend credit in connection therewith, and otherwise engage in or participate in credit card operations.

(3) Act as a trustee, executor, administrator, guardian, or in any other fiduciary capacity.

(4) Become a member of a clearing house association and pledge assets required for its qualification.

(5)a. Mutual capital certificates may be issued by State-chartered savings banks and sold directly to subscribers or through underwriters, and the certificates shall constitute part of the general reserve and net worth of the issuing savings bank. The Commissioner of Banks, in the rules relating to the issuance and sale of mutual capital certificates, shall provide that the certificates:

1. Are subordinate to all savings accounts, savings certificates, and debt obligations;
2. Constitute a claim in liquidation on the general reserves, surplus and undivided profits of the savings bank remaining after the payment of all savings accounts, savings certificates, and debt obligations;
3. Are entitled to the payment of dividends; and
4. May have a fixed or variable dividend rate.

b. The Commissioner of Banks shall provide in the rules for charging losses to the mutual capital, reserves, and other net worth accounts.

(b) To the extent that the Commissioner of Banks may authorize by rules, a savings bank may issue notes, bonds, debentures, or other obligations or securities. (1991, c. 680, s. 1; 2001-193, s. 16.)

§§ 54C-147 through 54C-160: Reserved for future codification purposes.

ARTICLE 8.

Operations.

§ 54C-161. Generally accepted accounting principles.

A savings bank shall maintain its books and records in accordance with generally accepted accounting principles. (1991, c. 680, s. 1.)

§ 54C-162. Liquidity.

A savings bank shall maintain cash and readily marketable investments in an amount that may be established in the rules of the Commissioner of Banks, but the requirement shall not be less than ten percent (10%) of the assets of the savings bank. Upon receipt of a duly certified copy of the resolution by the board of directors of any savings bank requesting a temporary suspension, the Commissioner of Banks may suspend the liquidity requirement for a period not longer than six months. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-163. Net worth requirement.

A savings bank shall maintain net worth in an amount that may be established in the rules of the Commissioner of Banks, but the requirement shall not be less than five percent (5%) of the assets of the savings bank. Upon receipt of a duly certified copy of a resolution by the board of directors of any savings bank requesting a temporary suspension, the Commissioner of Banks may suspend the net worth requirement for a period not longer than six months. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-164. Deposit accounts.

(a) A savings bank may raise capital through the solicitation of deposits from any person, natural or corporate, except as restricted or limited by law, or by any rules that the Commissioner of Banks may prescribe.

(b) A savings bank may receive deposits of funds upon any terms as the contract of deposit shall provide subject to withdrawals or to be paid upon checks of the depositor. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-165. Joint accounts.

(a) Any two or more persons may open or hold a withdrawable account or accounts. The withdrawable account and any balance of the account is held by them as joint tenants, with or without right of survivorship, as the contract shall provide. The account may also be held under G.S. 41-2.1 and have incidents set forth in that section, but if the account is held under G.S. 41-2.1, the contract shall set forth that fact as well. Unless the persons establishing the account have agreed with the savings bank that withdrawals require more than one signature, payment by the savings bank to, or on the order of, any persons holding an account authorized by this section is a total discharge of the savings bank's obligation as to the amount so paid. Funds in a joint account established with the right of survivorship shall belong to the surviving joint tenant or tenants upon the death of a joint tenant, and the funds are subject only to the personal representative's right of collection as set forth in G.S. 28A-15-10(a)(3), or as provided in G.S. 41-2.1 if the account is established under that section. Payment by the savings bank of funds in the joint account to a surviving joint tenant or tenants shall terminate the personal representative's authority under G.S. 28A-15-10(a)(3) to collect against the savings bank for the funds so paid, but the personal representative's authority to collect the funds from the surviving joint tenant or tenants is not terminated. A pledge of the account by a holder shall, unless otherwise specifically agreed upon, be a valid pledge and transfer of the account, or of the amount so pledged, and shall not operate to sever or terminate the joint ownership of all or any part of the account. Persons establishing an account under this section shall sign a statement showing their election of the right of survivorship in the account, and containing language set forth in a conspicuous manner and substantially similar to the following:

"SAVINGS BANK (or name of institution) JOINT ACCOUNT
WITH RIGHT OF SURVIVORSHIP
G.S. 54C-165

We understand that by establishing a joint account under G.S. 54C-165 that:

1. The savings bank (or name of institution) may pay the money in the account to, or on the order of, any person named in the account unless we have agreed with the savings bank that withdrawals require more than one signature; and
2. Upon the death of one joint owner the money remaining in the account will belong to the surviving joint owners and will not pass by inheritance to the heirs of the deceased joint owner or be controlled by the deceased joint owner's will.

We DO elect to create the right of survivorship in this account.

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______________________________"

(a1) This section is not deemed exclusive. Deposit accounts not conforming to this section are governed by other applicable law as appropriate.

(b) This section does not repeal or modify any law relating to estate taxes. This section regulates and protects the savings bank in its relationships with the joint owners of deposit accounts.

(c) No addition to the account nor any withdrawal or payment shall affect the nature of the account as a joint account or affect the right of any tenant to terminate the account. (1991, c. 680, s. 1; 1998-69, s. 18.)

§ 54C-166. Payable on Death (POD) accounts.

(a) If a person or persons establishing a withdrawable account executes a written agreement with the savings bank containing a statement that it is executed under this section and providing for the account to be held in the name of the person or persons as owner or owners for one or more persons designated as beneficiaries, the account and any balance of the account is held as a Payable on Death account with the following incidents:

(1) Any owner during the owner's lifetime may change any designated beneficiary by a written direction to the savings bank.

(1a) If there are two or more owners of a Payable on Death account, the owners shall own the account as joint tenants with right of survivorship and, except as otherwise provided in this section, the account shall have the incidents set forth in G.S. 54C-165.

(2) Any owner may withdraw funds by writing checks or otherwise, as set forth in the account contract, and receive payment in cash or check payable to the owner's personal order.

(3) If only one beneficiary is living and of legal age at the death of the last surviving owner, the beneficiary is the holder of the account, and a payment by the savings bank to the holder is a total discharge of the

savings bank's obligation as to the amount paid. If two or more beneficiaries are living at the death of the last surviving owner, they shall be owners of the account as joint tenants with right of survivorship as provided in G.S. 54C-165, and payment by the savings bank to the owners or to any of the owners shall be a total discharge of the savings bank's obligation as to the amount paid.

(4) If one or more owners survive the last surviving beneficiary, the account shall become an individual account of the owner, or a joint account with right of survivorship of the owners, and shall have the legal incidents of an individual account in the case of a single owner or a joint account with right of survivorship, as provided in G.S. 54C-165, in the case of multiple owners.

(5) If only one beneficiary is living and that beneficiary is not of legal age at the death of the last surviving owner, the savings bank shall transfer the funds in the account to the general guardian or guardian of the estate, if any, of the minor beneficiary. If no guardian of the minor beneficiary has been appointed, the savings bank shall hold the funds in a similar interest-bearing account in the name of the minor until the minor reaches the age of majority or until a duly appointed guardian withdraws the funds.

(6) Prior to the death of the last surviving owner, no beneficiary shall have any ownership interest in a Payable on Death account. Funds in a Payable on Death account established under this subsection shall belong to the beneficiary or beneficiaries upon the death of the last surviving owner and the funds shall be subject only to the personal representative's right of collection as set forth in G.S. 28A-15-10(a)(1). Payment by the savings bank of funds in the Payable on Death account to the beneficiary or beneficiaries shall terminate the personal representative's authority under G.S. 28A-15-10(a)(1) to collect against the savings bank for the funds so paid, but the personal representative's authority to collect the funds from the beneficiary or beneficiaries is not terminated.

The person or persons establishing an account under this subsection shall sign a statement containing language set forth in a conspicuous manner and substantially similar to the following:

SAVINGS BANK (OR NAME OF INSTITUTION) PAYABLE ON DEATH ACCOUNT

G.S. 54C-166(A)

I (or we) understand that by establishing a Payable on Death account under G.S. 54C-166(a) that:

1. During my (or our) lifetime, I (or we), individually or jointly, may withdraw the money in the account; and
2. By written direction to the savings bank (or name of institution) I (or we), individually or jointly, may change the beneficiary; and
3. Upon my (or our) death the money remaining in the account will belong to the beneficiary or beneficiaries and the money will not be inherited by my (or our) heirs or be controlled by will.

____

____

(a1) This section is not deemed exclusive. Deposit accounts not conforming to this section are governed by other applicable law, as appropriate.

(b) Repealed by Session Laws 2001-267, s. 4, effective October 1, 2001.

(c) No addition to the accounts, nor any withdrawal, payment, or change of beneficiary shall affect the nature of the accounts as Payable on Death accounts, or affect the right of any owner to terminate the account.

(d) This section does not repeal or modify any law relating to estate taxes. (1991, c. 680, s. 1; 1998-69, s. 19; 2001-267, s. 4; 2001-487, s. 61(b).)

§ 54C-167. Personal agency accounts.

(a) A person may open a personal agency account by written contract containing a statement that it is executed under this section. A personal agency account may be a checking account, savings account, time deposit, or any other type of withdrawable account or certificate. The written contract shall name an agent who shall have authority to act on behalf of the depositor in regard to the account as set out in this subsection. The agent shall have the authority to:

(1) Make, sign, or execute checks drawn on the account or otherwise make withdrawals from the account;
(2) Endorse checks made payable to the principal for deposit only into the account; and
(3) Deposit cash or negotiable instruments, including instruments endorsed by the principal, into the account.

A person establishing an account under this section shall sign a statement containing language substantially similar to the following in a conspicuous manner:

"SAVINGS BANK (or name of institution)
PERSONAL AGENCY ACCOUNT
G.S. 54C-167

I understand that, by establishing a personal agency account under G.S. 54C-167, the agent named in the account may:

1. Sign checks drawn on the account; and
2. Make deposits into the account.

I also understand that upon my death the money remaining in the account will be controlled by my will or inherited by my heirs.

____"

(b) An account created under this section grants no ownership right or interest in the agent. Upon the death of the principal there is no right of survivorship to the account and the authority set out in subsection (a) of this section terminates.

(c) The written contract referred to in subsection (a) of this section shall provide that the principal may elect to extend the authority of the agent to act on behalf of the principal in regard to the account notwithstanding the subsequent incapacity or mental incompetence of the principal. If the principal so elects to extend the authority of the agent, then upon the subsequent incapacity or mental incompetence of the principal, the agent may continue to exercise the authority, without the requirement of bond or of accounting to any court, until the agent receives actual knowledge that the authority has been terminated by a duly qualified guardian of the estate of the incapacitated or incompetent principal, or by the duly appointed attorney-in-fact for the incapacitated or incompetent principal, acting under a durable power of attorney, as defined in G.S. 32A-8, which grants to the attorney-in-fact that authority in regard to the account which is granted to the agent by the written contract executed under this section, at which time the agent shall account to the guardian or attorney-in-fact for all actions of the agent in regard to the account during the incapacity or incompetence of the principal. If the principal does not so elect to extend the authority of the agent, then upon the subsequent incapacity or mental incompetence of the principal, the authority of the agent terminates.

(d) When an account under this section has been established, all or part of the account or any interest or dividend thereon may be paid by the savings bank on a check made, signed, or executed by the agent. In the absence of actual knowledge that the principal has died or that the agency created by the account has been terminated, the payment is a valid and sufficient discharge to the savings bank for payment so made. (1991, c. 680, s. 1.)

§ 54C-168. Collection of processing fee for returned checks.

Notwithstanding any other law, a savings bank may charge and collect a processing fee for checks on which payment has been refused by the payor depository institution. A savings bank may also collect a processing fee for checks drawn on that savings bank with respect to an account with insufficient funds. (1991, c. 680, s. 1.)

§ 54C-169. Right of setoff on deposit accounts.

(a) A savings bank shall have a right of setoff, without further agreement or pledge, upon all deposit accounts owned by any member or customer to whom or upon whose behalf the savings bank has made as unsecured advance of money by loan. Upon default in the repayment or satisfaction thereof, the savings bank may cancel on its books all or any part of the deposit accounts owned by the member or customer, and apply the value of the accounts in payment of the obligation.

(b) A savings bank that exercises the right of setoff provided in this section shall first give 30 days' notice to the member or customer that the right will be exercised. The accounts may be held or frozen, with no withdrawals permitted, during the 30-day notice period. The accounts may not be canceled and the value of the accounts may not be applied to pay the obligation until the 30-day period has expired without the member or customer having cured the default on the obligation. The amount of any member's or customer's interest in a joint account or other account held in the names of more than one person is subject to the right of setoff provided in this section.

(c) This section is not exclusive, but shall be in addition to contract, common law, and other rights of setoff. Any other rights are not governed in any fashion by this section. (1991, c. 680, s. 1.)

§ 54C-170. Minors as deposit account holders.

(a) A savings bank may issue a deposit account to a minor as the sole and absolute owner, or as a joint owner, and receive payments, pay withdrawals, accept pledges and act in any other manner with respect to the account on the order of the minor with like effect as if the minor were of full age and legal capacity. Any payment to a minor is a discharge of the savings bank to the extent thereof. The account shall be held for the exclusive right and benefit of the minor, and any joint owners, free from the control of all persons, except creditors.

(b) A savings bank may lease a safe deposit box to a minor and, with respect to the lease, may deal with the minor in all regards as if the minor were of full age and legal capacity. A minor entering a lease agreement with a savings bank under this subsection is bound by the terms of the agreement to the same extent as if the minor were of full age and legal capacity. (1991, c. 680, s. 1; 1991 (Reg. Sess., 1992), c. 829, s. 11.)

§ 54C-171. Deposit accounts as deposit of securities.

Notwithstanding any restrictions or limitations contained in any law of this State, the deposit accounts of any State savings bank may be accepted by any agency, department, or official of this State in any case wherein the agency, department, or official acting in its official capacity requires that securities be deposited with the agency, department, or official. (1991, c. 680, s. 1.)

§ 54C-172. New account books.

A new account book or certificate or other evidence of ownership of a deposit account may be issued in the name of the holder of record at any time, when requested by the holder or the holder's legal representative, upon proof satisfactory to the savings bank that the original account book or certificate has been lost or destroyed. The new account book or certificate shall expressly state that it is issued in lieu of the one lost or destroyed and that the savings bank shall in no way be liable thereafter on account of the original book or certificate. The savings bank may, in its bylaws, require indemnification against any loss that might result from the issuance of the new account book or certified certificate. (1991, c. 680, s. 1.)

§ 54C-173. Transfer of deposit accounts.

The owner of a deposit account may transfer the owner's rights therein absolutely or conditionally to any other person eligible to hold the same, but the transfer may be made on the books of the savings bank only upon presentation of evidence of transfer satisfactory to the savings bank, and accompanied by the proper application for transfer by the transferor and transferee, who shall accept the account subject to the terms and conditions of the account contract, the bylaws of the savings bank, the certificate of incorporation of the savings bank, and all rules of the Commissioner of Banks. Notwithstanding the effectiveness of a transfer between the parties, the savings bank may treat the holder of record of a deposit account as the owner of the deposit account for all purposes, including payment and voting, in the case of a mutual savings bank, until the savings bank records the transfer and assignment. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-174. Authority of power of attorney.

A savings bank may continue to recognize the authority of an individual holding a power of attorney in writing to manage or to make withdrawals, either in whole or in part, from the deposit account of a customer or member until the savings bank receives written or actual notice of death or of adjudication of incompetency of the member or revocation of the authority of the individual holding the power of attorney. Payment by the savings bank to an individual holding a power of attorney before receipt of the notice is a total discharge of the savings bank's obligation as to the amount so paid. (1991, c. 680, s. 1.)

§ 54C-175. Days and hours of operation.

A savings bank may operate on such days and during such hours, and may observe such holidays, as the savings bank's board of directors shall designate. (1991, c. 680, s. 1; 1995 (Reg. Sess., 1996), c. 556, s. 4.)

§ 54C-176. Power to borrow money.

A savings bank, in its certificate of incorporation or in its bylaws, may authorize the board of directors to borrow money, and the board of directors may, by resolution adopted by a vote of at least two-thirds of the entire board duly recorded in the minutes, authorize the officers of the savings bank to borrow money for the savings bank on any terms and conditions as the board may deem proper. (1991, c. 680, s. 1.)

§ 54C-177. Authority to join federal reserve bank.

A State savings bank may subscribe to the capital stock and become a member of a federal reserve bank. A savings bank shall continue to be subject to the supervision and examination required by the laws of this State, except that the Federal Reserve Board shall have the right, if it deems necessary, to make examinations; and the Commissioner of Banks may disclose to the Federal Reserve Board, or to the examiners duly appointed by it, all information in reference to the affairs of a savings bank that has become, or desires to become, a member of a federal reserve bank. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-178. Regional reciprocal acquisitions.

State savings banks and holding companies thereof shall have the same powers to acquire and be acquired as State associations and their savings and loan holding companies under Article 3A of Chapter 54B of the General Statutes. For this purpose, the term "association" as used in Article 3A of Chapter 54B of the General Statutes shall include a State savings bank chartered under this Chapter, and the term "savings and loan holding company" shall include holding companies of State savings banks chartered under this Chapter. (1991, c. 680, s. 1.)

§ 54C-179. Forced retirement of deposit accounts.

(a) A savings bank may, at any time that funds are on hand and available for this purpose, force the retirement of and redeem all or any portion of its deposit accounts that have not been pledged as security for loans. A savings bank may not redeem any fixed term deposit accounts that have not matured. The board of directors of the savings bank shall determine the number of and total amount of the deposit accounts to be retired.

(b) A savings bank shall give at least 30 days' notice by certified mail to the last address of each holder of an affected deposit account. The redemption price of deposit accounts so retired is the full withdrawal value of the account, as determined on the last interest date, plus all interest on deposit accounts credited or paid as of the effective retirement date. Interest continues to accrue and be paid or credited by the savings bank to the deposit accounts to be retired through the effective retirement date.

(c) Interest on the deposit accounts called for forced retirement ceases to accrue after the effective retirement date, if the required notice has been given properly, and if on the retirement date the funds necessary for payment have been set aside so as to be available. All rights with respect to those deposit accounts terminate after the effective retirement date, except for the right of the holder of the retired deposit account to receive the full redemption price.

(d) A savings bank shall not redeem deposit accounts by forced retirement whenever it has on file applications for withdrawal or maturities that have not yet been acted upon and paid. (1991 (Reg. Sess., 1992), c. 829, s. 12.)

§§ 54C-180 through 54C-194: Reserved for future codification purposes.

ARTICLE 9.

Holding Companies.

§ 54C-195. Holding companies.

(a) Notwithstanding any other law, a stock savings bank may, simultaneously with its incorporation or conversion to a stock savings bank, provide for its ownership by a holding company. In the case of a conversion, members of the converting savings bank shall have the right to purchase capital stock of the holding company in lieu of capital stock of the converted savings bank in accordance with G.S. 54C-33(c)(6).

(b) Notwithstanding any other law, a stock savings bank may reorganize its ownership, to provide for ownership by a holding company, upon adoption of a plan of reorganization by a favorable vote of not less than two-thirds of the members of the board of directors of the savings bank and approval of the plan of reorganization by the holders of not less than a majority of the issued and outstanding shares of stock of the savings bank. The plan of reorganization shall provide that (i) the resulting ownership is vested in a North Carolina corporation, (ii) all stockholders of the stock savings bank have the right to exchange shares, (iii) the exchange of stock is not subject to State or federal income taxation, (iv) stockholders not wishing to exchange shares are entitled to dissenters' rights as provided under G.S. 55-113, and (v) the plan of reorganization is fair and equitable to all stockholders.

(c) Notwithstanding any other law, a mutual savings bank may reorganize its ownership to provide for ownership by a holding company upon adoption of a plan of reorganization by favorable vote of not less than two-thirds of the members of the board of directors of the savings bank and approval of the plan of reorganization by a majority of the voting members of the savings bank. The plan of reorganization shall provide that (i) the resulting ownership is vested in a North Carolina corporation, (ii) the resulting ownership of one or more subsidiary savings banks is evidenced by stock shares, (iii) the substantial portion of the assets and all of the insured deposits and part or all of the other liabilities are transferred to one or more subsidiary savings banks, (iv) the reorganization is not subject to State or federal income taxation, and (v) the plan of reorganization is fair and equitable to all members of the savings bank.

(d) A holding company may invest in any investment authorized by its board of directors, except as limited by regulations adopted by the Commissioner of Banks under this Article.

(e) An entity that controls a stock savings bank, or acquires control of a stock savings bank, is a holding company. (1991, c. 680, s. 1; 2001-193, s. 16.)

§ 54C-196. Supervision of holding companies.

Holding companies are under the supervision of the Commissioner of Banks. The Commissioner of Banks shall exercise all powers and responsibilities with respect to holding companies which the Commissioner of Banks exercises with respect to savings banks. (1991, c. 680, s. 1; 2001-193, s. 16.)

§§ **54C-197, 54C-198:** Reserved for future codification purposes.

ARTICLE 10.

Savings Bank Interstate Branches.

§ 54C-199. Title.

This Article shall be known and may be cited as the North Carolina Savings Bank Interstate Branch Act. (1993, c. 191, s. 3.)

§ 54C-200. Definitions.

As used in this Article, unless the context clearly requires otherwise, the following definitions apply:

(1) Repealed by Session Laws 2004-203, s. 35(b), effective August 17, 2004.

(2) "Branch" means a full service office of a savings bank through which it renders a savings bank service other than its principal office. A savings bank may engage in any authorized function or service through an authorized branch office.

(3) "Commission" means the State Banking Commission.

(4) "Home state" means (i) as to a state-chartered savings bank, the state which granted the savings bank its charter, and (ii) as to a federal savings bank, the state in which the savings bank has its principal office.

(5) "Out-of-state" savings bank means a savings bank granted a charter by any state other than this State and whose principal office is not located in this State.

(6) "Savings bank" means a state savings bank or a federal savings bank, unless limited by use of the words "State" or "federal".

(7) "State savings bank" means a depository institution chartered under the laws of this State.

(8) "Supervisor" means the state savings bank supervisor or equivalent state official having primary regulatory authority over an out-of-state savings bank. (1993, c. 191, s. 3; 2001-193, ss. 16, 17; 2004-203, s. 35(b).)

§ 54C-201. Establishment of branches by out-of-state savings banks.

Any out-of-state savings bank that meets the requirements of this Article may establish a branch within North Carolina either by (i) *de novo* entry; (ii) the purchase of an existing branch; (iii) the purchase of all or substantially all of the assets of a State savings bank located in North Carolina; or (iv) merger or consolidation. (1993, c. 191, s. 3.)

§ 54C-202. Application requirements.

(a) Any out-of-state savings bank desiring to establish a branch office under this Article shall file with the Commissioner of Banks a written application meeting the following requirements:

(1) The out-of-state savings bank shall agree to comply with all the applicable rules and regulations, and informational filing requirements contained in the laws and rules of this State that would apply to a State savings bank engaging in an equivalent form of transaction. Additionally, the Commissioner of Banks shall apply the same standards of approval to the application of the out-of-state savings bank as

would apply to an application by a State savings bank for an equivalent form of transaction.

(2) The out-of-state savings bank shall provide the Commissioner of Banks, in the manner prescribed by the Commissioner of Banks, with such additional information as the Commissioner of Banks deems necessary, to fully evaluate the application.

(3) The out-of-state savings bank shall pay an application fee established by the Commissioner of Banks pursuant to G.S. 54C-9.

(4) The out-of-state savings bank shall not commence operations of the branch office until it has received the written approval of the Commissioner of Banks.

(b) The Commissioner of Banks shall act on the application within 90 days of receipt of the completed application. (1993, c. 191, s. 3; 2001-193, s. 16.)

§ 54C-203. Conditions for approval.

No application by an out-of-state savings bank received under this Article may be finally approved by the Commissioner of Banks unless:

(1) The Commissioner of Banks has received in writing approval of the proposed transaction from the supervisor of the out-of-state savings bank;

(2) The supervisor of the out-of-state savings bank agrees in writing to share with the Commissioner of Banks examination reports prepared by the supervisor and any other information deemed necessary by the Commissioner of Banks regarding the out-of-state savings bank;

(3) The out-of-state savings bank agrees in writing to make available to the Commissioner of Banks all information that may be required to effectively examine the savings bank;

(4) The out-of-state savings bank agrees in writing that so long as it maintains a branch in North Carolina, it will meet the conditions set forth in this Article and comply with all applicable North Carolina laws and any rules issued thereunder, as well as any orders or directives issued to the savings bank by the Commissioner of Banks;

(5) The home state of the out-of-state savings bank permits savings banks chartered under the laws of this State to establish branches within its border; and

(6) The out-of-state savings bank designates and files with the Office of the Secretary of State a document appointing an agent in this State to receive service of judicial process. (1993, c. 191, s. 3; 2001-193, s. 16.)

§ 54C-204. Special conditions.

(a) The Commissioner of Banks may require an out-of-state savings bank to designate one of its branches in North Carolina as a "headquarters branch" and may, by rule, require that reports, books, and records required of savings banks doing business under this Article be available at the designated headquarters branch.

(b) Once an out-of-state savings bank has established at least one branch in North Carolina pursuant to this Article, subsequent applications to establish additional branches shall be considered on the same basis as an application of a State savings bank to establish an additional branch pursuant to G.S. 54C-23.

(c) If an out-of-state savings bank establishes a branch or branches by merger with or purchase from a savings bank located in this State, and the out-of-state savings bank and the savings bank located in this State are both owned by the same holding company, any conditions, limitations, or restrictions placed on the holding company, pursuant to Article 9 of this Chapter, shall continue to apply to both the acquiring out-of-state savings bank and its holding company. (1993, c. 191, s. 3; 2001-193, s. 16.)

§ 54C-205. Powers.

An out-of-state savings bank that establishes a branch in North Carolina may engage in all the activities authorized by North Carolina law for a State savings bank except to the extent that such activities have been expressly prohibited by the state supervisor of the out-of-state savings bank or the laws of the out-of-state savings bank's home state. (1993, c. 191, s. 3.)

§ 54C-206. Establishment of out-of-state branches by State savings banks.

With the prior consent of the Commissioner of Banks, any savings bank chartered under the laws of North Carolina may establish a branch in any other state in accordance with the laws of such other state. (1993, c. 191, s. 3; 2001-193, s. 16.)

§ 54C-207. Regulatory and supervisory oversight.

(a) The Commissioner of Banks may enter into such agreements as necessary regarding the scope, timing, coordination, and frequency of examinations and other supervisory matters, including the sharing of information gathered in such examinations, with other supervisors and federal savings bank regulators. This authority applies to both out-of-state savings banks and their holding companies.

(b) The Commissioner of Banks may require periodic reports on the financial condition of any out-of-state savings bank or its holding company that maintains a branch within North Carolina and may from time to time require from any such out-of-state savings banks other reports under oath in such scope and detail as the Commissioner of Banks may reasonably determine to be necessary for the purpose of assuring continuing compliance with the provisions of this Article.

(c) The Commissioner of Banks may, if necessary, conduct full-scope, on-site examinations of any branch established pursuant to this Article.

(d) Out-of-state savings banks shall be assessed and required to pay supervisory and examination fees in accordance with G.S. 54C-55 and the rules issued thereunder. (1993, c. 191, s. 3; 2001-193, s. 16.)

§ 54C-208. Enforcement.

(a) Any enforcement authority available to the Commissioner of Banks for use against a State savings bank may, subject to the provisions of Chapter 150B of the General Statutes, be used against a branch established under this Article and against the out-of-state savings bank or its parent holding company establishing such branch.

(b) The Commissioner of Banks may suspend or revoke the authority of an out-of-state savings bank to establish or maintain a branch in North Carolina upon a finding of fact or condition or circumstance that is grounds for denial of an application to establish and maintain a branch under this Article.

(c) The Commissioner of Banks may enforce the provisions of this Article through an action in any court of North Carolina or any other state or any court of the United States as provided in G.S. 54C-76, 54C-77, 54C-78, and

54C-79 for the purpose of obtaining an appropriate remedy for violation of any provisions of this Article.

(d) The Commissioner of Banks may enter into joint actions with other supervisors or federal savings banking regulators, or both, having concurrent jurisdiction over any out-of-state savings bank that has a branch in North Carolina or over any State savings bank that has a branch in another state, or may take such action independently to carry out the Commissioner of Banks' responsibilities under this Article and assure compliance with the provisions of this Article and the applicable savings banking laws of this State. (1993, c. 191, s. 3; 2001-193, s. 16.)

§ 54C-209. Branch closings.

An out-of-state savings bank that is subject to an order or written agreement revoking its authority to establish or maintain a branch in North Carolina and any State savings bank that is subject to an order or written agreement revoking its authority to establish or maintain a branch in another state shall wind up the business of that branch in an orderly manner that protects the depositors, customers, and creditors of the branch, and that complies with all North Carolina laws and all other applicable laws regarding the closing of the branch. (1993, c. 191, s. 3.)

§ 54C-210. Rules.

The Commission may adopt rules as necessary to carry out the provisions of this Article. (1993, c. 191, s. 3.)

§ 54C-211. Appeal of Commissioner of Banks' decision.

Any aggrieved party in a proceeding under this Article may, within 30 days after final decision of the Commissioner of Banks, appeal such decision to the Commission. The Commission, within 30 days of receipt of the notice of appeal, shall approve, disapprove, or modify the Commissioner of Banks' decision. Failure of the Commission to act within 30 days of receipt of notice of appeal shall constitute a final decision of the Commission approving the decision of the Commissioner of Banks. Notwithstanding any other provision of law, any aggrieved party to a decision of the Commission shall be entitled to an appeal pursuant to G.S. 54C-16. (1993, c. 191, s. 3; 2001-193, s. 16.)

§ 54C-212. Severability.

If any provision of this Article or the application of such provision to any persons or circumstances is found invalid, the remainder of this Article and its application to persons or circumstances other than those as to which it is held invalid, shall not be affected. (1993, c. 191, s. 3.)

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NORTH CAROLINA COMMENTARY

This revision of the North Carolina Business Corporation Act is based upon the Revised Model Business Corporation Act (1984) (hereinafter "the Model Act"). To maintain uniformity, the numbering of the sections corresponds to that of the Model Act, except that the General Statutes Chapter 55 number has been added to each section and the Model Act chapters have been changed to articles.

Two types of comments appear. Under the designation "Official Comment" is the Official Comment of the Section of Corporation, Banking and Business Law of the American Bar Association for that section. Under the designation "North Carolina Comment" are the comments of the drafters who adapted the Model Act for enactment in North Carolina. The North Carolina comments are designed to note (1) deviations from the Model Act and (2) some significant changes from the former law. Some sections therefore do not have a North Carolina Comment.

Editor's Note. — Session Laws 1989, ch. 265, s. 1, effective July 1, 1990, rewrote Chapter 55 and entitled it the North Carolina Business Corporation Act, to replace former Chapter 55, entitled the Business Corporation Act, which had been adopted by Session Laws 1955, c. 1371, s. 1.

Section 2 of Session Laws 1989, c. 265 provided: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Comments to the 1984 Revised Model Business Corporation Act and all explanatory comments of the drafters of this act as the Revisor may deem appropriate."

Amended North Carolina Commentaries reflect either errors discovered in the comments as originally drafted or technical amendments enacted in 1990 to the current North Carolina Business Corporation Act.

Where appropriate, the historical citations to sections of former Chapter 55 have been added to corresponding sections in current Chapter 55.

Some of the case notes appearing under the sections of this Chapter were decided under former Chapter 55 or under prior law.

For tables of corresponding sections of former and current Chapter 55, see the tables at the end of this Chapter.

ARTICLE 1.

General Provisions.

Part 1. Short Title and Reservation of Power.

§ 55-1-01. Short title.

This Chapter shall be known and may be cited as the "North Carolina Business Corporation Act." (1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

The short title provided by section 1.01 creates a convenient name for the state's business corporation act.

See the Introduction for a general description of the development of the Model Act, the purposes it is intended to serve, the principles under which the 1984 Revised Model Business Corporation Act was prepared, and the roles of the Cross-References and Official Comments.

Cross References. — For constitutional provisions regarding corporations, see N.C. Const., Art. VIII. As to executions, see G.S. 1-324.1 et seq. As to receivers of corporations, see G.S. 1-507.1 et seq. As to jurisdiction of the superior court division over proceedings under this Chapter, see G.S. 7A-249. As to provisions relating to nonprofit corporations, see G.S. 55A-1 to 55A-89.1.

Legal Periodicals. — For article giving comments of draftsmen of the Business Corporation Act adopted in 1955, see 33 N.C.L. Rev. 26 (1954).

For case law survey on business associations, see 41 N.C.L. Rev. 415 (1963).

For article reevaluating the Business Corporation Act adopted in 1955, see 43 N.C.L. Rev. 768 (1965).

For article surveying case law as to corporations, see 44 N.C.L. Rev. 950 (1966).

For note on the liability of directors and officers for negligent management, see 45 N.C.L. Rev. 748 (1967).

For comment on tax and corporate aspects of professional incorporation in North Carolina, see 48 N.C.L. Rev. 573 (1970).

For note, "Glenn v. Wagner: Instrumentality Rule versus the Balancing Test in Piercing the Corporate Veil," see 64 N.C.L. Rev. 1265 (1986).

For article, "The Corporate Fox and the Shareholders' Hen House: Reflections on Alford v. Shaw," see 65 N.C.L. Rev. 569 (1987).

For article, "The Uncertain Case Against the Double Taxation of Corporate Income," see 68 N.C.L. Rev. (1990).

For business symposium, "Management Buyouts: Strategies, Ethics and Other Considerations," see 25 Wake Forest Law Rev. 1 (1990).

For article discussing changes in theories of the corporation over the last 150 years, see "Theories of the Corporation," 1990 Duke L.J. 201.

For article, "The Corporate Persona, Contract (and Market) Failure, and Moral Values," see 69 N.C.L. Rev. 273 (1991).

For article, "Discrimination, Managerial Discretion and the Corporate Contract," see 26 Wake Forest L. Rev. 541 (1991).

For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

For article, "Silencing the Shareholder's Voice," see 80 N.C.L. Rev. 1897 (2002).

§ 55-1-02. Reservation of power to amend or repeal.

The General Assembly has power to amend or repeal all or part of this Chapter at any time and all domestic and foreign corporations subject to this Chapter are governed by the amendment or repeal. (1901, c. 2, s. 7; Rev., s. 1136; C.S., s. 1135; G.S., s. 55-36; 1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Provisions similar to section 1.02 have their genesis in *Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat) 518 (1819), which held that the United States Constitution prohibited the application of newly enacted statutes to existing corporations while suggesting the efficacy of a reservation of power similar to section 1.02. The purpose of section 1.02 is to avoid any possible argument that a corporation has contractual or vested rights in any specific statutory provision and to ensure that the state may in the future modify its corporation statutes as it deems appropriate and require existing corporations to comply with the statutes as modified.

All articles of incorporation or certificates of authority granted under the Model Act are subject to the reservation of power set forth in section 1.02. Further, corporations "governed" by this Act—which includes all corporations formed or qualified under earlier, general incorporation statutes that contain a reservation of power—are also subject to the reservation of power of section 1.02 and bound by subsequent amendments to the Act.

Many states have constitutional provisions mandating the reservation of power to amend or modify corporate statutes and charters. In these states section 1.02 is also supported by specific constitutional authorization.

NORTH CAROLINA COMMENTARY

This section is substantially the same, in effect, as former G.S. 55-174.

This reserved power also appears in the North Carolina Constitution. *See* N.C. Const. Art. VIII, § 1; *The Yadkin River Power Co. v. Whitney Co.*, 150 N.C. 31, 63 S.E. 820 (1906).

Legal Periodicals. — For article on the evolution of corporate combination law, see 76 N.C.L. Rev. 687 (1998).

§§ 55-1-03 through 55-1-19: Reserved for future codification purposes.

Part 2. Filing Documents.

§ 55-1-20. Filing requirements.

(a) A document required or permitted by this Chapter to be filed by the Secretary of State must be filed under Chapter 55D of the General Statutes.

(b) A document submitted on behalf of a domestic or foreign corporation must be executed:

(1) By the chair of its board of directors, by its president, or by another of its officers;

(2) If directors have not been selected or the corporation has not been formed, by an incorporator; or

(3) If the corporation is in the hands of a receiver, trustee, or other court-appointed fiduciary, by that fiduciary.

(c) through (i). Reserved.

(j) Repealed by Session Laws 2002-159, s. 15 effective October 11, 2002. (1955, c. 1371, s. 1; 1967, c. 13, s. 1; c. 823, s. 16; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.1(a); 1991, c. 645, s. 15; 1999-369, s. 1.1; 2001-358, ss. 3(a), 6(a); 2001-387, ss. 1, 155, 173; 2001-413, s. 6; 2002-159, s. 15.)

Editor's Note. — Session Laws 2001-358, s. 52, authorizes the Revisor of Statutes to transfer, as historical annotations, the Official Comments and the North Carolina Comments to those portions of Chapter 55 of the General Statutes that are recodified by that act to the corresponding locations in Chapter 55D of the General Statutes, as the Revisor deems appropriate. Pursuant to this authority, the Official Comments and the North Carolina Commentary formerly located at this section have been transferred to G.S. 55D-10.

This section was amended by Session Laws 2001-358, ss. 3(a) and 6(a) in the coded bill drafting format provided by G.S. 120-20.1. The act, in s. 3(a), recodified subsections (a) through (e) and (g) through (i) as new G.S. 55D-10. The act, is s. 6(a) rewrote the section, treating subsection (j) as also having been recodified by s. 3(a). Subsection (j) has been set out above and subsections (c) through (i) have been set out as "Reserved" at the direction of the Revisor of Statutes.

Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 1, amended this section. However, s. 155 of c. 387 repealed s. 1, contingent upon the enactment of Session Laws 2001-358. Session Laws 2001-358 was enacted on August 10, 2001.

Legal Periodicals. — For article, "Revolving Funds: In the Vanguard of the Preservation Movement," see 11 N.C. Cent. L.J. 256 (1980).

For "Legislative Survey: Business & Banking," see 22 Campbell L. Rev. 253 (2000).

§ 55-1-21. Forms.

(a) The Secretary of State may promulgate and furnish on request forms for the following:

(1) An application for a certificate of existence.

(2) A foreign corporation's application for a certificate of authority to transact business in this State.

(3) A foreign corporation's application for a certificate of withdrawal.

(4) Repealed by Session Laws 1997-475, s. 6.2, effective January 1, 1998.

If the Secretary of State so requires, use of these forms is mandatory.

(b) The Secretary of State may promulgate and furnish on request forms for other documents required or permitted to be filed by this Chapter but their use is not mandatory. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1997-475, s. 6.2.)

OFFICIAL COMMENT

As described in the Official Comment to section 1.20, documents are entitled to filing under the Model Act if they meet the substantive and formal requirements of the Act; they may also contain additional information if the person submitting the document so elects. See the Official Comments to sections 1.20 and 1.25. In these circumstances it is not appropriate to vest the secretary of state with general authority to establish mandatory forms for use under the Model Act. Certain types of reports and requests for documents may be processed efficiently only if uniform forms are prescribed by the secretary of state. Certificates of existence, for example, should require specific information located at specific places on the form; similarly, processing of large-volume, largely routine filings is expedited if standardized forms are required. Also, the disclosure requirements of the annual report may be administered on a systematic basis if a standardized form is mandated. Section 1.21(a) recognizes that these considerations may exist in limited cases, and expressly enumerates those forms for which the secretary of state is authorized to establish mandatory forms.

Section 1.21(b) authorizes (but does not require) the secretary of state to prepare forms suitable for use for other documents required or permitted to be filed under the Act. However, the use of these forms is permissive and cannot be required by the secretary of state.

NORTH CAROLINA COMMENTARY

The Model Act was modified by changing "prescribe" to "promulgate," because "prescribe" is inconsistent with the idea of optional forms.

§ 55-1-22. Filing, service, and copying fees.

(a) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to the Secretary for filing:

	Document	Fee
(1)	Articles of incorporation	$125.00
(2)	Application for reserved name	30.00
(3)	Notice of transfer of reserved name	10.00
(4)	Application for registered name	10.00
(5)	Application for renewal of registered name	10.00
(6)	Corporation's statement of change of registered agent or registered office or both	5.00
(7)	Agent's statement of change of registered office for each affected corporation	5.00
(8)	Agent's statement of resignation	No fee
(9)	Designation of registered agent or registered office or both	5.00
(10)	Amendment of articles of incorporation	50.00
(11)	Restated articles of incorporation	10.00
	with amendment of articles	50.00
(12)	Articles of merger or share exchange	50.00
(12a)	Articles of conversion (other than articles of conversion included as part of another document)	50.00
(13)	Articles of dissolution	30.00
(14)	Articles of revocation of dissolution	10.00
(15)	Certificate of administrative dissolution	No fee
(16)	Application for reinstatement following administrative dissolution	100.00
(17)	Certificate of reinstatement	No fee
(18)	Certificate of judicial dissolution	No fee

	Document	Fee
(19)	Application for certificate of authority	250.00
(20)	Application for amended certificate of authority	75.00
(21)	Application for certificate of withdrawal	25.00
(22)	Certificate of revocation of authority to transact business	No fee
(23)	Annual report (paper)	25.00
(23a)	Annual report (electronic)	18.00
(24)	Articles of correction	10.00
(25)	Application for certificate of existence or authorization (paper)	15.00
(25a)	Application for certificate of existence or authorization (electronic)	10.00
(26)	Any other document required or permitted to be filed by this Chapter	10.00
(27)	Repealed by Session Laws 2001-358, s. 6(b), effective January 1, 2002.	

(b) The Secretary of State shall collect a fee of ten dollars ($10.00) each time process is served on the Secretary under this Chapter. The party to a proceeding causing service of process is entitled to recover this fee as costs if the party prevails in the proceeding.

(c) The Secretary of State shall collect the following fees for copying, comparing, and certifying a copy of any filed document relating to a domestic or foreign corporation:

(1) One dollar ($1.00) a page for copying or comparing a copy to the original.
(2) Fifteen dollars ($15.00) for a paper certificate.
(3) Ten dollars ($10.00) for an electronic certificate.

(d) The fee for the annual report in subdivision (23) of this section is nonrefundable. (1957, c. 1180; 1967, c. 823, s. 20; 1969, c. 751, ss. 42, 43, 45; c. 797, ss. 4, 5; 1975, 2nd Sess., c. 981, s. 1; 1983, c. 713, ss. 32-38; 1989, c. 265, s. 1; c. 714; 1989 (Reg. Sess., 1990), c. 1057; 1991, c. 574, s. 1; 1997-456, s. 55.3; 1997-475, s. 5.1; 1997-485, s. 10; 2001-358, s. 6(b); 2001-387, ss. 2, 173; 2001-413, s. 6; 2002-126, ss. 29A.25, 29A.26; 2003-349, s. 7; 2007-323, s. 30.6(a).)

OFFICIAL COMMENT

Section 1.22 establishes in a single section the filing fees for all documents that may be filed under the Model Act. The dollar amounts for each document should be inserted by each state as it adopts the Act.

The list of documents in section 1.22 includes all documents that are authorized to be filed with the secretary of state under the Model Act. The catch-all in subdivision (26) will apply to any document for which a state does not establish a specific filing fee plus any document that later amendments to the statute may authorize or direct be filed with the secretary of state without establishing a specific filing fee.

Subdivision (9) states that no fee is applicable to filing the resignation of a registered agent. This provision permits a person who is named as a registered agent without his consent, or who agrees to serve as registered agent for a fee and the fee is not paid, to eliminate any reference to himself in the records of the secretary of state without expense.

Subdivision (8) contains a maximum fee for filing a change of address of a registered agent. Since corporation service companies serve as registered agents for thousands of corporations in many jurisdictions, their change of address may require a very large number of filings. Hence, the fee is broadly based on the number of corporations affected but a maximum fee is specified to reflect that as the number of changes increases the cost per change should decrease.

Sections 11.07, 15.20, and 15.31 require the secretary of state to serve process on foreign corporations under the circumstances there specified. The fee for this service is set forth in section 1.22(b).

Section 1.22(c) establishes standard fees for coping filed documents and certifying that copies are true copies under section 1.27.

NORTH CAROLINA COMMENTARY

This section contains a new fee schedule covering documents required or permitted to be filed under this Act, and the fees shown here combine the fees and taxes that were separately covered in former G.S. 55-155 and former G.S. 55-156. In some cases the fees are higher than the fees and taxes under the prior law. The sliding scale that applied in some cases under the prior law is eliminated in favor of a flat fee in all cases. The format was adopted from the Model Act.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 154(b), provides that "Nothing in the act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form."

Subsection (a), as amended by Session Laws 2007-323, s. 30.6(a), effective September 1, 2007, is applicable to annual reports filed on or after that date.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2008-194, s. 2(a)-(f), provides: "(a) The following definitions apply in this section:

"(1) Department. — The Department of the Secretary of State.

"(2) Filer. — An individual, entity, or corporation that files a single notice pursuant to this section for more than 20,000 entities on file with the Department.

"(3) Notice. — A bulk filing which includes the information required in G.S. 55D-31(a)(2) through (6) and a certification that the filer has complied with the entity notification requirements of G.S. 55D-31(b). For a notice intended to update information for unincorporated nonprofit associations, 'notice' shall also mean a filing which includes the information required by G.S. 59B-11(b)(4). Any notice filed must be in an electronic form acceptable to the Department and include a written statement that the notice is filed pursuant to this section.

"(b) Upon receipt and filing by the Department, a notice pursuant to this section shall be sufficient as a matter of law under G.S. 55D-31 and G.S. 59B-11 to update registered office and registered agent information for each entity on file with the Department for which the filer is listed on the records of the Department as the registered office, the registered agent, or both.

"(c) The requirements of G.S. 55D-13(a) and (b), 55D-10(b)(8), 55-1-22(a), 55A-1-22(a), 57C-1-22(a), 59-35.2(a), 59-1106(a), and 59B-11(f) shall not apply to notices filed pursuant to this section.

"(d) This section shall only apply to one notice for each filer.

"(e) Unless otherwise specified, the change of address shall become effective on the 45th day following the Department's receipt of a notice filed pursuant to this section. A filer may specify in the notice a later effective date for the change of address, but not an earlier effective date.

"(f) A notice filed pursuant to this section shall be delivered to the Department no later than one year after the effective date of this section."

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 389.

CASE NOTES

Applied in Ben Johnson Homes, Inc. v. Watkins, 142 N.C. App. 162, 541 S.E.2d 769, 2001 N.C. App. LEXIS 32 (2001).

§§ 55-1-22.1 through 55-1-27: Transferred to §§ 55D-11 through 55D-17 by Session Laws 2001-358, s. 3(b).

§ 55-1-28. Certificate of existence.

(a) Anyone may apply to the Secretary of State to furnish a certificate of existence for a domestic corporation or a certificate of authorization for a foreign corporation.

(b) A certificate of existence or authorization sets forth:

(1) The domestic corporation's corporate name or the foreign corporation's corporate name used in this State;

(2) That (i) the domestic corporation is duly incorporated under the law of this State, the date of its incorporation, and the period of its duration if less than perpetual; or (ii) that the foreign corporation is authorized to transact business in this State;

(3) That the articles of incorporation of a domestic corporation or the certificate of authority of a foreign corporation has not been suspended for failure to comply with the Revenue Act of this State and that the corporation has not been administratively dissolved for failure to comply with the provisions of this Chapter;

(4) That its most recent annual report required by G.S. 55-16-22 either has been delivered to the Secretary of State or is not delinquent;

(5) That articles of dissolution have not been filed; and

(6) Other facts of record in the office of the Secretary of State that may be requested by the applicant.

(c) Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the Secretary of State may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this State. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1991, c. 645, s. 1; 1997-475, s. 6.3.)

OFFICIAL COMMENT

Section 1.28 establishes a procedure by which anyone may obtain a conclusive certificate from the secretary of state that a particular domestic or foreign corporation is in existence or is authorized to transact business in the state. The certificate will probably be a standardized form. The secretary of state is to make the judgment whether or not the corporation is in existence or is authorized to transact business from public records only and is not expected to make a more extensive investigation. In appropriate cases, the secretary of state may issue a certificate subject to specified qualifications.

Section 1.28(b)(5) refers only to taxes, fees, or penalties collected by the secretary of state or collected by other agencies and reported to the secretary of state. In some states the secretary of state may ascertain from other agencies that franchise or other taxes have been paid and include this information in the certificate. In states where this procedure does not unduly delay the issuance of certificates, section 1.28 may be revised appropriately. Section 1.28(b)(5) relates only to taxes, fees, or penalties to the extent their nonpayment affects the existence or authorization to transact business of the corporation.

A certificate of existence or authorization that may be relied on as binding and conclusive is of material assistance to attorneys who may be required to give formal legal opinions in connection with corporate transactions.

NORTH CAROLINA COMMENTARY

Although it has no express counterpart in prior law, this section codifies the practice of the Secretary of State of issuing "certificates of good standing." Although subdivision (b)(3) refers only to taxes, fees and penalties collected by the Secretary of State, it is expected that the North Carolina Department of Revenue will continue the practice of giving letters confirming the payment of fees and taxes and penalties collectible by the Department.

§ 55-1-29: Transferred to § 55D-18 by Session Laws 2001-358, s. 3(b).

Part 3. Secretary of State.

§ 55-1-30. Powers.

The Secretary of State has the power reasonably necessary to perform the duties required of him by this Chapter. (1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 1.30 is intended to grant the secretary of state the authority necessary for his efficient performance of the filing and other duties imposed on him by the Act but is not intended to give him general authority to establish public policy. The most important aspects of a modern corporation statute relate to the creation and maintenance of relationships among persons interested in or involved with a corporation; these relationships basically should be a matter of concern to the parties involved and not subject to regulation or interpretation by the secretary of state. Further, even in situations where it is claimed that the corporation has been formed or is being operated for purposes that may violate the public policies of the state, the secretary of state generally should not be the governmental official that determines the scope of public policy through administration of his filing responsibilities under the Act. Rather, the attorney general may seek to enjoin the illegal conduct or to dissolve involuntarily the offending corporation.

Section 1.30 is more narrowly drafted than earlier versions of the Model Act and the statutes of many states.

NORTH CAROLINA COMMENTARY

This section is substantially the same as former G.S. 55-168.

§ 55-1-31. Interrogatories by Secretary of State.

The Secretary of State may propound to any corporation, domestic or foreign which he has reason to believe is subject to the provisions of this Chapter, and to any officer or director thereof, such written interrogatories as may be reasonably necessary and proper to enable him to ascertain whether such corporation is subject to the provisions of this Chapter or has complied with all the provisions of this Chapter applicable to it. Subject to applicable jurisdictional requirements, such interrogatories shall be answered within 30 days after the mailing therefor, or within such additional time as shall be fixed by the Secretary of State, and the answers thereto shall be full and complete and shall be made in writing and under oath. If such interrogatories be directed to an individual they shall be answered by him, and if directed to a corporation they shall be answered by the president, vice-president, secretary or assistant secretary thereof. The Secretary of State shall certify to the Attorney General, for such action as the Attorney General may deem appropriate, all interrogatories and answers thereto which disclose a violation of any of the provisions of this Chapter, requiring or permitting action by the Attorney General. (1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

NORTH CAROLINA COMMENTARY

This section brings forward former G.S. 55-165 with minor modifications to provide the Secretary of State a formal mechanism for obtaining information necessary for him to carry out his duties. It does not appear in the Model Act.

§ 55-1-32. Penalties imposed upon corporations, officers, and directors for failure to answer interrogatories.

(a) The knowing failure or refusal of a domestic or foreign corporation to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter shall constitute grounds for administrative dissolution under G.S. 55-14-20 or for revocation under G.S. 55-15-30, as the case may be.

(b) Each officer and director of a domestic or foreign corporation who knowingly fails or refuses within the time prescribed by this Chapter to answer truthfully and fully interrogatories propounded to him by the Secretary of State in accordance with the provisions of this Chapter shall be guilty of a Class 1 misdemeanor. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1993, c. 539, s. 440; c. 552, s. 3; 1994, Ex. Sess., c. 24, s. 14(c).)

NORTH CAROLINA COMMENTARY

This section brings forward former G.S. 55-166 with two exceptions. First, a violation of this section by a corporation is not a misdemeanor; instead, the Secretary of State is empowered to suspend the offending corporation's articles of incorporation or certificate of authority to do business. Natural persons who violate the section are guilty of a misdemeanor. Second, the provisions relating to signing false documents were omitted and are covered by G.S. 55-1-29.

§ 55-1-33. Information disclosed by interrogatories.

Interrogatories propounded by the Secretary of State and the answers thereto shall not be open to public inspection nor shall the Secretary of State disclose any facts or information obtained therefrom except insofar as his official duty may require the same to be made public or in the event such interrogatories or the answers thereto are required for evidence in any criminal proceedings or in any other action or proceedings by this State. (1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

NORTH CAROLINA COMMENTARY

This section brings forward former G.S. 55-167.

§§ 55-1-34 through 55-1-39: Reserved for future codification purposes.

Part 4. Definitions.

§ 55-1-40. Chapter definitions.

In this Chapter unless otherwise specifically provided:

(1) "Articles of incorporation" include amended and restated articles of incorporation and articles of merger.

(2) "Authorized shares" means the shares of all classes a domestic or foreign corporation is authorized to issue.

(2a) "Business entity," as used in G.S. 55-11-10 and Article 11A of this Chapter, means a domestic corporation (including a professional corporation as defined in G.S. 55B-2), a foreign corporation, a domestic or foreign nonprofit corporation, a domestic or foreign limited liability company, a domestic or foreign limited partnership, a registered limited liability partnership or foreign limited liability partnership as defined in G.S. 59-32, or any other partnership as defined in G.S. 59-36 whether or not formed under the laws of this State.

(3) "Conspicuous" means so written that a reasonable person against whom the writing is to operate should have noticed it. For example, printing in italics or boldface or contrasting color, or typing in capitals or underlined, is conspicuous.

(4) "Corporation" or "domestic corporation" means a corporation for profit or a corporation having capital stock that is incorporated under or subject to the provisions of this Chapter and that is not a foreign corporation except that in G.S. 55-9-01 and G.S. 55-15-21 "corporation" includes domestic and foreign corporations.

(5) "Deliver" includes mail.

(6) "Distribution" means a direct or indirect transfer of money or other property (except its own shares) or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect of any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; or otherwise.

(6a) "Dividend credit" as used in G.S. 55-6-01(d)(5) means the aggregate of all yearly dividend credits. "Yearly dividend credit" means with respect to noncumulative preferred shares, the amount by which the full dividend preference of such a share, to the extent that such preference is earned by the corporation with respect to such a share in a particular fiscal year, exceeds the dividends paid on said share for that year; provided, that no dividend credit shall accrue unless, and only to the extent that, there exists an earned surplus at the end of such fiscal year. Computations of earnings allocable to classes of shares made in good faith by the board of directors in accordance with generally accepted accounting principles shall be conclusive. For the purpose of this definition, a dividend is deemed paid if it has been declared and funds for its payment have been set aside.

(6b) "Domestic limited liability company" has the same meaning as in G.S. 57C-1-03.

(6c) "Domestic limited partnership" has the same meaning as in G.S. 59-102.

(6d) "Domestic nonprofit corporation" means a corporation as defined in G.S. 55A-1-40.

(7) "Effective date of notice" is defined in G.S. 55-1-41.

(8) "Electronic" has the same meaning as in G.S. 66-312.

(8a) "Electronic record" has the same meaning as in G.S. 66-312.

(8b) "Electronic signature" has the same meaning as in G.S. 66-312.

(9) "Entity" includes (without limiting the meaning of such term in Article 9 of this Chapter):

a. Any domestic or foreign:
   1. Corporation; nonprofit corporation; professional corporation;
   2. Limited liability company;
   3. Profit and nonprofit unincorporated association; and
   4. Business trust, estate, partnership, trust;

b. Two or more persons having a joint or common economic interest; and

c. The United States, and any state and foreign government.

(10) "Foreign corporation" means a corporation for profit incorporated under a law other than the law of this State.

(10a) "Foreign limited liability company" has the same meaning as in G.S. 57C-1-03.

(10b) "Foreign limited partnership" has the same meaning as in G.S. 59-102.

(10c) "Foreign nonprofit corporation" means a foreign corporation as defined in G.S. 55A-1-40.

(11) "Governmental subdivision" includes authority, county, district, and municipality.

(12) "Includes" means a partial definition.

(13) "Individual" denotes a natural person legally competent to act and also includes the estate of an incompetent or deceased individual.

(13a) An item is "mailed" when it is deposited in the United States mail with postage thereon prepaid and correctly addressed. When a corporation mails an item to a shareholder, "correctly addressed" means addressed to the shareholder's address as shown in the corporation's current record of shareholders.

(14) "Means" denotes an exhaustive definition.

(14a) "Merger" as used in Article 9 includes a "share exchange" as used in Article 11.

(15) "Notice" includes demand and is defined in G.S. 55-1-41.

(16) "Person" includes individual and entity.

(17) "Principal office" means the office (in or out of this State) where the principal executive offices of a domestic or foreign corporation are located, as designated in its most recent annual report filed with the Secretary of State or, in the case of a domestic or foreign corporation that has not yet filed an annual report, in its articles of incorporation or application for a certificate of authority, respectively.

(18) "Proceeding" includes civil suit and criminal, administrative, and investigatory action.

(18a) "Public corporation" means any corporation that has a class of shares registered under Section 12 of the Securities Exchange Act of 1934, as amended (15 U.S.C. § 78*l*).

(19) "Record date" means the date established under Article 6 or 7 on which a corporation determines the identity of its shareholders for purposes of this Chapter.

(20) "Secretary" means the corporate officer to whom the board of directors has delegated responsibility under G.S. 55-8-40(c) for custody of the minutes of the meetings of the board of directors and of the shareholders and for authenticating records of the corporation.

(21) "Shares" means the units into which the proprietary interests in a corporation are divided.

(22) "Shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

(23) "State", when referring to a part of the United States, includes a state and commonwealth (and their agencies and governmental subdivisions) and a territory and insular possession (and their agencies and governmental subdivisions) of the United States.

(24) "Subscriber" means a person who subscribes for shares in a corporation, whether before or after incorporation.

(24a) "Unincorporated entity" means a domestic or foreign limited liability company, a domestic or foreign limited partnership, a registered limited liability partnership or foreign limited liability partnership as defined in G.S. 59-32, or any other partnership as defined in G.S. 59-36, whether or not formed under the laws of this State.

(25) "United States" includes district, authority, bureau, commission, department, and any other agency of the United States.

(26) "Voting group" means all shares of one or more classes or series that under the articles of incorporation or this Chapter are entitled to vote

and be counted together collectively on a matter at a meeting of shareholders. All shares entitled by the articles of incorporation or this Chapter to vote generally on the matter are for that purpose a single voting group. (1955, c. 1371, s. 1; 1959, c. 1316, s. 1; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.4; 1993, c. 552, s. 4; 1999-369, ss. 1.2, 1.3; 1999-456, s. 3; 2001-358, s. 5(a); 2001-387, ss. 3, 4, 5, 173, 175(a); 2001-413, s. 6; 2001-487, s. 62(a).)

OFFICIAL COMMENT

Section 1.40 collects in a single section definitions of terms used throughout the Model Act. Subchapters and sections of the Act in a few instances contain specialized definitions applicable only to those subchapters or sections.

Most of the definitions of section 1.40 are drawn directly from earlier versions of the Model Act and are reasonably self-explanatory. A number of definitions, however, are new or deserve further explanation.

1. Conspicuous

"Conspicuous" is defined in section 1.40(3) basically as defined in section 1-201(10) of the UNIFORM COMMERCIAL CODE. Even though the definition indicates some of the methods by which a provision may be made attention-calling, the test is whether attention can reasonably be expected to be called to it.

2. Corporation, domestic corporation, and foreign corporation

"Corporation," "domestic corporation," and "foreign corporation" are defined in sections 1.40(4) and (10). The word "corporation," when used alone, refers only to domestic corporations. In a few instances, the phrase "domestic corporation" has been used in order to contrast it with a foreign corporation.

3. Distribution

The term "distribution" defined in section 1.40(6) is a fundamental element of the financial provisions of the Model Act as amended in 1980. Section 6.40 sets forth a single, unitary test for the validity of any "distribution." Section 1.40(6) in turn defines "distribution" to include all transfers of money or other property made by a corporation to any shareholder in respect of the corporation's shares, except mere changes in the unit of interest such as share dividends and share splits. Thus, a "distribution" includes the declaration or payment of a dividend, a purchase by a corporation of its own shares, a distribution of evidences of indebtedness or promissory notes of the corporation, and a distribution in voluntary or involuntary liquidation. If a corporation incurs indebtedness in connection with a distribution (as in the case of a distribution of a debt instrument or an installment purchase of shares), the creation, incurrence, or distribution of the indebtedness is the event which constitutes the distribution rather than the subsequent payment of the debt by the corporation.

The term "indirect" in the definition of "distribution" is intended to include transactions like the repurchase of parent company shares by a subsidiary whose actions are controlled by the parent. It also is intended to include any other transaction in which the substance is clearly the same as a typical dividend or share repurchase, no matter how structured or labeled.

4. Entity

The term "entity," defined in section 1.40(9), appears in the definition of "person" in section 1.40(16) and is included to cover all types of artificial persons. See also the definitions of "governmental subdivision," in section 1.40(11), "state," in section 1.40(23), and "United States," in section 1.40(25).

5. Principal office

Section 1.40(17) defines the principal office of a corporation to be the office, within or without the state, where the principal executive office of the corporation is located. Many corporations maintain numerous offices, but there if usually one office, sometimes colloquially referred to as the home office, headquarters, or executive suite, where the principal corporate officers are located. The corporation must designate its principal office address in the annual report required by section 16.22. In case of doubt as to which corporate office is the principal office, the designation by the corporation in its annual report should be accepted as establishing the principal office of the corporation.

6. Shareholder

The definition of "shareholder" in section 1.40(22) includes a beneficial owner of shares named in a nominee certificate under section 7.23, but only to the extent of the rights granted the beneficial owner in the certificate — for example, the right to receive notice of, and vote at, shareholders' meeting. Various substantive sections of the Model Act also permit holders of voting trust certificates or beneficial owners of shares (not subject to a nominee certificate under section 7.23) to exercise some of the rights of a "shareholder." See, for example, section 7.40 (derivative proceedings).

7. SECRETARY

The term "secretary" is defined in section 1.40(20) since the Model Act does not require the corporation to maintain any specific or titled officers. See section 8.40. However, some corporate officer, however titled, must perform the functions described in this definition, and that officer is referred to as the "secretary" in various sections of the Act that impose a duty on him.

8. PERSON

The term "person" is defined in section 1.40(16) to include an individual or an entity. In the case of an individual the Model Act assumes that the person is competent to act in the matter under general state law independent of the corporation statute.

9. VOTING GROUP

Section 1.40(26) defines "voting group" for purposes of the Act as a matter of convenient reference. A "voting group" consists of all shares of one or more classes or series that under the articles of incorporation or the revised Model Act are entitled to vote and be counted together collectively on a matter. Shares entitled to vote "generally" on a matter under the articles of incorporation or this Act are for that purpose a single voting group. The word "generally" signifies all shares entitled to vote on the matter by the articles of incorporation or this Act that do not expressly have the right to be counted or tabulated separately. "Voting groups" are thus the basic units of collective voting at a shareholders' meeting, and voting by voting groups may provide essential protection to one or more classes or series of shares against actions that are detrimental to the rights or interests of that class or series.

The determination of which shares form part of a single voting group must be made from the provisions of the articles of incorporation and of this Act. In a few instances under the Model Act, the board of directors may establish the right to vote by voting groups. On most matters coming before shareholders' meetings, only a single voting group, consisting of a class of voting or common shares, will be involved, and action on such a matter is effective when approved by that voting group pursuant to section 7.25. See section 7.26(a). If a second class of shares is also entitled to vote on the matter, then a further determination must be made as to whether that class is to vote as a separate voting group or whether it is to vote along with the other voting shares as part of a single voting group.

Members of the board of directors are usually elected by the single voting group of shares entitled to vote generally; in some circumstances, however, some members of the board may be selected by one voting group and other members by one or more different voting groups. See section 8.03.

The definition of a voting group permits the establishment by statute of quorum and voting requirements for a variety of matters considered at shareholders' meetings in corporations with multiple classes of shares. See sections 7.25 and 7.26. Depending on the circumstances, two classes or series of shares may vote together collectively on a matter as a single voting group, they may be entitled to vote on the matter separately as two voting groups, or one or both of them may not be entitled to vote on the matter at all.

AMENDED NORTH CAROLINA COMMENTARY

This section defines more terms than were defined in former G.S. 55-2 and in some cases the definitions are different. The following differences should be noted:

(i) For the sake of uniformity with other states, this Act does not use the term "charter," but instead defines "articles of incorporation" to include all amendments.

(ii) This section does not contain general definitions of the terms "assets," "dominant shareholder," "liabilities," "net assets," or "preferred share," as did prior law, because such terms have no special significance in the Model Act.

This section differs from the Model Act in certain respects:

(i) The phrase "unless otherwise specifically provided" was added to the introduction to allow for different definitions in Article 9.

(ii) Except for the final clause thereof, the definition of "corporation" was brought forward with minor modifications from prior law. The final clause, relating to the use of the term "corporation" in G.S. 55-9-01, was considered necessary because that section, which was brought forward from prior law, uses the term "corporation" in certain cases to refer to any corporation, foreign or domestic. In the remainder of Article 9, the term "corporation" refers to domestic corporations only.

(iii) The definition of "dividend credit" was brought forward with minor modifications from prior law.

(iv) The Model Act's definition of "employee" was deleted as unnecessary and undesirable.

(v) The Model Act's definition of "entity" was expanded to include professional corporations.

(vi) "Means" was substituted for "denotes" in the definition of "includes."

(vii) The definition of "individual" was expanded.

(viii) Definitions were included for "mail" and "merger" to clarify possible confusion in the use of those terms.

(ix) "Notice" was defined to include "demand."

(x) A definition of "public corporation" was added for ease of reference in those provisions of the Act that are applicable only to corporations having a class of shares registered under the Securities Exchange Act of 1934.

The Model Act uses the term "not-for-profit corporation" rather than the term "nonprofit corporation," which is used in this Act. The terms "not-for-profit corporation" and "nonprofit corporation" are interchangeable in Chapter 55A. "Non-profit corporation" and "nonprofit association" were therefore used throughout this Act.

Editor's Note. — The subdivision added by Session Laws 1999-369, s. 1.3, has been designated as (24a) pursuant to directions from the Revisor of Statutes.

Session Laws 2001-358, s. 53, provided that the act which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 154(b), provides that "Nothing in the act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form."

Legal Periodicals. — For article on the evolution of corporate combination law, see 76 N.C.L. Rev. 687 (1998).

For "Legislative Survey: Business & Banking," see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

Cited in Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992).

§ 55-1-41. Notice.

(a) Notice under this Chapter shall be in writing unless oral notice is authorized in the corporation's articles of incorporation or bylaws and written notice is not specifically required by this Chapter.

(b) Notice may be communicated in person; by electronic means; or by mail or private carrier. If these forms of personal notice are impracticable as to one or more persons, notice may be communicated to such persons by publishing notice in a newspaper in the county wherein the corporation has its principal place of business in the State, or if it has no principal place of business in the State, the county wherein it has its registered office; or by radio, television, or other form of public broadcast communication.

(c) Written notice by a domestic or foreign corporation to its shareholder is effective when deposited in the United States mail with postage thereon prepaid and correctly addressed to the shareholder's address shown in the corporation's current record of shareholders. To the extent the corporation pursuant to G.S. 55-1-50 and the shareholder have agreed, notice by a domestic corporation to its shareholder in the form of an electronic record sent by electronic means is effective when it is sent as provided in G.S. 66-325. A shareholder may terminate any such agreement at any time on a prospective basis effective upon written notice of termination to the corporation or upon such later date as may be specified in the notice.

(d) Written notice to a domestic or foreign corporation (authorized to transact business in this State) may be addressed to its registered agent at its registered office or to the corporation or its secretary at its principal office shown in its most recent annual report on file in the office of the Secretary of State or, in the case of a domestic or foreign corporation that has not yet filed an annual report, in its articles of incorporation or application for a certificate of authority, respectively.

(e) Except as provided in subsection (c), written notice is effective at the earliest of the following:

(1) When received;

(2) Five days after its deposit in the United States mail, as evidenced by the postmark or otherwise, if mailed with at least first-class postage thereon prepaid and correctly addressed;

(3) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.

In the case of notice in the form of an electronic record sent by electronic means, the time of receipt shall be determined as provided in G.S. 66-325.

(f) Oral notice is effective when actually communicated to the person entitled thereto.

(g) If this Chapter prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements not inconsistent with this section or other provisions of this Chapter, those requirements govern. (1989, c. 265, s. 1; 1993, c. 552, s. 5; 2001-387, s. 6.)

OFFICIAL COMMENT

Section 1.41 establishes rules for determining how notice may be given and when notice is effective for a variety of purposes under the Model Act.

1. NOTICE BY A CORPORATION TO ITS SHAREHOLDERS

Section 1.41(c) provides that notice by a corporation to its shareholders is effective when mailed if correctly addressed with sufficient postage. The correct address for this purpose is the address shown in the corporation's records. The effect of this section is to permit the corporation to compute the statutory time periods for notice of shareholders' meetings and other actions from the date the notice is mailed without regard to where its shareholders are located or the time it takes for the mail to reach them.

Written notice to shareholders by persons other than the corporation is effective as provided in section 1.41(e). Notice by the corporation to its shareholders that is not addressed to the record address of the shareholder is effective when received under section 1.41(e).

2. NOTICE TO THE CORPORATION

Section 1.41(d) provides that notice to a corporation may be addressed to the registered agent of the corporation at its registered office or to the corporation or its secretary at the principal office of the corporation as shown in its most recent public filing. An officer, director, or shareholder of a corporation will normally give written notice to the corporation by delivering or mailing a copy of that notice to the corporation or to the secretary of the corporation at its principal office. Such a notice is effective when it is received. Such notice may be given for a variety of purposes under this Act, e.g., giving notice of intent to dissent (section 13.21), notice of a demand to inspect books and records (section 16.02), and notices of resignation (sections 8.07 and 8.43). This method of giving notice to the corporation, however, is not exclusive, and an officer, director, or shareholder may give notice in other ways as well.

Persons who have no prior relationship with the corporation may give notice either to the registered agent of the corporation, or if they wish, to the corporation or its secretary at its principal office.

3. MISCELLANEOUS PROVISIONS

Section 1.41 also contains a variety of general provisions dealing with notice. It recognizes, for example, that notice on some occasions may be given orally if that is reasonable under the circumstances. It also deals with situations where notice may be sought to be given to persons for whom no current address is available, or where personal notice is impractical. Notice delivered to the person's last known address is effective as described in section 1.41(e) even though never actually received by the person. Section 1.41(b) also authorizes notice by publication in some circumstances, including radio, television, or other form of public wire or wireless communication.

Section 1.41(g) recognizes that other sections of the Act prescribe specific notice requirements for particular situations — e.g., service of process on a corporation's registered agent under section 5.04 — and that these specific requirements, rather than the general requirements of section 1.41, control. Finally, the second sentence of subsection 1.41(g) permits a corporation's articles of incorporation or bylaws to prescribe the corporation's own notice requirements, if they are not inconsistent with the general requirements of this section or specific requirements of other sections of the Act.

The rules set forth in section 1.41 permit many other sections of the Model Act to be phrased simply in terms of giving or delivering notice without repeating details with respect to how notice should be given and when it is effective in various circumstances.

NORTH CAROLINA COMMENTARY

The prior law contained no general definition of "notice."

The present section differs from the Model Act in the following respects:

(i) Subsection (a) requires that notice be in writing unless oral notice is authorized by the corporation's articles of incorporation or bylaws; the Model Act permits oral notice if it is "reasonable under the circumstances."

(ii) Subsection (b) specifically allows notice to be given by facsimile transmission. When the specified modes of communication of notice are impracticable as to one or more persons, subsection (b) is more limited than the Model Act in that it permits dispensing with the specified mode only as to those persons with respect to whom it is impracticable.

(iii) Subsections (c) and (f) do not contain the Model Act's reference to notices being "comprehensible" because this language was deemed unnecessary. Subsection (f) was rewritten to provide that oral notice is effective when actually communicated to the person entitled to it.

(iv) Subsections (c) and (e) use "with postage thereon prepaid" instead of "postpaid."

(v) Subsection (d) permits notice to be mailed to a principal office listed in an annual report only after the report is on file in the Secretary of State's office; the Model Act apparently permits otherwise.

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

CASE NOTES

Cited in Nissan Div. of Nissan Motor Corp. in United States v. Nissan, 111 N.C. App. 748, 434 S.E.2d 224 (1993).

§ 55-1-42. Number of shareholders.

(a) For purposes of this Chapter, the following identified as a shareholder in a corporation's current record of shareholders constitutes one shareholder:

(1) All co-owners of the same shares;

(2) A corporation, partnership, trust, estate, or other entity;

(3) The trustees, guardians, custodians, or other fiduciaries of a single trust, estate, or account.

(b) For purposes of this Chapter, shareholdings registered in substantially similar names constitute one shareholder if it is reasonable to believe that the names represent the same person. (1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 1.42 provides rules for determining the number of shareholders in a corporation. The Model Act generally avoids provisions that are based on the number of shareholders of a corporation, since these provisions may encourage individual shareholders to divide or combine their holdings for private strategic advantage. But in two instances the number of shareholders is critical: to permit a corporation to dispense with a board of directors as its principal form of corporate governance under section 8.01 and to elect close corporation status under the Model Statutory Close Corporation Supplement. The determination of the precise number of shareholders may also become important in other contexts in the future.

NORTH CAROLINA COMMENTARY

This section has no counterpart in prior law. The section is different from the Model Act in that it counts all co-owners as a single shareholder, whereas the Model Act counts as a single shareholder only "three or fewer co-owners."

§§ 55-1-43 through 55-1-49: Reserved for future codification purposes.

Part 5. Miscellaneous.

§ 55-1-50. Electronic transactions.

For purposes of applying Article 40 of Chapter 66 of the General Statutes to transactions under this Chapter, a corporation may agree to conduct a transaction by electronic means through provision in its articles of incorporation or bylaws or by action of its board of directors. (2001-387, s. 7.)

Editor's Note. — Session Laws 2001-387, s. 154(b), provides that "Nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form."

ARTICLE 2.

Incorporation.

§ 55-2-01. Incorporators.

One or more persons may act as the incorporator or incorporators of a corporation by delivering articles of incorporation to the Secretary of State for filing. (Code, ss. 677, 678, 679, 682; 1885, cc. 19, 190; 1893, c. 318; 1897, c. 204; 1901, c. 2, ss. 8, 9; cc. 6, 41; 1903, c. 453; Rev., ss. 1137, 1139; C.S., s. 1114; 1945, c. 635; G.S., ss. 55-2, 55-3; 1951, c. 265, s. 1; 1955, c. 1371, s. 1; 1969, c. 751, s. 1; 1971, c. 1231, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

The only functions of incorporators under the Model Act are (1) to sign the articles of incorporation, (2) to deliver them for filing with the secretary of state, and (3) to complete the formation of the corporation to the extent set forth in section 2.05. One or more "persons" may serve as incorporator; "person" is defined in section 1.40 to include both individuals and entities; "entity" is also defined in that section to include corporations, unincorporated associations, partnerships, trusts, estates, and governments.

The Model Act also simplifies the formalities of execution and filing. The requirement in earlier versions of the Model Act and in many state statutes that articles be acknowledged or verified has been eliminated. Also, the requirement that "duplicate originals" (each being executed as an original document) be submitted has been replaced with the requirement that a signed original and an "exact or conformed" copy be submitted. See the Official Comment to section 1.20.

NORTH CAROLINA COMMENTARY

Under former G.S. 55-6, only natural persons could act as incorporators.

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

CASE NOTES

Editor's Note. *— The case below was decided under prior law.*

Duties and Obligations of Promoters. — The promoters of a corporation are held to the duties of trustees and the obligation of directors. They may not take a secret or undisclosed profit in the organization by way of shares therein or otherwise. Goodman v. White, 174 N.C. 399, 93 S.E. 906 (1917).

§ 55-2-02. Articles of incorporation.

(a) The articles of incorporation must set forth:

(1) A corporate name for the corporation that satisfies the requirements of G.S. 55D-20 and G.S. 55D-21;

(2) The number of shares the corporation is authorized to issue and any other information required by G.S. 55-6-01;

(3) The street address, and the mailing address if different from the street address, of the corporation's initial registered office, the county in which the initial registered office is located, and the name of the corporation's initial registered agent at that address;

(3a) The street address, and the mailing address if different from the street address, of the corporation's principal office, if any, and the county in which the principal office, if any, is located; and

(4) The name and address of each incorporator.

(b) The articles of incorporation may set forth any provision that under this Chapter is required or permitted to be set forth in the bylaws, and may also set forth:

(1) The names and addresses of the individuals who are to serve as the initial directors;

(2) Provisions not inconsistent with law regarding (i) the purpose or purposes for which the corporation is organized; (ii) managing the business and regulating the affairs of the corporation; (iii) defining, limiting, and regulating the powers of the corporation, its board of directors, and shareholders; (iv) a par value for authorized shares or classes of shares; (v) the imposition of personal liability on shareholders for the debts of the corporation to a specified extent and upon specified conditions; (vi) any limitation on the duration of the corporation; and

(3) A provision limiting or eliminating the personal liability of any director arising out of an action whether by or in the right of the corporation or otherwise for monetary damages for breach of any duty as a director. No such provision shall be effective with respect to (i) acts or omissions that the director at the time of such breach knew or believed were clearly in conflict with the best interests of the corporation, (ii) any liability under G.S. 55-8-33, (iii) any transaction from which the director derived an improper personal benefit, or (iv) acts or omissions occurring prior to the date the provisions became effective. As used herein, the term "improper personal benefit" does not include a director's reasonable compensation or other reasonable incidental

benefit for or on account of his service as a director, officer, employee, independent contractor, attorney, or consultant of the corporation. A provision permitted by this Chapter in the articles of incorporation, bylaws, or a contract or resolution indemnifying or agreeing to indemnify a director against personal liability shall be fully effective whether or not there is a provision in the articles of incorporation limiting or eliminating personal liability.

(c) The articles of incorporation need not set forth any of the corporate powers enumerated in this Chapter.

(d) Articles of incorporation filed to effect the conversion of another business entity pursuant to Article 11A of this Chapter shall also include the statements required by G.S. 55-11A-03(a). (Code, s. 677; 1885, c. 19; 1889, c. 170; 1891, c. 257; 1893, c. 244; 1901, c. 2, s. 8; c. 47; 1903, c. 453; Rev., s. 1137; 1911, c. 213, s. 1; 1913, c. 5, s. 1; C.S., s. 1114; Ex. Sess. 1920, c. 55; 1924, c. 98; 1935, cc. 166, 320; 1939, c. 222; G.S., s. 55-2; 1951, c. 265, s. 1; 1955, c. 1371, s. 1; 1957, c. 979, s. 5; 1959, c. 1316, s. 11/2; 1969, c. 751, s. 2; 1973, c. 469, s. 2; 1987, c. 626, s. 1; 1989, c. 265, s. 1; 1993, c. 552, s. 6; 2001-358, s. 16; 2001-387, ss. 8, 9, 173, 175(a); 2001-413, s. 6.)

OFFICIAL COMMENT

1. INTRODUCTION

Section 2.02(a) sets forth the minimum mandatory requirements for all articles of incorporation while section 2.02(b) describes optional provisions that may be included. A corporation that is formed solely pursuant to the mandatory requirements will generally have the broadest powers and least restrictions on activities permitted by the Model Act. The Model Act thus permits the creation of a "standard" corporation by a simple and easily prepared one-page document.

No reference is made in section 2.02(a) either to the period of duration of the corporation or to its purposes. A corporation formed under these provisions will automatically have perpetual duration under section 3.02(1) unless a special provision is included providing a shorter period. Similarly, a corporation formed without reference to a purpose clause will automatically have the purpose of engaging in any lawful business under section 3.01(a). The option of providing a narrower purpose clause is also preserved in sections 2.02(b)(2) and 3.01, with the effect described in the Official Comment to section 3.01.

2. REQUIREMENTS

The only information required in the articles of incorporation to form a "standard" corporation is:

(1) The name, which must meet the requirements of chapter 4 of the Model Act.

(2) The number of shares the corporation is authorized to issue. If a single class of shares is authorized, only the number of shares authorized need be disclosed; if more than one class of shares is authorized, however, both the number of authorized shares of each class and a description of the rights of each class must be included. See the Official Comment to sections 6.01 and 6.02. It is unnecessary to specify par value, expected minimum capitalization, or contemplated issue price.

(3) The street address of the corporation's initial registered office and the name of its initial registered agent. A mailing address consisting only of a post office box is not sufficient.

(4) The name and address of each incorporator.

No reference need be made in these "standard" articles to a variety of other matters that are referred to in earlier versions of the Model Act and the statutes of many states. For example, there is no need to refer to preemptive rights. See section 6.31 and the Official Comment. Generally, no substantive effect should be given to the absence of a specific reference to such matters in section 2.02 since they are referred to in other sections of the Model Act, which usually provide an "opt in" privilege that permits a draftsman to elect special treatment if he so desires. See particularly the list of optional provisions set forth in parts 4 and 5 of this comment.

3. OPTIONAL PROVISIONS

Section 2.02(b) describes specific options that may be elected by the draftsman and contains general authorization to include other provisions relevant to the authority of the corporation, its officers and board of directors, or to the management of the corporation's internal affairs. These provisions include:

a. Initial directors

Under section 2.02(b)(1) an election may be made to have the corporation organized by a person or persons other than the incorporators. See the Official Comment to section 2.03. These persons, described as "initial directors," may be either the permanent directors or interim directors to be replaced by the shareholders after the corporation is organized.

b. Purpose clause

Under section 2.02(b)(2)(i), the corporation may elect a limited purpose clause or provide for specific purposes without limiting the broad purposes provided in section 3.01. (Specific purposes may be needed, among other reasons, for qualification in certain domestic and foreign jurisdictions and in order to obtain licenses.)

c. Duration

Nearly every corporation today is formed with perpetual duration, but a corporation may elect a shorter duration under section 2.02(b)(2)(iii).

d. Par value

While par value is no longer a mandatory statutory concept, section 2.02(b)(2)(iv) permits the inclusion of optional "par value" provisions with regard to shares. Special provisions may give effect or meaning to "par value" essentially as a matter of contract between the parties. These provisions, whether appearing in the articles or in other documents, have only the effect any permissible contractual provision has in the absence of a prohibition by statute. Provisions in the articles establishing an optional par value may also be of use to corporations which are to be qualified in foreign jurisdictions in that franchise or other taxes are computed upon the basis of par value.

For a general discussion of the treatment of par value, stated capital, and other historical concepts relating to capitalization, see the Official Comment to section 6.21.

e. Shareholder liability

The basic tenet of modern corporation law is that shareholders are not liable for the corporation's debts by reason of their status as shareholders. Section 2.02(b)(2)(v) nevertheless permits a corporation to impose that liability under specified circumstances if that is desirable. If no provision of this type is included shareholders have no liability for corporate debts except to the extent they become liable by reason of their own conduct or acts. See section 6.22(b).

f. Corporate powers

Section 2.02(c) makes it unnecessary to set forth any corporate powers in the articles. Section 3.02 grants every corporation essentially the same power that an individual possesses with respect to his affairs. This grant of power, however, may be considered overbroad for certain corporations; if so, it may be qualified or narrowed by appropriate provisions in the articles.

g. Miscellaneous

Under section 2.02(b)(2)(ii) and (iii) the draftsman may include any provision not inconsistent with law for "managing the business and regulating the affairs of the corporation" and "defining, limiting, and regulating the powers of the corporation, its board of directors and shareholders." This language is designed to allow the draftsman to place in the articles any number of miscellaneous provisions that he believes sufficiently important to be of public record or subject to amendment only by the processes applicable to amendments of articles of incorporation. Basically, the process of amendment of articles of incorporation requires shareholder approval, while bylaws typically may be amended by the board of directors acting alone, though in some instances the power of directors to amend bylaws is restricted. See sections 10.20 — 10.22 and the Official Comments to those sections. Provisions relating to the business or affairs of the corporation that may be included in the articles may be subdivided into three general classes:

(1) Provisions that under the Model Act may be elected only by specific inclusion in the articles of incorporation. A list of these provisions is set forth in part 4 of this comment.

(2) Provisions that under the Model Act may be elected by specific inclusion in either the articles of incorporation or the bylaws, and the draftsman elects to include the provision in the articles. A list of provisions that may be elected in either the bylaws or the articles is set forth in part 5 of this comment.

(3) Other provisions not referred to in the Model Act that the draftsman decides should be included in the articles of incorporation. This includes but is not limited to any provision that the Act requires or permits to be set forth in the bylaws. See section 2.02(b)(3).

h. Self-dealing transactions

When subsidiaries or corporate joint ventures are being formed, special consideration should be given to the inclusion of provisions designed to limit or avoid the unexpected application of the doctrines of corporate opportunity and conflict of interest. While this type of clause will not provide total protection, it may be given limited effect, for example, by shifting the burden of proving unfairness or "exonerating" an arrangement from "adverse influences." See *Spiegal v. Beacon Participations Inc.*, 297 Mass. 398, 8 N.E.2d 895 (1937); see generally the Official Comment to section 8.31.

4. OPTIONS IN MODEL ACT THAT MAY BE ELECTED ONLY IN THE ARTICLES OF INCORPORATION

a. Options with respect to directors

(1) Board of directors may be dispensed with

entirely in limited circumstances or its functions may be restricted, § 8.01.
(2) Power to compensate directors may be restricted or eliminated, § 8.11.
(3) Election of directors by cumulative voting may be authorized, § 7.28.
(4) Election of directors by greater than plurality of vote may be authorized, § 7.28.
(5) Directors may be elected by classes of shares, § 8.04.
(6) Power to remove directors without cause may be restricted or eliminated, § 8.08.
(7) Terms of directors may be staggered so that all directors are not elected in the same year, § 8.06.
(8) Power to fill vacancies may be limited to the shareholders, § 8.10.
(9) Power to indemnify directors, officers, and employees may be limited, §§ 8.50-8.58.

b. Options with respect to shareholders

(1) Special voting groups of shareholders may be authorized, § 7.25.
(2) Quorum for voting groups of shareholders may be increased or reduced, §§ 7.25, 7.26 and 7.27.
(3) Quorum for voting by voting groups of shareholders may be prescribed, see § 7.26.
(4) Greater than majority vote may be required for action by voting groups of shareholders, § 7.27, see also § 10.21.

c. Options with respect to shares

(1) Shares may be divided into classes and classes into series, §§ 6.01 and 6.02.
(2) Cumulative voting for directors may be permitted, § 7.28.
(3) Distributions may be restricted, § 6.40.
(4) Share dividends may be restricted, § 6.23.
(5) Voting rights of classes of shares may be limited or denied, § 6.01.
(6) Classes of shares may be given more or less than one vote per share, § 7.21.
(7) Shares may be redeemed at the option of the corporation or the shareholder, § 6.01.
(8) Reissue of redeemed shares may be prohibited, § 6.31.
(9) Shareholders may be given preemptive rights to acquire unissued shares, § 6.30.
(10) Redemption preferences may be ignored in determining lawfulness of distributions, § 6.40.

5. OPTIONS IN MODEL ACT THAT MAY BE ELECTED EITHER IN THE ARTICLES OF INCORPORATION OR IN THE BYLAWS

a. Options with respect to directors

(1) Number of directors may be fixed or changed within limits, § 8.03.
(2) Qualifications for directors may be prescribed, § 8.02.
(3) Notice of regular or special meetings of board of directors may be prescribed, § 8.22.
(4) Power of board of directors to act without meeting may be restricted, § 8.21.
(5) Quorum for meeting of board of directors may be increased or decreased (down to one-third) from majority, § 8.24.
(6) Action at meeting of board of directors may require a greater than majority vote, § 8.24.
(7) Power of directors to participate in meeting without being physically present may be prohibited, § 8.20.
(8) Board of directors may create committees and specify their powers, § 8.25.
(9) Power of board of directors to amend bylaws may be restricted, §§ 10.20 and 10.22.

b. Options with respect to shares

(1) Shares may be issued without certificates, § 6.26.
(2) Procedure for treating beneficial owner of street name shares as record owner may be prescribed, § 7.23.
(3) Transfer of shares may be restricted, § 6.27.

NORTH CAROLINA COMMENTARY

The Model Act was modified by inserting a cross-reference in subdivision (a)(2) for clarity and by revising subdivision (a)(3) to require more specific information regarding the corporation's address and registered office.

In addition, the Model Act was modified to add more optional provisions available for articles of incorporation, including a limitation on duration (subdivision (b)(2)(vi)) and a provision limiting or eliminating the personal liability of directors in certain circumstances (subsection (b)(3)), which existed under former G.S. 55-7(2) and (11). The phrase "not made in good faith" in former G.S. 55-7(11)(i) was deleted solely because it was thought to be redundant.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-

413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Legal Periodicals. — For article on corporate directors' accountability, see 66 N.C.L. Rev. 171 (1987).

For article, "Should Corporate Statutes Providing Special Protection for Directors Be Limited to Publicly Traded Corporations?," see 24 Wake Forest L. Rev. 79 (1989).

For comment, "North Carolina's Statutory Limitation on Directors' Liability," see 24 Wake Forest L. Rev. 117 (1989).

For article, "The Corporate Persona, Contract (and Market) Failure, and Moral Values," see 69 N.C.L. Rev. 273 (1991).

For article on the evolution of corporate combination law, see 76 N.C.L. Rev. 687 (1998).

CASE NOTES

Editor's Note. *— The cases below were decided under prior law.*

Corporation Held Limited to Objects Stated. — A charter of incorporation creating a company for the purpose of effecting a communication by a plank-road between designated points, with the privilege of taking tolls, did not authorize the company to establish a stage line upon their road, nor to contract for carrying the United States mail. Wiswell v. Greenville Plank-Road Co., 56 N.C. 183 (1857).

Use of All Powers Not Required. — The fact that a corporation avails itself of only one of several privileges granted by its charter does not invalidate the act of incorporation. Wadesboro Cotton Mills Co. v. Burns, 114 N.C. 353, 19 S.E. 238 (1894).

Limit of Corporate Existence. — A corporation whose term of existence is fixed and limited in the act which creates it cannot endure beyond the prescribed time, unless its existence is prolonged by the same authority or continued for the purpose of adjusting and closing its business, and no judicial proceedings are required to terminate it. Asheville Div. No. 15 v. Aston, 92 N.C. 578 (1885).

De Jure and De Facto Existence. — A corporation de jure is said to exist when persons holding a charter have made substantial compliance with the provisions of the same, looking to its proper organization, while a corporation de facto is one where the parties having a charter or law authorizing it have in good faith made a colorable compliance with such requirements, and have proceeded in the exercise of the corporate powers or a part of them. Wood v. Staton, 174 N.C. 245, 93 S.E. 794 (1917).

Existence of a corporation may be proved by reputation. Existence or nonexistence is a fact and may be proved as other facts. Gulf States Steel Co. v. Ford, 173 N.C. 195, 91 S.E. 844 (1917).

Proof of Existence by Written Contract. — Where a written contract entered into between the parties furnishes evidence that the defendant was dealing with the plaintiff as a corporation, and the plaintiff's existence as a corporation is denied, the contract may properly be introduced upon this disputed fact. Otis Elevator Co. v. Cape Fear Hotel Co., 172 N.C. 319, 90 S.E. 253 (1916).

Copies of Letters of Incorporation as Proof of Existence. — Copies of letters of incorporation are admissible to show prima facie the existence of a corporation, and the corporation cannot avoid its liability for debts because in fact it had but an inchoate existence. Marshall v. Macon County Bank, 108 N.C. 639, 13 S.E. 182 (1891).

§ 55-2-03. Incorporation.

(a) Corporate existence begins when the articles of incorporation become effective.

(b) The Secretary of State's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the State to cancel or revoke the incorporation or involuntarily dissolve the corporation.

(c) No provision in this Chapter or any prior act shall be construed to require that a corporation have more than one shareholder. (1901, c. 2, s. 10; Rev., s. 1140; C.S., s. 1116; G.S., s. 55-4; 1955, c. 1371, s. 1; 1957, c. 550, ss. 2, 3; 1967, c. 13, s. 3; 1989, c. 265, s. 1; 2001-387, s. 10.)

OFFICIAL COMMENT

Section 2.03(a) provides that the existence of a corporation begins when the articles of incorporation are filed, unless a delayed effective date is specified under section 1.23. Chapter 1 contains detailed rules for the filing and effective dates of documents, all of which are applicable to articles of incorporation and other documents. These filing rules simplify the process of creating a corporation in several respects.

1. WHAT TO FILE

Section 1.20 requires that only one executed original and an exact or conformed copy of the articles need be delivered to the secretary of state for filing. This delivery must be accompanied by the applicable filing fee.

2. NATURE OF FILING

Section 1.25 provides that the secretary of state files the articles by stamping them "filed" and recording the date and time of receipt; he then retains the signed original articles of incorporation for his records and returns the exact or conformed copy to the incorporators along with a receipt for the fee. The return of this copy and the fee receipt establishes that the articles have been filed in the form of the copy.

3. CERTIFICATE OF INCORPORATION ELIMINATED

Section 1.25 provides that approval by the secretary of state is in the form of return of the copy of the articles with a fee receipt rather than a certificate of incorporation, as was the older practice still followed in many states. See the Official Comment to section 1.25.

4. PRECISE TIME OF INCORPORATION

Section 2.03(a) ties the precise time of incorporation to the date and time stamped on the articles. Section 1.23 provides in turn that this is the date and time the articles are received by the secretary of state; in other words, consistent with the practice of many secretaries of state, processing time is ignored and the date and time of receipt of the articles are the date and time of incorporation. The creators of the corporation may, however, specify that the corporation's existence will begin on a later date than the date of filing, and at a precise time on such a date, to the extent permitted by section 1.23.

5. CONCLUSIVENESS OF SECRETARY OF STATE'S ACTION ON QUESTION OF INDIVIDUAL LIABILITY FOR CORPORATE ACTIONS

Under section 2.03(b) the filing of the articles of incorporation as evidenced by return of the stamped copy of the articles with the fee receipt is conclusive proof that all conditions precedent to incorporation have been met, except in proceedings brought by the state. Thus the filing of the articles of incorporation is conclusive as to the existence of limited liability for persons who enter into transactions on behalf of the corporation. If articles of incorporation have not been filed, section 2.04 generally imposes personal liability on all persons who prematurely act as or on behalf of a "corporation" knowing that articles have not been filed. Section 2.04 may protect some of these persons to a limited extent, however; see the Official Comment to that section.

NORTH CAROLINA COMMENTARY

Subsection (c) was added to the Model Act's provisions to bring forward the provisions of former G.S. 55-3.1.

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

CASE NOTES

Editor's Note. — *Most of the cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Corporation as Alter Ego of Dominant Shareholder. — The mere fact that one person owns all of the stock of a corporation does not make its acts the acts of the stockholder so as to impose liability therefor upon him. However, when the corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation. Henderson v. Security Mtg. & Fin. Co., 273 N.C. 253, 160 S.E.2d 39 (1968).

When Corporation Regarded as an Association of Persons. — When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. Henderson v. Security Mtg. & Fin. Co., 273 N.C. 253, 160 S.E.2d 39 (1968).

Personal liability of stockholder created before the effective date of former § 55-3.1 because corporation did not have three shareholders would not be defeated by virtue of former G.S. 55-3.1. Lester Bros. v. Pope Realty & Ins. Co., 250 N.C. 565, 109 S.E.2d 263 (1959).

For case decided before the passage of former § 55-3.1 and dealing with the effect of the acquisition of all stock in a corporation by one person, see Park Terrace, Inc. v. Phoenix Indem. Co., 243 N.C. 595, 91 S.E.2d 584 (1956), commented on in 34 N.C.L. Rev. 471, 531 (1956).

Chattel Mortgage Executed in Name of Corporation by Person Acquiring All Stock as Corporate Act. — Acquisition of the entire capital stock of a corporation by one person does not affect the corporate entity, and the execution in the name of the corporation by such person of a chattel mortgage is a corporate act and binding, provided the rights of its then existing creditors are not affected. Wall v. Colvard, Inc., 268 N.C. 43, 149 S.E.2d 559 (1966).

Cited in Statesville Stained Glass, Inc. v. T.E. Lane Constr. & Supply Co., 110 N.C. App. 592, 430 S.E.2d 437 (1993).

§ 55-2-04: Reserved for future codification purposes.

NORTH CAROLINA COMMENTARY

Section 2.04 of the Model Act, which relates to liability for preincorporation transactions, was omitted because it was thought to be too simplistic to apply to every preincorporation situation. General case law will apply. *See generally Smith v. Morgan,* 50 N.C. App. 208, 209, 272 S.E.2d 602 (1980) *(statement in dictum).*

§ 55-2-05. Organization of corporation.

(a) After incorporation:

(1) If initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting at the call of a majority of the directors to complete the organization of the corporation by appointing officers, adopting bylaws, and carrying on any other business brought before the meeting;

(2) If initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at the call of a majority of the incorporators: (i) to elect directors and complete the organization of the corporation; or (ii) to elect a board of directors who shall complete the organization of the corporation.

(b) Action required or permitted by this Chapter to be taken by incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by one or more written consents describing the action taken and signed by each incorporator. If the incorporators act at a meeting, the notice and procedural provisions of G.S. 55-8-22, 55-8-23, and 55-8-24 shall apply.

(c) An organizational meeting may be held in or out of this State. (Code, s. 665; 1901, c. 2, s. 18; Rev., s. 1142; C.S., s. 1118; G.S., s. 55-6; 1955, c. 1371, s. 1; 1969, c. 751, s. 3; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Following incorporation, the organization of new corporation must be completed so that it may engage in business. This usually requires adoption of bylaws, the appointment of officers and agents, the raising of equity capital by the issuance of shares to the participants in the venture, and the election of directors.

Earlier versions of the Model Act required initial directors to be named in the articles and provided that they complete the organization of the corporation. Many states followed this pattern, but others provided that the incorporators organize the corporation or meet to elect a board of directors to organize the corporation. The goal of all these provisions was usually to permit the completion of the organization of the corporation with minimum expense and formality, though in many cases it was felt necessary for business decisions to be made at an early stage by the persons with responsibility for business operation.

Experience in states followed the Model Act pattern revealed that multiple organizational meetings were often necessary, particularly where for reasons of convenience or secrecy both the incorporators and initial directors were "dummies" without any financial interest in the enterprise who were not expected to make any significant business decisions. In this situation, the initial directors formally organized the corporation, including issuing of at least some shares; immediately following this organizational meeting, the new shareholders met to elect a permanent board of directors who were to manage the business. In many instances, the permanent board of directors also had to meet immediately after its selection by the shareholders to consider business questions that must be resolved promptly, such as authorization of employment contracts or the valuation of property or services to be accepted as consideration for shares.

Section 2.05 simplifies the formation process by allowing alternative methods of completing the formation of the corporation.

First, section 2.05(a)(1) contemplates that if the draftsman elects to set forth the names of the initial directors in the articles of incorporation, the persons so named will organize the corporation. It is expected that initial directors will be named only if they will be the permanent board of directors and there is no objection to the disclosure of their identity in the articles of incorporation.

Second, section 2.05(a)(2) provides alternative methods for completing the organization of the corporation if initial directors are not named in the articles of incorporation. The incorporators may themselves complete the organization, or they may simply meet to elect a board of directors who are then to complete the organization. It is contemplated that in routine incorporations, the first alternative will be elected, while in more complex situations when prompt business decisions must be made, the second alternative will be chosen and the completion of the organization will be turned over to the board of directors representing the investment interests in the corporation.

Sections 2.05(b) and (c) are limited to meetings of incorporators since sections 8.21 and 8.22 permit the same actions by the board of directors. If a meeting of shareholders is necessary, sections 7.01 and 7.04 give them the same flexibility that is given incorporators under sections 2.05(b) and (c).

NORTH CAROLINA COMMENTARY

This section, unlike prior law, permits the incorporator or incorporators to hold the organizational meeting of the corporation under certain circumstances. The last sentence of subsection (b) was added to the Model Act's provisions for clarification.

§ 55-2-06. Bylaws.

(a) The incorporators or board of directors of a corporation shall adopt initial bylaws for the corporation.

(b) The bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation. (1955, c. 1371, s. 1; 1959, c. 1316, ss. 2, 3; 1973, c. 469, s. 4; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

The responsibility for adopting the original bylaws is placed on the person or persons completing the organization of the corporation.

Section 2.06(b) restates the accepted scope of bylaw provisions. For a list of Model Act provisions that become effective only if specific reference is made to them in the bylaws, see the Official Comment to section 2.02. Provisions set forth in bylaws may additionally be contained in shareholder or board resolutions unless this Act requires them to be set forth in the bylaws.

The power to amend or repeal bylaws, or

adopt new bylaws after the formation of the corporation is completed, is addressed in sections 10.20 through 10.22 of the Model Act.

NORTH CAROLINA COMMENTARY

The Model Act's use of the word "shall" in subsection (a) requires that a corporation have bylaws, whereas, under prior law, the adoption of bylaws was at least theoretically optional. Use of the word "shall," however, is not intended to imply that a North Carolina corporation not adopting bylaws is not a valid corporation.

Legal Periodicals. — For note on unanimous approval of corporate bylaws and creation of shareholder agreements, see 1 Campbell L. Rev. 153 (1979).

CASE NOTES

Editor's Note. *— The cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Statutory Norms Control Amendments Where Bylaws Fail to Control. — In the absence of a valid provision in the charter or bylaws controlling amendment, statutory or common-law norms governing amendment apply. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

Shareholders' agreement which is part of the charter or bylaws is subject to amendment as provided therein or, in the absence of an internal provision governing amendments, as provided by statutory norms. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

When parties to a shareholders' agreement choose to embody it in the charter or bylaws, it must be concluded that they intended for statutory or common-law norms governing amendment to apply absent an expressed intention to deviate from them. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

Principle by which a shareholder is bound by a corporate resolution, regularly passed pursuant to charter and bylaws, prevails only in reference to his status and rights as a shareholder, and not where he deals independently with corporation as one of its customers in the line of its business. Cardwell v. Garrison, 179 N.C. 476, 103 S.E. 3 (1920).

Bylaws as Evidence Against Strangers. — The bylaws of a corporation are usually not evidence for it against strangers who deal with it, unless they are brought home to their knowledge and assented to by them. Smith & Melton v. N.C.R.R., 68 N.C. 107 (1873).

§ 55-2-07. Emergency bylaws.

(a) Unless the articles of incorporation provide otherwise, the board of directors of a corporation may adopt bylaws to be effective only in an emergency defined in subsection (d). The emergency bylaws, which are subject to amendment or repeal by the shareholders, may make all provisions necessary for managing the corporation during the emergency, including:

(1) Procedures for calling a meeting of the board of directors;
(2) Quorum requirements for the meeting; and
(3) Designation of additional or substitute directors.

(b) All provisions of the regular bylaws consistent with the emergency bylaws remain effective during the emergency. The emergency bylaws are not effective after the emergency ends.

(c) Corporate action taken in good faith in accordance with the emergency bylaws binds the corporation and the fact that the action was taken by special procedures may not be used to impose liability on a corporate director, officer, employee, or agent.

(d) An emergency exists for purposes of this section if a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event. (1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 2.07 is no longer an optional provision (as was the case with its predecessor in earlier versions of the Model Act) but is unqualifiedly recommended for adoption. The problem it addresses is potentially present in every state and in every corporation, and the widespread acceptance of the earlier provision to date by a number of states argues that it be uniformly adopted.

The adoption of emergency bylaws in advance of an emergency not only clarifies lines of command and responsibility but also tends to ensure continuity of responsibility. The board of directors may be authorized by the emergency bylaws, for example, to designate the officers or other persons, in order of seniority and subject to various conditions, who may be deemed to be directors during the emergency.

The definition of "emergency" adopted by subsection (d) is broader than a nuclear disaster or attack on the United States. It includes any catastrophic event, such as an airplane crash or fire, that makes it difficult or impossible for a quorum of the corporation's board of directors to be assembled. While there apparently has been no recent illustration of a public corporation facing such a catastrophic event, its possibility should not be ignored. In order to encourage corporations to adopt emergency bylaws, section 2.07(c) broadly validates all corporate actions taken "in good faith" pursuant to them and immunizes all corporate directors, officers, employees, and agents from liability as a result of these actions. The phrase "action taken in good faith in accordance with the emergency bylaws" has been substituted for "willful misconduct," the language of the earlier Model Act provision. This change is designed to conform the standard for immunity here and elsewhere in the Model Act and represents no substantive change.

A corporation that does not adopt emergency bylaws under this section may nevertheless exercise the powers described in section 3.03 in the event of an emergency as defined in section 2.07(d).

NORTH CAROLINA COMMENTARY

This section has no equivalent under prior law. The Model Act was rewritten in subsection (c) to clarify that the limitation on liability contained in that subsection is limited to liability arising by reason of action taken by special procedures under emergency bylaws.

ARTICLE 3.

Purposes and Powers.

§ 55-3-01. Purposes.

(a) Every corporation incorporated under this Chapter has the purpose of engaging in any lawful business unless a more limited purpose is set forth in its articles of incorporation.

(b) A corporation engaging in a business that is subject to regulation under another statute of this State may incorporate under this Chapter only if permitted by, and subject to all limitations of, the other statute. (1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 3.01(a) provides that every corporation automatically has the purpose of engaging in any lawful business unless a narrower purpose is described in the articles of incorporation. The specification of an "any lawful business" clause has become so nearly universal in states that permit the clause that no reason exists for treating it otherwise than as the norm for the "standard" corporation.

The option of a narrower purpose clause is most likely to be elected only in situations where one or more participants in the corporation desire to limit or retain a check on the business operations of the corporation. The articles of incorporation may limit lines of business in which the corporation may engage. It should be recognized, however, that the limited scope of the ultra vires concept in litigation between the corporation and outsiders means that a third person entering into a transaction that violates the restrictions in the purpose clause may be able to enforce the transaction in accordance with its terms if he was unaware of the narrow purpose clause when he entered the transaction. See the Official Comment to section 3.04.

Many corporations may also find it desirable to supplement a general purpose clause with an additional statement of business purposes. This may be necessary for licensing or for qualification purposes in some states.

Section 3.01(b) is designed to tie in the limitless lawful purpose corporation permitted by section 3.01(a) with the numerous state statutes that impose regulations or limitations on corporations formed to, or actually engaging in, certain lines of business. These state statutes are of various types.

a. Special incorporation statutes

Some of these statutes, particularly those relating to banking and insurance, establish a separate incorporation process and incorporating agency. These special incorporating states may refer back to or incorporate by reference portions of the general business corporation statute.

b. Miscellaneous regulatory statutes

Other regulatory statutes may permit incorporation under the general business corporation act if the corporation imposes restrictions or limitations in its articles of incorporation; these restrictions may relate to the business in which the corporation may engage, its manner of internal governance, or the persons who may or may not be shareholders and participate in the venture. The language of section 3.01(b) is designed to cover all these multiple variations and is a substitute for the narrower language "except for the purpose of banking or insurance" that appeared in earlier versions of the Model Act and the statutes of many states.

c. Professional corporations

Traditionally, incorporation was not permitted at all for the purpose of practicing the learned professions—e.g., law, medicine, and dentistry—primarily because of the personal skills and confidential relationships between lawyer and client or physician and patient. In the early 1960s, however, a significant movement toward incorporation of professionals surfaced as part of an effort by professionals to obtain employee federal tax benefits. Professionals hoped to form corporations to conduct their practice as employees of the corporation rather than as independent entrepreneurs. Early efforts by professionals to form entities to conduct their practice (despite the lack of state statutory authority to incorporate) met with opposition from the Internal Revenue Service. In 1960 the I.R.S. issued the "Kintner" regulations, which in effect provided that federal tax status would be determined on the basis of the organization's characterization under state law. TREAS. REGS. § 301.7701-2 (1960). In response, a number of states passed legislation specifically authorizing professionals to incorporate. Recognition of the corporate tax status of professional corporations was eventually conceded. REV. RUL. 70-101, 1970-1 C.B. 278. All jurisdictions now have statutes providing for incorporation for the purpose of practicing a profession, and in 1977 a Professional Corporation Supplement to the Model Act was approved. For further consideration of professional corporation acts, see the Annotations to the Model Professional Corporation Supplement.

d. Miscellaneous organizations

Other types of corporations, such as nonprofit corporations, cooperatives, and unions, usually may not incorporate under the business corporation act. Many states have enacted special statutes for these classes entities: a Model Nonprofit Corporation Act was approved in 1952 and has been periodically revised since then.

Section 3.01(b) is designed to preserve all statutory requirements applicable to all of these various classes of specialized and nonbusiness corporations.

NORTH CAROLINA COMMENTARY

This section is substantially the same as former G.S. 55-5.

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

§ 55-3-02. General powers.

(a) Unless its articles of incorporation or this Chapter provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power:

(1) To sue and be sued, complain and defend in its corporate name;
(2) To have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing it or in any other manner reproducing it;
(3) To make and amend bylaws, not inconsistent with its articles of incorporation or with the laws of this State, for managing the business and regulating the affairs of the corporation;
(4) To purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located;
(5) To sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;
(6) To purchase, receive, subscribe for, or otherwise acquire; own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of; and deal in and with shares or other interests in, or obligations of, any other entity;
(7) To make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations (which may be convertible into or include the option to purchase other securities of the corporation), and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income;
(8) To lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;
(9) To be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other entity;
(10) To conduct its business, locate offices, and exercise the powers granted by this act within or without this State;
(11) To elect or appoint directors, officers, employees, and agents of the corporation, define their duties, fix their compensation, and lend them money and credit;
(12) To pay pensions and establish pension plans, pension trusts, profit sharing plans, stock bonus plans, stock option plans, and other benefit or incentive plans for any or all of its current or former directors, officers, employees, and agents;
(13) To make donations for the public welfare or for charitable, religious, cultural, scientific, or educational purposes;
(14) To transact any lawful business that will aid governmental policy;
(15) To make payments or donations, or do any other act, not inconsistent with law, that furthers the business and affairs of the corporation; and
(16) To provide insurance for its benefit on the life or physical or mental ability of any of its directors, officers or employees or on the life or physical or mental ability of any security holder for the purpose of acquiring at his death or disability its securities owned by such security holder, and for these purposes the corporation is deemed to have an insurable interest in its directors, officers, employees, or security holders; and to provide insurance for its benefit on the life or physical or mental ability of any other person in whom it has an insurable interest.

(b) It shall not be necessary to set forth in the articles of incorporation any of the powers enumerated in this section. (Code, ss. 663, 666, 691, 692, 693; 1893, c. 159; 1901, c. 2, s. 1; Rev., s. 1128; 1909, c. 507, s. 1; C.S., s. 1126; 1925, cc. 235, 298; 1929, c. 269; 1939, c. 279; 1945, c. 775; G.S., s. 55-26; 1951, c. 1240, s. 1; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 4, 5; 1969, c. 751, ss. 7, 8; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

The law of corporations has always proceeded on the fundamental assumption that corporations are creations with limited power; such an assumption was articulated by the United States Supreme Court as early as 1804, *Head & Armory v. Providence Insurance Co.,* 6 U.S. (2 Cranch) 127, 169 (1804), and appears never to have been seriously questioned as a judicial matter.

It is clear that narrow and limited powers clauses are undesirable: they encourage litigation by bringing into question reasonable transactions that further the business and interests of the corporation and to the extent transactions are unauthorized, may defeat valid and reasonable expectations. The history of the Model Act and of many state statutes in this area is largely one ensuring that corporate powers are broad enough to cover all reasonable business transactions.

In developing section 3.02, serious consideration was given to whether there was a continued need for a long list of corporate powers or whether a general provision granting every corporation power to act to the same extent as an individual might be substituted. Because of the long history of these powers, however, it was feared that no matter how broadly phrased a general provision might be, a court might conclude that some power might not exist because no specific reference to it was made in the statute. It was also feared that cautious attorneys might begin to restore power clauses to articles of incorporation out of concern that a general clause of the type in question might not be interpreted literally. Hence, the present language, which is similar to that included in the statutes of California and other states, was adopted. The general clause granting the corporation essentially the same powers as an individual is coupled with a nonexclusive listing of powers, including the traditional power clauses that appear in many state statutes.

The general philosophy of section 3.02 is thus that corporations formed under the Model Act provisions should be automatically authorized to engage in all acts and have all powers that an individual may have. Because broad grants of power of this nature may not be desired in some corporations, section 3.02 generally authorizes articles of incorporation to deny or limit specific powers to a specific corporation if that is felt desirable. This power to exclude specific powers does not reflect a substantive change from earlier versions of the Model Act (which did not contain an express provision to this effect) but simply makes explicit what was always implicit. Illustrative of the powers that may be appropriate for limitation in specific corporations are the powers (discussed below) to make political contributions to the extent permitted by law or to make expenditures to influence elections affecting the corporate business to the extent permitted by law.

The powers listed in section 3.02 were broadened in several significant respects:

(1) All limitations on loans to directors have been eliminated. The wisdom and propriety of these loans should be evaluated on the basis of general fiduciary standards and the benefits to the corporation. See sections 8.30, 8.31, and 8.32. Section 3.02(11) thus rejects the conceptual argument that because certain transactions are subject to abuse, all such transactions should be prohibited.

(2) It is made clear in section 3.02(12) that former as well as present directors, officers, employees, and agents may participate in pension, option, and similar benefit plans.

(3) Section 3.02(15) permits payments or donations or other acts "that further the business and affairs of the corporation." This clause, which is in addition to and independent of the power to make charitable and similar donations under section 3.02(13), permits contributions for purposes that may not be charitable, such as for political purposes or to influence elections. This power exists only to the extent consistent with law other than the Model Act. It is the purpose of this section to authorize all corporate actions that are lawful or not against public policy.

The powers of a corporation under the Model Act exist independently of whether a corporation has a broad or narrow purpose clause. A corporation with a narrow purpose clause nevertheless has the same powers as an individual to do all things necessary or convenient to carry out its business. Many actions are therefore intra vires even though they do not directly affect the limited purpose for which the corporation is formed. For example, a corporation may generally make charitable contributions without regard to the purpose for which the charity will use the funds or may invest money in shares of other corporations without regard to whether the corporate purpose of the other corporation is broader or narrower than the limited purpose clause of the investing corporation. In some instances, however, a limited or narrow purpose clause may be considered to be a restriction on corporate powers as well as a restriction on purposes. Since the same ultra vires rule is applicable to corporations that exceed their purposes or powers (see the Official Comment to section 3.04), it is not necessary to determine whether a narrow purpose clause also limits the powers of the corporation but simply whether the purpose of the transaction in question is consistent with the purpose clause. Of course, these issues cannot arise in corporations with an "any lawful business" purpose clause.

NORTH CAROLINA COMMENTARY

This section contains essentially all of the powers enumerated in former G.S. 55-17, but it avoids the distinction that the prior law made between unconditional powers and those exercisable by a corporation "only in connection with the purposes stated in its charter," and lists all powers in a single sequence. The words "or this act" were added to the Model Act's introductory language in subsection (a) to emphasize that there may be limiting provisions elsewhere in Chapter 55. Subdivision (a)(11) was modified to incorporate language from former G.S. 55-17(a)(4) that was believed to be less restrictive than the Model Act's language, and subdivision (12) was modified by changing the Model Act's reference to "share" bonus and "share" option plans to the more commonly used terms, "stock" bonus and "stock" option plans. Subdivision (13) was modified to add donations for religious and cultural purposes, which were permitted under former G.S. 55-17(a)(6). Subdivision (16) brings forward former G.S. 55-17(b) (4), and is more specific than the Model Act in authorizing insurance on the corporation's directors, officers, employees and security holders.

In addition, former G.S. 55-17(c) was added to this section as subsection (b) to avoid any negative inference by its omission. It does not appear in the Model Act.

Legal Periodicals. — For note, "Glenn v. Wagner: Instrumentality Rule versus the Balancing Test in Piercing the Corporate Veil," see 64 N.C.L. Rev. 1265 (1986).

CASE NOTES

I. In General.
II. Suits by and Against Corporations.
III. Rights as to Property.
IV. Corporate Seal.

I. IN GENERAL.

Editor's Note. — The cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.

Implied Powers Necessary to Exercise of Express Powers. — Corporations possess by legal implication such powers as are essential to the exercise of the powers expressly conferred and necessary to attain the main objects for which they were formed. Barcello v. Hapgood, 118 N.C. 712, 24 S.E. 124 (1896).

Corporation may transact business anywhere, unless prohibited by its charter or excluded by local laws. Garrett v. Bear, 144 N.C. 23, 56 S.E. 479 (1907).

Ratification of and Liability for Pre-Incorporation Contract. — Although a corporation may not technically ratify a contract made on its behalf prior to its incorporation, since it could not at that time have authorized such action on its behalf, it may, after it comes into existence, adopt such contract by its corporate action, which adoption may be express or implied, and thereby become liable for its performance. Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282 (1976).

II. SUITS BY AND AGAINST CORPORATIONS.

Same Liability as Natural Person. — A corporation is now held liable to civil and criminal actions under the same conditions and circumstances as natural persons are. Reddit v. Singer Mfg. Co., 124 N.C. 100, 32 S.E. 392 (1899).

Liability for Slander. — A corporation may be held liable for slander when the defamatory words are uttered by express authority of the company or by one of its officers or agents in the course of his employment, and authority for such utterances may be fairly and reasonably inferred under relevant and sufficient circumstances. Cotton v. Fisheries Prods. Co., 177 N.C. 56, 97 S.E. 712 (1919).

Ejectment and Trespass Will Lie Against Corporation. — Corporations, in contemplation of the law, are capable of having actual possession of the land, and whatever may have been supposed to the contrary in the distant past, the actions of ejectment and trespass lie against them. Young v. Barden, 90 N.C. 424 (1884).

Personal Liability of Corporate Officer

for Pre-Incorporation Note Executed in Another State. — In an action to recover on a promissory note executed in Georgia and payable in Georgia, Georgia law applied, so that defendant could be held personally liable on the note which he executed as president of a corporation which had not yet been formed, but which was subsequently incorporated and which made payments on the note until default. Smith v. Morgan, 50 N.C. App. 208, 272 S.E.2d 602 (1980).

Suits Must Be in Corporate Name. — A suit against a corporation must be brought against it in its corporate name, and not against its officers or agents. Britain v. Newland, 19 N.C. 363 (1837); Young v. Barden, 90 N.C. 424 (1884).

Unless Corporation Is Insolvent. — In case of insolvency, where a receiver has been appointed, he may sue either in his own name or in that of the corporation. Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371 (1894); Smathers v. Western Carolina Bank, 135 N.C. 410, 47 S.E. 893 (1904).

Misnomer Immaterial. — A misnomer does not vitiate, provided the identity of the corporation with that intended by the parties is apparent, whether it is in a deed, or in a judgment, or in a criminal proceeding. McCrea v. Starr, 5 N.C. 252 (1809); Asheville Div. No. 15 v. Aston, 92 N.C. 579 (1885); Gordon v. Pintsch Gas Co., 178 N.C. 435, 100 S.E. 878 (1919).

III. RIGHTS AS TO PROPERTY.

Property of a corporation belongs to it, not to the stockholders. They only have an interest in such property through their relation to the company, and in this respect the State is like any other stockholder. Marshall v. Western N.C.R.R., 92 N.C. 322 (1885).

Where the State is a stockholder in a railroad company, it is bound by the provisions of the charter in the same manner as an individual. It has no advantage as a stockholder on account of its sovereignty, for, by becoming such, it lays aside its character as a sovereign and places itself on a footing of equality with the individual stockholders. Marshall v. Western N.C.R.R., 92 N.C. 322 (1885).

Corporation May Hold Estates in Fee. — Although the existence of a corporation be limited to a certain number of years, yet the corporation is capable of holding estates in fee. Asheville Div. No. 15 v. Aston, 92 N.C. 578 (1885).

Effect of Conveyance for Use Beyond Corporate Powers. — Where a corporation takes a conveyance of lands for use beyond its charter powers, the deed is not void, but only voidable upon the objection of the State. Cross v. Seaboard Air Line Ry., 172 N.C. 119, 90 S.E. 14 (1916).

Private corporation may dispose of its property without express authority of the legislature. Benbow v. Cook, 115 N.C. 324, 20 S.E. 453 (1894).

A strictly private corporation can lawfully sell any of its property, real or personal, just as an individual can. Barcello v. Hapgood, 118 N.C. 712, 24 S.E. 124 (1896).

A corporation chartered for the purpose of mining and milling ores has the right, by implication of law, to buy and sell real estate essential to the successful prosecution of its business. Barcello v. Hapgood, 118 N.C. 712, 24 S.E. 124 (1896).

Necessity for Authorization by Directors to Sell Corporate Property. — Corporate directors are trustees of the corporation's property, and usually a corporation may sell, transfer, and convey its corporate real estate only when authorized to do so by its board of directors. And statutory provisions may be supplemented by stipulation in the corporation's bylaws. Tuttle v. Junior Bldg. Corp., 228 N.C. 507, 46 S.E.2d 313 (1948).

In the absence of charter provisions or bylaws to the contrary, the president of a corporation is the general manager of its corporate affairs, and his contracts made in the name of the corporation in the general course of business and within the apparent scope of his authority are ordinarily enforceable, but ordinarily he has no power to sell or contract to sell the real or personal property of the corporation without authority from its board of directors. Tuttle v. Junior Bldg. Corp., 228 N.C. 507, 46 S.E.2d 313 (1948).

Right to Mortgage Property. — Corporations other than railroad companies have a general power to mortgage their property, unless prohibited by some provision in the charter, the right to mortgage being a natural result of the right to incur an indebtedness. Antietam Paper Co. v. Chronical Publishing Co., 115 N.C. 143, 20 S.E. 366 (1894).

Corporation may acquire land by showing sufficient adverse possession for the statutory period. Cross v. Seaboard Air Line Ry., 172 N.C. 119, 90 S.E. 14 (1916).

IV. CORPORATE SEAL.

Power to have a common seal and to alter or renew the same at will is frequently conferred on corporations by statute, but such power is one of the incidental and implied powers of every corporation when not expressly conferred. Bailey v. Hassell, 184 N.C. 450, 115 S.E. 166 (1922).

As a general rule, a corporation may use or adopt any seal. Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965).

And May Adopt Seal for Special Occa-

sion. — If a corporation adopts a seal different from its corporate seal for a special occasion, or if it has no corporate seal, the seal adopted is the corporate seal for the time and the occasion. Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965).

Any Device May Be Used for Seal. — Any device used for the corporate seal will be sufficient, provided it was intended for and used as the seal of the corporation, and had been adopted by proper action of the corporation for that purpose. Bailey v. Hassell, 184 N.C. 450, 115 S.E. 166 (1922).

A corporate seal may consist of anything found upon a paper and which appears to have been put there by due authority or to have been adopted and used by such authority as and for the seal of the corporation. Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965).

The simple word "seal" with a scroll adopted as the seal of a corporation and used by it on a deed to its lands according to resolutions of the stockholders and directors thereof at separate meetings held for the purpose, when all were present, is sufficient. Bailey v. Hassell, 184 N.C. 450, 115 S.E. 166 (1922).

Burden of Proof as to Seal on Contract and Statute of Limitations. — The burden was upon plaintiffs to prove that the action accrued within the time limited by G.S. 1-47, by showing that the company adopted the seal appearing on the contract for the special occasion or for all similar occasions, or that such seal became the seal of the corporation by reason of some other rule of law, or that the regular corporate seal was impressed or attached to the original of the contract, or that there were facts and circumstances which excluded the operation of the 3-year statute, G.S. 1-52, other than the matter of a seal. Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965).

§ 55-3-03. Emergency powers.

(a) In anticipation of or during an emergency defined in subsection (d), the board of directors of a corporation may:

(1) Modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent; and

(2) Relocate the principal office, designate alternative principal offices or regional offices, or authorize the officers to do so.

(b) During an emergency defined in subsection (d), unless emergency bylaws provide otherwise:

(1) Notice of a meeting of the board of directors need be given only to those directors whom it is practicable to reach and may be given in any practicable manner, including by publication and radio; and

(2) One or more officers of the corporation present at a meeting of the board of directors may be deemed to be directors for the meeting, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum.

(c) Corporate action taken in good faith during an emergency under this section to further the ordinary business affairs of the corporation binds the corporation and the fact that said action is taken by special procedures may not be used to impose liability on a corporate director, officer, employee, or agent.

(d) An emergency exists for purposes of this section if a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event. (1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 3.03 should be read in conjunction with section 2.07, which authorizes a corporation to adopt emergency or standby bylaws. Section 3.03 grants every corporation limited powers to act in an emergency even though it has failed to enact emergency bylaws under section 2.07.

An "emergency" for purposes of section 3.03 is defined in subsection (d) as any catastrophic event that makes it difficult or impossible to assemble a quorum of directors. In this situation, section 3.03(b) dispenses with or relaxes notice requirements and permits corporate officers to serve as directors in order to achieve a quorum. The section also authorizes the board of directors, either before or during an emergency, to modify lines of succession and relocate the principal business office of the corporation. These actions may be taken only by the board of directors at a meeting at which a quorum is present after giving effect, if necessary, to section 3.03(b).

These minimal provisions, it is believed, should permit a corporation to continue to function in the face of an emergency even if no emergency bylaws have been adopted under section 2.07.

NORTH CAROLINA COMMENTARY

This section has no counterpart in prior law. The Model Act was rewritten in subsection (c) to conform to changes made to G.S. 55-2-07(c)(2).

§ 55-3-04. Ultra vires.

(a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

(b) A corporation's power to act may be challenged:

(1) In a proceeding by a shareholder against the corporation to enjoin the act;

(2) In a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation; or

(3) In a proceeding by the Attorney General under G.S. 55-14-30.

(c) In a shareholder's proceeding under subsection (b)(1) to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss (other than anticipated profits) suffered by the corporation or another party because of enjoining the unauthorized act. (Code, ss. 607, 686; 1901, c. 2, s. 107; Rev., s. 1197; C.S., s. 1143; G.S., 55-47; 1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

The basic purpose of section 3.04 — as has been the purpose of all similar statutes during the 20th century — is to eliminate all vestiges of the doctrine of inherent incapacity of corporations. See Campbell, "The Model Business Corporation Act," 11-4 BUS. LAW. 98, 102 (1956). Under this section it is unnecessary for persons dealing with a corporation to inquire into limitations on its purposes or powers that may appear in its articles of incorporation. A person who is unaware of these limitations when dealing with the corporation is not bound by them. The phrase in section 3.04(a) that the "validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act" applies equally to the use of the doctrine as a sword or as a shield: a third person may no more avoid an undesired contract with a corporation on the ground the corporation was without authority to make the contract than a corporation may defend a suit on a contract on the ground that the contract is ultra vires.

The language of section 3.04 extends beyond contracts and conveyances of property; "corporate action" of any kind cannot be challenged on the ground of ultra vires. For this reason it makes no difference whether a limitation in articles of incorporation is considered to be a limitation on a purpose or a limitation on a power; both are equally subject to section 3.04. Corporate action also includes inaction or refusal to act. The common law of ultra vires distinguished between executory contracts, partially executed contracts, and fully executed ones; section 3.04 treats all corporate action the same — except to the extent described in section 3.04(b) — and the same rules apply to all contracts no matter at what stage of performance.

Section 3.04, however, does not validate corporate conduct that is made illegal or unlawful by statute or common law decision. This conduct is subject to whatever sanction, criminal or civil, that is provided by the statute or decision. Whether or not illegal corporate conduct is voidable or rescindable depends on the applicable statute or substantive law and is not affected by section 3.04.

Section 3.04 also does not address the validity of essentially intra vires conduct that is not approved by appropriate corporate action. It does not deal, for example, with the enforceability of an executory contract to sell substantially all the assets of a corporation not in the ordinary course of business that was not approved by the shareholders as required by section 12.02. This type of transaction is not beyond the purposes or powers of the corporation; it simply has not been approved by the corporate authorities as required by law. Similarly, section 3.04 does not deal with whether a corporation is bound by the action of a corporate agent if the action requires, but has not received, approval by the board of directors. Whether or not the corporation is bound by this action depends on the law of agency, particularly the scope of apparent authority and whether the third person knew or should have known of the defect in the corporate approval process. These actions may be ultra vires with respect to the agent's authority but they are not ultra vires with respect to the corporation and are not controlled by section 3.04.

Similarly, corporate action is not ultra vires under section 3.04 merely because it constitutes a breach of fiduciary duty. For example, a misuse of corporate assets for personal purposes by an officer or director is a breach of fiduciary duty and may be enjoined. Similarly, in some circumstances a lien on corporate assets and a contract entered into by the corporation may be cancelled or enjoined if they constitute breaches of fiduciary duty and the third person is charged with knowledge that they were improper. These transactions, however, are not ultra vires with respect to the corporation, and cannot be attacked under section 3.04. They may be enjoined because of breach of the fiduciary duty, not because the transaction exceeds the powers or purposes of the corporation.

Section 3.04(b), like the prior Model Act provisions, permits challenges to the corporation's lack of power in three limited classes of cases:

(1) In suits by the attorney general under section 14.30. This provision does not answer the question whether or not a corporation may be dissolved or enjoined by the attorney general for committing an ultra vires act; it simply preserves the power of the state to assert that certain corporate action was ultra vires.

(2) In a suit by the corporation, either directly or through a legal representative, against incumbent or former officers or directors for authorizing or causing the corporation to engage in an ultra vires act. Again, this section does not address whether or not there is liability for causing the corporation to enter into an ultra vires act; it simply preserves the power of the corporation to assert that certain corporate action was ultra vires.

(3) In a suit by a shareholder against the corporation to enjoin an ultra vires act. This suit, however, is subject to the requirements of section 3.04(c). Under this subsection an ultra vires act may be enjoyed only if all "affected parties" are parties to the suit. The requirement that the action be "equitable" generally means that only third persons dealing with a corporation while specifically aware that the corporation's action was ultra vires will be enjoined. The general phrase "if equitable" was retained because of the possibility that other circumstances may exist in which it may be equitable to refuse to enforce an ultra vires contract. Further, if enforcement of the contract is enjoined, either the third person or the corporation may in the discretion of the court be awarded damages from the other for loss (excluding anticipated profits).

Section 3.04(c) thus authorizes a court to enjoin or set aside an ultra vires act or grant other relief that may be necessary to protect the interests of all affected persons, including the interests of third persons who deal with the corporation.

NORTH CAROLINA COMMENTARY

This section contains no change of substance from former G.S. 55-18 except that the new section applies only to North Carolina corporations whereas the prior statute purported to apply to foreign corporations as well.

CASE NOTES

Editor's Note. *— The cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Doctrine of ultra vires has been very much modified, and many contracts made in the course of business, especially when executed and benefits are received or liabilities are incurred, will be upheld and enforced which were once declared absolutely void. Hutchins v. Bank, 128 N.C. 72, 38 S.E. 252 (1901).

The doctrine of ultra vires has been curtailed to a considerable degree. Piedmont Aviation, Inc. v. S & W Motor Lines, 262 N.C. 135, 136 S.E.2d 658 (1964).

Question whether acts are ultra vires is a conclusion of law to be drawn from the facts stated. Spencer v. Seaboard Air Line Ry., 137 N.C. 107, 49 S.E. 96 (1904).

State May Enjoin Threatened Ultra Vires Act. — Modification of the doctrine does not involve the right in an appropriate case of the State to enjoin a threatened ultra vires act. Victor v. Louise Cotton Mills, 148 N.C. 107, 61 S.E. 648 (1908).

Stockholder May Bring Action. — If an act of a corporation is ultra vires, any one or more stockholders may by some appropriate method call it in question, and, unless barred by having consented to or acquiesced in it, have relief. Victor v. Louise Cotton Mills, 148 N.C. 107, 61 S.E. 648 (1908); Lutterloh v. City of Fayetteville, 149 N.C. 65, 62 S.E. 758 (1908).

§ 55-3-05. Exercise of corporate franchises not granted.

The Attorney General may upon his own information or upon complaint of a private party bring an action in the name of the State to restrain any person from exercising corporate franchises not granted. (Code, ss. 607, 686; 1901, c. 2, s. 107; Rev., s. 1197; C.S., s. 1143; G.S., s. 55-47(2); 1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

NORTH CAROLINA COMMENTARY

This section brings forward former G.S. 55-10.

ARTICLE 4.

Name.

§§ 55-4-01 through 55-4-05: Transferred to §§ 55D-20 through 55D-27 by Session Laws 2001-358, ss. 14(a) and 14(b).

ARTICLE 5.

Office and Agent.

§ 55-5-01. Registered office and registered agent.

Each corporation must maintain a registered office and registered agent as required by Article 4 of Chapter 55D of the General Statutes and is subject to service on the Secretary of State under that Article. (1901, c. 5; Rev., s. 1243; C.S., s. 1137; 1937, c. 133, ss. 1-3; G.S., ss. 55-38, 55-39; 1955, c. 1371, s. 1; 1957, c. 979, s. 17; 1989, c. 265, s. 1; 2000-140, s. 101(a); 2001-358, ss. 44, 47(a); 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 52, authorizes the Revisor of Statutes to transfer, as historical annotations, the Official Comments and the North Carolina Comments to those portions of Chapter 55 of the General Statutes that are recodified by this act to the corresponding locations in Chapter 55D of the General Statutes, as the Revisor deems appropriate. Pursuant to this authority, the Official Comments and the North Carolina Commentary formerly located at this section have been transferred to G.S. 55D-30.

Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

CASE NOTES

Editor's Note. — The case below was decided under the Business Corporation Act adopted in 1955.

The listing of an agent for corporate service of process is not a voluntary action, subject to the discretion of the corporation. This listing is legislatively mandated. South Carolina Ins. Co. v. Hallmark Enters., Inc., 88 N.C. App. 642, 364 S.E.2d 678, cert. denied, 322 N.C. 482, 370 S.E.2d 228 (1988), (decided under prior law).

Failure to Notify Insurer of Suit Where Corporation Without Agent Received No Notice Thereof. — Corporation could not rely on its violation of former G.S. 55-13 to justify its failure to receive notice of suit. Consequently, it did not give notice of suit to its insurer at the time it was reasonably expected to receive actual notice thereof, thus failing to notify insurer as soon as practicable. South Carolina Ins. Co. v. Hallmark Enters., Inc., 88 N.C. App. 642, 364 S.E.2d 678, cert. denied, 322 N.C. 482, 370 S.E.2d 228 (1988), (decided under prior law).

§§ 55-5-02 through 55-5-04: Transferred to §§ 55D-31 through 55D-33 by Session Laws 2001-358, s. 44.

ARTICLE 6.

Shares and Distribution.

Part 1. Shares.

§ 55-6-01. Authorized shares.

(a) The articles of incorporation must prescribe the classes of shares and the number of shares of each class that the corporation is authorized to issue. If more than one class of shares is authorized, the articles of incorporation must prescribe a distinguishing designation for each class, and, prior to the issuance of shares of a class, the preferences, limitations, and relative rights of that class must be described in the articles of incorporation. All shares of a class must have preferences, limitations, and relative rights identical with those of other shares of the same class unless the articles of incorporation divide a class into series. If a class is divided into series, all the shares of any one series must have preferences, limitations, and relative rights identical with those of other shares of the same series. The requirement of identical rights within a class shall not be construed to conflict with any special voting rights specified elsewhere in this Chapter.

(b) Each series of a class must be given a distinguishing designation.

(c) The articles of incorporation must authorize

(1) One or more classes of shares that together have unlimited voting rights, and

(2) One or more classes of shares (which may be the same class or classes as those with voting rights) that together are entitled to receive the net assets of the corporation upon dissolution.

(d) The articles of incorporation may authorize one or more classes or series within a class of shares that:

(1) Have special, conditional, or limited voting rights, or no right to vote, except to the extent prohibited by this Chapter;

(2) Are redeemable or convertible as specified in the articles of incorporation (i) at the option of the corporation, the shareholder, or another person or upon the occurrence of a designated event; (ii) for cash, indebtedness, securities, or other property; (iii) in a designated amount or in an amount determined in accordance with a designated formula or by reference to extrinsic data or events;

(3) Entitle the holders to distributions calculated in any manner, including dividends that may be cumulative, noncumulative, or partially cumulative;

(4) Have preference over any other class or series within a class of shares with respect to distributions, including dividends and distributions upon the dissolution of the corporation.

(5) Notwithstanding the provisions of (d)(3) and (4) of this section, noncumulative preferred shares of a class or series within a class out of which shares were initially issued after June 30, 1957, and before October 1, 1969, shall be entitled to a dividend credit, as defined in this Chapter, and until such dividend credit is fully discharged no dividend shall be paid to any shares that are subordinate to such preferred shares as to dividends.

(e) The description of the designations, preferences, limitations, and relative rights in subsection (d) is not exhaustive. (1901, c. 2, s. 19; 1903, c. 660, ss. 2, 3; Rev., s. 1159; C.S., s. 1156; 1921, c. 116, s. 1; 1923, c. 155; C.S., s. 1167(a); 1925, c. 118, ss. 2, 2a; c. 262, s. 1; 1939, c. 199; 1949, c. 929; G.S., ss. 55-61, 55-73; 1953, c. 822, ss. 1, 3; 1955, c. 1371, s. 1; 1969, c. 751, ss. 15-17; 1985, c. 117, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 6.01 adopts a new terminology from that traditionally used in corporation statutes to describe classes of shares that may be created, but makes only limited substantive changes from earlier versions of the Model Act. Traditional corporation statutes work from a perceived inheritance of concepts of "common shares" and "preferred shares" that at one time may have had considerable meaning but that today often do not involve significant distinctions. It is possible under modern corporation statutes to create classes of "common" shares that have important preferential rights and classes of "preferred" shares that are subordinate in all important economic aspects or that are indistinguishable from common shares in either voting rights or entitlement to participate in the assets of the corporation upon dissolution. The revised Model Act breaks away from the inherited concepts of "common" and "preferred" shares and develops more general language to reflect the actual flexibility in the creation of classes of shares that exists in modern corporate practice. The words "common shares" or "preferred shares" are no longer used in the revised Model Act, though the words appear in a few instances in examples appearing in the Official Comment.

1. Section 6.01(a)

Section 6.01(a) requires that the articles of incorporation prescribe the classes of shares and the number of shares of each class that the corporation is authorized to issue. If the articles authorize the issue of only one class of shares, no designation or description of the shares is required, it being understood that these shares have both the power to vote and the power to receive the net assets of the corporation upon dissolution. See section 6.01(b). Shares with both of these characteristics are usually referred to as "common shares" or "common stock," but no specific designation is required by the Model Act.

If more than one class of shares is authorized, the preferences, limitations, and relative rights of each class of shares must be described in the articles of incorporation before any shares of that class are issued, or the board of directors may be given authority to establish them under section 6.02. These descriptions constitute the "contract" of the holders of those classes of shares with respect to their interest in the corporation and must be set forth in sufficient detail reasonably to define their interest. The designations, preferences, limitations, and relative rights of shares with one or more special or preferential rights which may be authorized are further described in section 6.01(c).

If more than one class is authorized (or if only one class is originally authorized but at some future time one or more other classes of shares are added by amendment), the preferences, limitations, and relative rights of each class or classes of shares, including the class or classes that possess the fundamental characteristics of voting and residual equity financial interests, must be described before shares of those classes are issued. If both fundamental characteristics are placed exclusively in a single class of shares, that class may be described simply as "common shares" or by statements such as the "shares have general distribution and voting rights," the "shares have all the rights of common shares," or the "shares have all rights not granted to the class A shares."

If the articles of incorporation create classes of shares that divide these fundamental rights among two or more classes of shares, it is necessary that the rights be clearly allocated among the classes. Specificity is required only to the extent necessary to differentiate the relative rights of the respective classes. For example, where one class has a liquidation preference over another, it is necessary to specify only the preferential liquidation right of that class; in the absence of a contrary provision in the articles, the remaining class would be entitled to receive the net assets remaining after the liquidation preference has been satisfied.

More than one class of shares may be designated as "common shares;" however, each must have a "distinguishing designation" under section 6.01(a), e.g., "nonvoting common shares" or "class A common shares," and the rights of the classes must be described. For example, if a corporation authorizes two classes of shares with equal rights to share in all distributions and with identical voting rights except that one class is entitled exclusively to elect one director and the second class is entitled exclusively to elect a second director, the two classes may be designated, e.g., as "Class A common" and "Class B common," and described, e.g., as "a class of common shares with the right to elect one director." What is required is language that makes the location of these rights clear.

Rather than describing the terms of each class of shares in the articles of incorporation, the corporation may delegate to the board of directors under section 6.02 the power to establish the terms of a class of shares (or of a series within a class of shares (if no shares of that class (or series) have previously been issued. Those terms, however, must be set forth in an amendment to the articles of incorporation before the shares are issued.

2. Section 6.01(b)

Section 6.01(b) requires that every corporation authorize one or more classes of shares that have the two fundamental characteristics of having unlimited voting rights and the right to receive the net assets of the corporation upon its dissolution. These two fundamental characteristics need not be placed in a single class of shares but may be divided as desired. It is nevertheless essential that the corporation always have authorized shares with these two characteristics, and section 6.03 requires that shares having in the aggregate these characteristics always be outstanding.

Section 6.01(b) ensures that there is always in existence one or more classes of shareholders who share in the ultimate residual interest in the corporation and who are entitled to elect a board of directors and make other fundamental decisions with respect to the corporation.

3. Section 6.01(c)

Section 6.01(c) lists the principal features that are customarily incorporated into classes of shares. Section 6.01(d) makes clear that this listing is not exhaustive.

a. In general

Section 6.01(c) authorizes creation of classes of shares with limited or residual rights without significant limitation. In earlier versions of the Model Act and in the statutes of many states, certain types of rights or privileges are not permitted. Many such statutes, for example, prohibit the creation of a class of voting shares without preferential financial rights that is callable at the discretion of the corporation ("callable common shares"). Another common prohibition is against shares that have the power to be converted at the option of the shareholder into other classes of shares that have preferential financial rights, or into debt securities of the corporation ("upstream" conversion privileges). For the reasons set forth below, these restrictions are not preserved in the revised Model Act.

b. Voting of shares

Any class of shares may be granted multiple or fractional votes per share without limitation. See section 7.21. Shares of any class may also be made nonvoting "except to the extent prohibited by this Act." This "except" clause refers to the provisions in the Model Act that permit shares that are designated to be nonvoting to vote as separate voting groups on amendments to articles of incorporation and other organic changes in the corporation that directly affect that class (sections 7.26 and 10.04). In addition, shares may be given voting rights that are limited or conditional (e.g., on the passing of a specified number of dividends). Section 6.01(b), however, requires that there always be one or more classes of shares that together have unlimited voting rights.

c. Redemption of shares

Section 6.01(c)(2) permits classes of shares to be made redeemable on the terms set forth in the articles of incorporation. Under this section, shares may be made "redeemable" at the option of the holder, the corporation, or another person; shares redeemable at the option of the corporation are sometimes called "callable shares," while shares redeemable at the option of the shareholder are sometimes described as involving a "put." The Model Act permits either type of redemption for any class of shares and thereby permits the creation of redeemable or callable shares without limitation (subject only to the provisos that the class or classes of shares described in section 6.01(b) must always exist and that at least one share of each class with those rights or powers must be outstanding under section 6.03).

Earlier versions of the Model Act and the statutes of many states contain a direct or indirect prohibition against callable voting shares or callable common shares. Even where such a prohibition exists, however, the same effect can be obtained by the use of consensual share transfer restrictions (see section 6.27). If it is possible to create what is essentially a callable voting share by agreement, there is no reason why such provisions should not be built directly and publicly into the capital structure of the corporation if that is desired.

The recognition of a redemption that is a "put" exercisable by the holders of the shares (or a third person such as holders of other classes of shares) is also new to the Model Act and is not permitted in many states. However, consensual share transfer restrictions may create a right that is indistinguishable from such a right of redemption, and a right of redemption is expressly recognized by many states in connection with certain specialized classes of corporations such as open-end investment companies. As described below, if a right of redemption is recognized, prohibitions in earlier versions of the Model Act and many state statutes against "upstream" conversions serve no purpose.

The amount to be paid upon the redemption of shares under section 6.01(c)(2) may be fixed in the articles of incorporation or "determined in accordance with a designated formula or by reference to extrinsic data or events." The reference to "extrinsic data or events" is intended to permit the redemption price to be established on the basis of matters external to the corporation, such as the purchase price of other shares, the level of the prime rate, the effective interest rate at which the corporation may obtain short- or long-term financing, the consumer price index or a designated currency ratio. While a designated price formula or references must be set out in the articles of incorporation, the board of directors may be given limited authority to implement the provisions.

All redemptions of shares are subject to the restrictions on distributions set forth in section 6.40. See section 6.03(b).

d. Convertibility of shares

Section 6.01(c)(2) also permits shares of any class to be made convertible into shares of any other class or into cash, indebtedness, securities, or other property of the corporation or another person.

As described above, earlier versions of the Model Act and the statutes of many states prohibit so-called "upstream" conversions, that is, shares convertible into debt securities or into a class of shares having prior or superior preference rights. See, e.g., N.Y. BUS. CORP. LAW ANN. § 519(a)(1) (McKinney 1963). This restriction was eliminated from the Model Act since it was recognized that the power to make shares redeemable at the option of the shareholder for cash (see section 6.01(c)(2)(ii)) should logically permit the shares to be redeemable or convertible at the option of the shareholder into other shares with senior preferential rights. Creditors of the corporation and holders of shares with preferential rights are less seriously affected by a conversion of shares into debt or into shares with preferential rights than they would be by the redemption of the shares for money, which is permitted by the revised Model Act, subject to the limitations of section 6.40. Shares made "redeemable" for debt under section 6.01(c)(2)(ii), achieve the same effect as a right to "convert" shares into debt securities.

4. EXAMPLES OF CLASSES OF SHARES PERMITTED BY SECTION 6.01

Section 6.01 authorizes the creation of new or innovative classes of shares without limitation or restriction. The section is basically enabling rather than restrictive since corporations often find it necessary to create new and innovative classes of shares for a variety of reasons, and with the disclosure of the terms of the new classes in the articles of incorporation that are a matter of public record there is no reason to restrict the power to create these classes. Innovative classes of shares may be created in connection with raising debt or equity capital. Securities with novel provisions are often created to meet perceived corporate needs in specific circumstances or because of financial problems generated by market conditions for capital. Novel classes of shares may also be created in order to effectuate desired control relationships among the participants in a venture. Classes of shares are likely to be used for this purpose in closely held corporations, whether or not statutory close corporation status is elected, but may also be used for this purpose by publicly held corporations.

Examples of innovative classes of shares are the following:

(1) Shares of one class may be authorized to elect a specified number of directors while shares of a second class may be authorized to elect the same or a different number of directors.

(2) Shares of one class may be entitled to vote as a separate voting group on certain transactions, but shares of two or more classes may be only entitled to vote together as a single voting group on the election of directors and other matters.

(3) Shares of one class may be nonvoting or

may be given multiple or fractional votes per share.

(4) Shares of one class may be entitled to different dividend rights or rights on dissolution than shares of another class.

These examples are intended to be illustrative only and not to exhaust the variations permissible under the Model Act.

A corporation has power to issue debt securities under section 3.02(7). Although section 6.01 authorizes the creation of interests that usually will be classed as "equity" rather than "debt," it is permissible to create classes of securities under section 6.01 that have some of the characteristics of debt securities. These securities are often referred to as "hybrid securities." Section 6.01 of the Model Act does not limit the development of hybrid securities, and equity securities may be created under the Model Act that embody any characteristics of debt that may be desired. Unlike some state statutes, however, the Model Act restricts the power to vote to securities classed as "shares" in the articles of incorporation.

NORTH CAROLINA COMMENTARY

The Model Act was modified in this section to deal only with the kind of shares that are authorized and, in G.S. 55-6-02, to deal only with blank shares where the board of directors fixes or determines the terms of a series within a class of shares. The Model Act blends these provisions by providing the authority to issue a series within a class in section 6.02 instead of section 6.01. Subsection (a) of this section incorporates subsection (b) of section 6.02 of the Model Act, slightly modified for clarity, while subsection (c) of section 6.02 was incorporated as subsection (b) of this section.

The last sentence of subsection (a) was added to dispel any possible conflict between this section and Article 9.

Former G.S. 55-40(c), relating to dividend credits, was brought forward as subdivision (d)(5), to continue providing for the permanent grandfathering of dividend credits.

Other minor modifications to the Model Act's language were made for clarification.

Cross References. — As to rights of holders of debt securities, see G.S. 55-7-21.1.

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

For article on the evolution of corporate combination law, see 76 N.C.L. Rev. 687 (1998).

CASE NOTES

Editor's Note. *— Some of the cases below were decided under prior law.*

Preferred stock forms a part of the capital stock of the corporation, entitling the holders to all rights of the stockholder subject to the terms and conditions on which their stock was issued. Kistler v. Caldwell Cotton Mills Co., 205 N.C. 809, 172 S.E. 373 (1934).

Preferred stockholder is not a creditor of the corporation, and must be confined to his rights as a stockholder. Weaver Power Co. v. Elk Mt. Mill Co., 154 N.C. 76, 69 S.E. 747 (1910).

Priorities of preferred stock are always subject to the rights of creditors. So an attempt of the corporation to give the preferred stockholders a lien upon its realty in the nature of a mortgage or deed of trust under the provisions of its charter is ineffectual as to the prior rights of creditors. Ellington v. Raleigh Bldg. Supply Co., 196 N.C. 784, 147 S.E. 307 (1929).

Voting Rights Not to Be Restricted. — When a corporation through its articles has authorized only one class of stock, any provision in the articles of incorporation that serves to restrict the voting rights of its shareholders is void as violative of subsection (c). Byrd v. Raleigh Golf Ass'n, 123 N.C. App. 272, 472 S.E.2d 395 (1996).

Provisions in defendant's articles of incorporation were void to the extent that they purported to condition each shareholder's right to vote upon the payment of annual dues. Byrd v. Raleigh Golf Ass'n, 123 N.C. App. 272, 472 S.E.2d 395 (1996).

§ 55-6-02. Terms of class or series determined by board of directors.

(a) If the articles of incorporation so provide, the board of directors may determine, in whole or part, the preferences, limitations, and relative rights (within the limits set forth in G.S. 55-6-01) of (1) any class of shares before the issuance of any shares of that class or (2) one or more series within a class before the issuance of any shares of that series.

(b) Before issuing any shares of a class or series created under this section, the corporation must deliver to the Secretary of State for filing articles of amendment, which are effective without shareholder action, that set forth:

(1) The name of the corporation;
(2) The text of the amendment determining the terms of the class or series of shares;
(3) The date it was adopted; and
(4) A statement that the amendment was duly adopted by the board of directors. (1901, c. 2, s. 19; 1903, c. 660, ss. 2, 3; Rev., s. 1159; C.S., s. 1156; 1923, c. 155; 1925, c. 118, ss. 2, 2a; 1939, c. 199; G.S., s. 55-61; 1953, c. 822, s. 1; 1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 6.02 permits the board of directors, if authority to do so is contained in the articles, to fix the terms of a class of shares to meet corporate needs, including current requirements of the securities market or the exigencies of negotiations for acquisition of other corporations or properties, without the necessity of holding a shareholders' meeting to amend the articles. This section therefore permits prompt action and gives desirable flexibility. The articles of incorporation may also create "series" of shares within a class (rather than designating that "series" as a separate class) if that is deemed desirable.

The board of directors may create new series within a class or set the terms of a class or series only if there are no outstanding shares of that class or series. This section recognizes that in some contexts there is no substantive difference between a "class" and a "series within a class," and that the labels are often a matter of convenience. In appropriate circumstances, a series may be treated as a class of shares that has one or both of the fundamental characteristics described in section 6.01(b).

Shares of stock to be issued in different classes or series that vary in terms to be set by the board of directors are sometimes referred to as "blank stock." The granting of the power to vary the terms gives the board of directors broad power to affect the capital structure of the corporation. Exercise of this power may in some circumstances dilute the interest of existing shareholders. But on balance it is desirable to permit this flexibility.

The power to vary the terms of "blank stock" for series of the same class extends to all the permitted variables set forth in section 6.01(c).

Subsection (e) requires a simple official filing to amend the articles so there will be a public record of the class or series the corporation intends to issue. The amendment may be made without shareholder action. See section 10.02.

NORTH CAROLINA COMMENTARY

Subsection (a) is identical to the Model Act's subsection 6.02(a), and subsection (b) is the same as the Model Act's subsection 6.02(d). As explained in the North Carolina Comment to G.S. 55-6-01, subsections (b) and (c) of the Model Act's section 6.02 were incorporated into G.S. 55-6-01 rather than this section.

§ 55-6-03. Issued and outstanding shares.

(a) A corporation may issue the number of shares of each class or series authorized by the articles of incorporation. Shares that are issued are outstanding shares until they are reacquired, redeemed, converted, or cancelled.

(b) The reacquisition, redemption, or conversion of outstanding shares is subject to the limitations of subsection (c) of this section and to G.S. 55-6-40.

(c) At all times that shares of the corporation are outstanding, there must be outstanding one or more shares that together have unlimited voting rights and one or more shares that together are entitled to receive the net assets of the corporation upon dissolution. (1901, c. 2, s. 19; 1903, c. 660, ss. 2, 3; Rev., s.

1159; C.S., s. 1156; 1921, c. 116, s. 1; 1923, c. 155; C.S., s. 1167(a); 1925, c. 118, ss. 2, 2a; c. 262, s. 1; 1939, c. 199; 1949, c. 929; G.S., ss. 55-61, 55-73; 1953, c. 822, ss. 1, 3; 1955, c. 1371, s. 1; 1969, c. 751, ss. 15-17; 1985, c. 117, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 6.03 permits the corporation to issue shares up to the number of shares authorized in the articles of incorporation and provides that shares that are issued are outstanding shares for purposes of this Act until they are reacquired, redeemed, converted, or cancelled. The determination of the number of shares to be issued is usually made by the board of directors but may be reserved by the articles of incorporation to the shareholders. The only requirements are that no class of shares be overissued and that one or more shares of a class or classes that together have unlimited voting power and one or more shares of a class or classes that together are entitled to the net assets of the corporation upon dissolution at all times must be outstanding.

Shares of any class that are outstanding may be made subject to share transfer restrictions that may result in contractual obligations by the corporation to reacquire shares. The validity of such share transfer restriction is today not open to serious question. See section 6.27. The corporation may also acquire outstanding shares of any class pursuant to a voluntary transaction between the shareholder and the corporation. All contractual or voluntary reacquisitions are subject to the restrictions set forth in subsection (c) of this section and to section 6.40. The corporation may also reacquire shares pursuant to a right of redemption (or an obligation to redeem) established in the articles of incorporation. See section 6.01(c)(2). All such redemptions of shares are also subject to the restrictions of subsection (c) of this section and to section 6.40. Shares of the class or classes described in section 6.01(b) may be reacquired or redeemed by the corporation in any of the foregoing ways to the same extent as shares of any other class, subject, however, to the overriding requirement of section 6.03(c) that at all times at least shares that meet the requirements of section 6.01(b) be outstanding.

The provisions of the revised Model Act are consistent with the specialized class of corporation known as the open-end investment company, which permits unlimited redemptions of shares at net asset value at the request of shareholders. Sections 6.01 and 6.03 permit the classes of shares with voting and dissolution rights to be made redeemable without limitation. The requirement of section 6.03(c) that at least one share be outstanding is also consistent with an unlimited right of redemption since that section only applies while there are shares of stock outstanding. If an open-end investment company or any other corporation should redeem all of its outstanding shares, it should file articles of dissolution under chapter 14 at or before the time the last share is redeemed.

NORTH CAROLINA COMMENTARY

A minor stylistic change from the Model Act was made in subsection (c).

§ 55-6-04. Fractional shares.

(a) A corporation may:

(1) Issue fractions of a share or pay in money the value of fractions of a share;

(2) Arrange for disposition of fractional shares by the shareholders;

(3) Issue scrip in registered or bearer form entitling the holder to receive a full share upon surrendering enough scrip to equal a full share.

(b) Each certificate representing scrip must be conspicuously labeled "scrip" and must contain the information required by G.S. 55-6-25(b).

(c) The holder of a fractional share is entitled to exercise the rights of a shareholder, including the right to vote, to receive dividends, and to participate in the assets of the corporation upon liquidation. The holder of scrip is not entitled to any of these rights unless the scrip provides for them.

(d) The board of directors may authorize the issuance of scrip subject to any condition considered desirable, including:

(1) That the scrip will become void if not exchanged for full shares before a specified date; and
(2) That the shares for which the scrip is exchangeable may be sold and the proceeds paid to the scripholders. (1955, c. 1371, s. 1; 1959, c. 1316, s. 20; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Fractional shares may arise from a share dividend that, as applied to a particular holder, does not produce an even multiple of shares; they may also result from fractional stock splits, from reverse splits, and from reclassifications and mergers. Although corporations are authorized to issue fractional shares, which are vested proportionately with the same rights as full shares, the creation of fractional shares often creates administrative difficulties, particularly for voting and dividend purposes.

Section 6.04 authorizes handling fractional shares in various ways, including:

(1) The corporation may issue scrip instead of fractional shares. Scrip confers none of the substantive rights of shareholders, but only authorizes holders to combine scrip certificates in amounts aggregating a full share and then to exchange them for a full share. This aggregation must occur within the time and subject to the conditions set initially by the board of directors and stated in the scrip certificate. Scrip that is not combined and exchanged becomes void. To protect shareholders against forfeiture of their interest, however, it is usually provided that the shares represented by scrip certificates not exchanged by the expiration date are to be sold and the proceeds held, either indefinitely or for a stated period, for the benefit of the scripholders and paid to them on surrender of their scrip certificate.

Scrip has been widely used in lieu of fractional shares. The New York Stock Exchange, while not requiring the use of any particular method for the settlement of fractional share interests, has established a policy relating to the minimum rights and privileges that scrip issued by registered companies must provide. N.Y.S.E. LISTED COMPANY MANUAL § 703.02(B).

(2) The corporation may authorize the immediate sale of all fractional share interests, thereby avoiding the expense and delay of scrip and the inconvenience of recognizing fractional shares. While this procedure denies shareholders the benefit of any subsequent rise in the market, it protects them against any subsequent decline and ensures them of recognition based on market values contemporaneous with the transaction. Since these transactions necessarily involve less than one full share for each shareholder, the amount involved in subsequent price changes is usually modest.

One variation of "going private" transactions to eliminate public shareholders in a corporation largely owned by management interests involves a reverse share split at a ratio that reduces all public shareholders' interest to a fractional share, followed by the reduction of the fractional interests to cash under this section. See "Guidelines on Going Private," 37 BUS. LAW. 313 (1981).

Under this section fractional shares may be certificated or uncertificated. There is no difference in treatment of certificated or uncertificated shares for this purpose. See sections 6.25 and 6.26.

§§ 55-6-05 through 55-6-19: Reserved for future codification purposes.

Part 2. Issuance of Shares.

§ 55-6-20. Subscription for shares before incorporation.

(a) A subscription for shares entered into before incorporation is irrevocable for six months unless the subscription agreement provides a longer or shorter period or all the subscribers agree to revocation.

(b) The board of directors may determine the payment terms of subscriptions for shares that were entered into before incorporation, unless the subscription agreement specifies them. A call for payment by the board of directors must be uniform so far as practicable as to all shares of the same class or series, unless the subscription agreement specifies otherwise.

(c) Shares issued pursuant to subscriptions entered into before incorporation are fully paid and nonassessable when the corporation receives the consideration specified in the subscription agreement.

(d) If a subscriber defaults in payment of money or property under a subscription agreement entered into before incorporation, the corporation may collect the amount owed as any other debt. Alternatively, unless the subscription agreement provides otherwise, the corporation may rescind the agreement and may sell the shares if the debt remains unpaid more than 20 days after the corporation sends written demand for payment to the subscriber.

(e) A subscription agreement entered into after incorporation is a contract between the subscriber and the corporation subject to G.S. 55-6-21. (1901, c. 2, ss. 23, 24, 25; Rev., ss. 1169, 1170, 1171; C.S., s. 1165; G.S., s. 55-70; 1955, c. 1371, s. 1; 1969, c. 751, s. 18; 1985, c. 117, s. 2; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Agreements for the purchase of shares to be issued by a corporation are typically referred to as "subscriptions" or "subscription agreements." Section 6.20 deals exclusively with preincorporation subscriptions, that is, subscriptions entered into before the corporation was formed. Preincorporation subscriptions have often been considered to be revocable offers rather than binding contracts. Since the corporation is not in existence, it cannot be a party to the agreement and the consideration established for the shares is not determined by the board of directors. While preincorporation subscriptions entered into simultaneously by several subscribers may be considered a binding contract between or among the subscribers, not all factual situations lend themselves to contractual analysis. Because of the uncertainty of the legal enforceability of these transactions, section 6.20 provides a simple set of legal rules applicable to the enforcement of preincorporation subscriptions by the corporation after its formation. It does not address the extent to which preincorporation subscriptions may constitute a contract between or among subscribers, and other subscribers may enforce whatever contract rights they have without regard to section 6.20.

Section 6.20(a) provides that preincorporation subscriptions are irrevocable for six months unless the subscription agreement provides that they are revocable or that they are irrevocable for some other period. Nevertheless, all the subscribers to shares may agree at any time that a subscriber may withdraw in part from his commitment to subscribe for shares, that a subscriber may revoke his subscription entirely, or that the period of irrevocability may continue for an additional stated period. If the corporation accepts the subscription during the period of irrevocability, the subscription becomes a contract binding on both the subscribers and the corporation. The terms of this contract are set forth in sections 6.20(b) and (d).

Section 6.20(b) provides that after incorporation the board of directors may determine the payment terms of subscriptions but these calls must be uniform so far as practicable as to all shares of the same class or series unless the subscriptions provide otherwise. Section 6.20(d) provides alternative methods of enforcement of preincorporation subscriptions by the corporation. If the consideration for the subscription involves the payment of money or conveyance of property, the corporation may, in the event of nonpayment, collect the amount due as any other debt. Alternatively, unless the subscription agreement provides otherwise, the corporation may rescind the agreement and may resell the shares after 20 days' notice to the subscriber.

Section 6.20(c) provides that shares issued pursuant to preincorporation subscriptions are fully paid and nonassessable when the corporation receives the subscription price. The liability of the subscriber to pay the purchase price is addressed in section 6.22. Section 6.20 does not address the liability of transferees of shares which may be issued before the subscription price is paid for the power of the corporation to cancel for nonpayment shares that have been issued before payment for the full subscription price. Issued shares represented by unpaid subscriptions are subject to cancellation for nonpayment to the same extent as shares issued for promissory notes or shares issued before the consideration therefor is paid. See the Official Comment to sections 6.21 and 6.22.

Post-incorporation subscriptions are contracts between the corporation and the investor by which the corporation agrees to issue shares for a stated consideration and the investor agrees to purchase the shares for that consideration. Post-incorporation subscriptions are simple contracts subject to the power of the board of directors and they may contain any mutually acceptable provisions subject to section 6.21. Section 6.20(e) states, for completeness, that post-incorporation subscriptions are contracts between the corporation and the subscriber subject to section 6.21.

NORTH CAROLINA COMMENTARY

The liquidated damages provision of former G.S. 55-43(i) was not brought forward. Under that provision, it was more disadvantageous for a subscriber to pay some money than to pay no money for shares under a subscription agreement, and the drafters concluded that this result was undesirable.

CASE NOTES

***Editor's Note.** — The cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Purpose. — The purpose of any statute of frauds type of provision, such as former G.S. 55-43, is to prevent fraud by requiring certain important transactions to be evidenced by a writing. Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360 (1984), rev'd on other grounds, 314 N.C. 1, 332 S.E.2d 51 (1985).

Physician Held Not an Equitable Stockholder in Professional Association. — Assuming, arguendo, that professional association and physician entered into a binding post-incorporation subscription agreement, under the facts, where physician neither tendered payment within a reasonable time nor demonstrated circumstances excusing such tender, he was not an equitable stockholder in the professional association. Buchele v. Pinehurst Surgical Clinic, 80 N.C. App. 256, 341 S.E.2d 772, aff'd, 318 N.C. 503, 349 S.E.2d 579 (1986).

Former Section Held Inapplicable. — Former G.S. 55-43 did not apply in an action by a former husband against his former wife and her incorporated fast food restaurant franchise for a declaration that he was entitled to an ownership interest. This was not an action in which a defendant was trying to enforce a plaintiff's promise to take shares in a corporation, but an action in which the plaintiff attempted to enforce the defendant's promise or contract to issue shares to the plaintiff, the number of shares to represent a certain percentage of ownership within the corporation being formed. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

Conditional Subscription. — A subscription to stock of a corporation may be made on condition that there shall be no liability until the corporation has received actual subscriptions to its capital stock to a specified amount. Alexander v. North Carolina Sav. Bank & Trust Co., 155 N.C. 124, 71 S.E. 69 (1911). See Penniman v. Alexander, 111 N.C. 427, 16 S.E. 408 (1892); Kelly v. Oliver, 113 N.C. 442, 18 S.E. 698 (1893); Queen City Printing & Paper Co. v. McAden, 131 N.C. 178, 42 S.E. 575 (1902).

§ 55-6-21. Issuance of shares.

(a) The powers granted in this section to the board of directors may be reserved to the shareholders by the articles of incorporation.

(b) The board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation.

(c) Before the corporation issues shares, the board of directors must determine that the consideration received or to be received for shares to be issued is adequate. The determination by the board of directors as to the adequacy of consideration is conclusive as to whether the shares are validly issued, fully paid, and nonassessable.

(d) When the corporation receives the consideration for which the board of directors authorized the issuance of shares, the shares issued therefor are fully paid and nonassessable.

(e) The corporation may place in escrow shares issued for a contract for future services or benefits or for a promissory note, or make other arrangements to restrict the transfer of the shares, and may credit distributions in respect of the shares against their purchase price, until the services are performed, the note is paid, or the benefit received. If the services are not performed, the note is not paid, or the benefits are not received, the shares escrowed or restricted and the distributions credited may be cancelled in whole or part. (1901, c. 2, ss. 19, 53, 54; 1903, c. 660, ss. 2, 3; Rev. ss. 1159, 1160, 1161; C.S., ss. 1157, 1158; G.S., ss. 55-62, 55-63; 1955, c. 1371, s. 1; 1957, s. 1039; 1959, c. 1316, ss. 10, 13, 14; 1969, c. 751, s. 20; 1973, c. 469, ss. 15, 45.2; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.7.)

OFFICIAL COMMENT

The financial provisions of the Model Act reflect a modernization of the concepts underlying the capital structure and limitations on distributions of corporations. This process of modernization began with amendments in 1980 to the 1969 Model Act that eliminated the concepts of "par value" and "stated capital," and further modernization occurred in connection with the development of the revised Act in 1984. Practitioners and legal scholars have long recognized that the statutory structure embodying "par value" and "legal capital" concepts is not only complex and confusing but also fails to serve the original purpose of protecting creditors and senior security holders from payments to junior security holders. Indeed, to the extent security holders are led to believe that it provides this protection, these provisions may be affirmatively misleading. The Model Act has therefore eliminated these concepts entirely and substituted a simpler and more flexible structure that provides more realistic protection to these interests. Major aspects of this new structure are:

(1) the provisions relating to the issuance of shares set forth in this and the following sections;
(2) the provisions limiting distributions by corporations set forth in section 6.40 and discussed in the Official Comment to that section; and
(3) the elimination of the concept of treasury shares described in the Official Comment to section 6.31.

Section 6.21 incorporates not only the elimination of the concepts of par value and stated capital from the Model Act in 1980 but also eliminates the earlier rule declaring certain kinds of property ineligible as consideration for shares. The caption of the section, "Issuance of Shares by the Board of Directors," reflects the change in emphasis from imposing restrictions on the issuance of shares to establishing general principles for their issuance. The section replaces two sections captioned, respectively, "Consideration for Shares" (section 18) and "Payment for Shares" (section 19) in the 1969 Model Act.

Since shares need not have a par value, under section 6.21 there is no minimum price at which specific shares must be issued and therefore there can be no "watered stock" liability for issuing shares below an arbitrarily fixed price. The price at which shares are issued is primarily a matter of concern to other shareholders whose interests may be diluted if shares are issued at unreasonably low prices or for overvalued property. This problem of equality of treatment essentially involves honest and fair judgments by directors and cannot be effectively addressed by an arbitrary doctrine establishing a minimum price for shares such as "par value" provided under older statutes.

Section 6.21(b) specifically validates contracts for future services (including promoters' services), promissory notes, or "any tangible or intangible property or benefit to the corporation," as consideration for the present issue of shares. The term "benefit" should be broadly construed to include, for example, a reduction of a liability, a release of a claim, or benefits obtained by a corporation by contribution of its shares to a charitable organization or as a prize in a promotion. In the realities of commercial life, there is sometimes a need for the issuance of shares for contract rights or such intangible property or benefits. And, as a matter of business economics, contracts for future services, promissory notes, and intangible property or benefits often have value that is as real as the value of tangible property or past services, the only types of property that many older statutes permit as consideration for shares. Thus, only business judgment should determine what kind of property should be obtained for shares, and a determination by the directors meeting the requirements of section 8.30 to accept a specific kind of valuable property for shares should be accepted and not circumscribed by artificial or arbitrary rules.

The issuance of some shares for cash and other shares for promissory notes, contracts for past or future services, or for tangible or intangible property or benefits, like the issuance of shares for an inadequate consideration, opens the possibility of dilution of the interests of other shareholders. For example, persons acquiring shares for cash may be unfairly treated if optimistic values are placed on past or future services or intangible benefits being provided by other persons. The problem is particularly acute if the persons providing services, promissory notes, or property or benefits of debatable value are themselves connected with the promoters of the corporation or with its directors.

Protection of shareholders against abuse of the power granted to the board of directors to determine that shares should be issued for intangible property or benefits is provided in part by the requirement that the board must act in accordance with the requirements of section 8.30, and, if applicable, section 8.31, in determining that the consideration received for shares is adequate, and in part by the requirement of section 16.21 that the corporation must inform all shareholders annually of all shares issued during the previous year for promissory notes or promises of future services.

Accounting principles are not specified in the Model Act, and the board of directors is not required by the statute to determine the "value" of noncash consideration received by the corporation (as was the case in earlier versions of the Model Act). In many instances, property or benefit received by the corporation will be of uncertain value; if the board of directors determines that the issuance of shares for the property or benefit is an appropriate transaction that protects the shareholders from dilution, that is sufficient under section 6.21. The board of directors does not have to make an explicit "adequacy" determination by formal resolution; that determination may be inferred from a determination to authorize the issuance of shares for a specified consideration.

Section 6.21 also does not require that the board of directors determine the value of the consideration to be entered on the books of the corporation, though the board of directors may do so if it wishes. Of course, a specific value must be placed on the consideration received for the shares for bookkeeping purposes, but bookkeeping details are not the statutory responsibility of the board of directors. The statute also does not require the board of directors to determine the corresponding entry on the right-hand side of the balance sheet under owner's equity to be designated as "stated capital" or be allocated among "stated capital" and other surplus accounts. The corporation, however, may determine that the shareholders' equity accounts should be divided into these traditional categories if it wishes.

The second sentence of section 6.21(c) describes the effect of the determination by the board of directors that consideration is adequacy for the issuance of shares. That determination, without more, is conclusive to the extent that adequacy is relevant to the question whether the shares are validly issued, fully paid, and nonassessable. Section 6.21(c) provides that shares are fully paid and nonassessable when the corporation receives the consideration for which the board of directors authorized their issuance. Whether shares are validly issued may depend on compliance with corporate procedural requirements, such as issuance within the amount authorized in the articles of incorporation or holding a directors' meeting upon proper notice and with a quorum present. The Model Act does not address the remedies that may be available for issuances that are subject to challenge. This somewhat more elaborate clause replaces the provision in earlier versions of the Model Act and many state statutes that the determination by the board of directors of consideration for the issuance of shares was "conclusive in the absence of fraud in the transaction."

Shares issued pursuant to preincorporation subscriptions are governed by section 6.20 and not this section.

The revised Model Act does not address the question whether validly issued shares may thereafter be cancelled on the grounds of fraud or bad faith if the shares are in the hands of the original shareholder or other persons who were aware of the circumstances under which they were issued when they acquired the shares. It also leaves to the Uniform Commercial Code other questions relating to the rights of persons other than the person acquiring the shares from the corporation. See the Official Commercial to section 6.22.

Section 6.21(e) permits the board of directors to determine that shares issued for promissory notes or for contracts for future services or benefits be placed in escrow or their transfer otherwise restricted until the services are performed, the benefits received, or the notes are paid. The section also defines the rights of the corporation with respect to these shares. If the shares are issued without being restricted as provided in this subsection, they are validly issued insofar as the adequacy of consideration is concerned. See section 6.22 and its Official Comment.

Section 6.21(a) provides that the powers granted to the board of directors by this section may be reserved to the shareholders by the articles of incorporation. No negative inference should be drawn from section 6.21(a) with respect to the efficacy of similar provisions under other sections of the Model Act.

NORTH CAROLINA COMMENTARY

Except for a minor stylistic change, this section is identical to section 6.21 of the Model Act. It differs in three main respects from former G.S. 55-46. First, the provisions of this section do not tie the minimum amount of consideration that must be received upon the issuance of the shares to their par or stated value. Second, the form that such consideration may take has been expanded to include future services and promissory notes, which were prohibited by former G.S. 55-46(b). Third, the board of directors is no longer required to state its determination of the fair value to the corporation of noncash consideration paid for shares; it is required only to determine that the noncash consideration is adequate.

CASE NOTES

Editor's Note. *— The cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Purpose Is to Prevent Fraud. — Former G.S. 55-62 was passed in order that stock subscriptions should be protected in their integrity and not become a means of deceiving those who dealt with the corporation. Goodman v. White, 174 N.C. 399, 93 S.E. 906 (1917).

Effect of Charter Provision That Stock Be Issued as Fully Paid. — A provision in the charter of an incorporated company that the capital stock "shall be issued as full-paid stock" does not permit shares of stock to be issued to stockholders without payment in money or its equivalent in property at an honest valuation. Clayton v. Ore Knob Co., 109 N.C. 385, 14 S.E. 36 (1891).

Cash Payment Unnecessary. — It is not essential to a bona fide subscription to stock in a corporation that there be a present payment in cash by the subscriber, or that he be solvent; a subscription is considered bona fide whenever made by one who subscribes in good faith, with reasonable expectation and apparent prospect of being able to pay assessments on his stock as they may thereafter be called for. Boushall v. Myatt, 167 N.C. 328, 83 S.E. 352 (1914).

Burden of Proof as to Value of Property. — The burden of proving that property was taken in payment at its true value, and, further, that such value was approved by a board of directors acting independently in the interest of the corporation, is upon the person who alleges payment. Goodman v. White, 174 N.C. 399, 93 S.E. 906 (1917).

Proceedings Where Property Fraudulently Overvalued. — Although a margin may be allowed for an honest difference of opinion as to value, a valuation grossly excessive, knowingly made, while its acceptance may bind the corporation, is a fraud on creditors, and they may proceed against the stockholders who sell the property individually, as for an unpaid subscription. Hobgood v. Ehlen, 141 N.C. 344, 53 S.E. 857 (1906); Goodman v. White, 174 N.C. 399, 93 S.E. 906 (1917).

Evidence of Fraud. — In an action by the receivers of an insolvent corporation to compel the payment of a subscription to stock issued for property acquired by the corporation for the conduct of the business, evidence tending to show a grossly excessive valuation of the property by the directors, knowingly made, is strong evidence of fraud, and may be conclusive thereof. Whitlock v. Alexander, 160 N.C. 465, 76 S.E. 538 (1912).

Nonsuit Properly Granted Absent Fraud. — The judgment of the board of directors, in fixing the value of property to be accepted in lieu of money, is conclusive in the absence of fraud; and in a suit to recover on a stock subscription, where there is no evidence of fraud, a judgment as of nonsuit is properly granted. Gover v. Malever, 187 N.C. 774, 122 S.E. 841 (1924).

Illegal Transaction by Promoter. — A transaction whereby a promoter borrowed a certain sum and bought a half interest in a company, and let the company that he was promoting take it over as soon as it was incorporated, and pay his note, and also issue to him stock as the consideration, was illegal. Goodman v. White, 174 N.C. 399, 93 S.E. 906 (1917).

The word "rendered" in former statute indicated that the services had to be performed prior to the issuance of the shares; so the requirement that the shares be taken for an agreed price has been satisfied by previous years of work in the business. Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360 (1984), rev'd on other grounds, 314 N.C. 1, 332 S.E.2d 51 (1985).

Cancellation of Officer's Shares for Nonpayment of Consideration. — Where the trial court specifically found as fact that officer and director paid no consideration for stock and caused a dilution of the shares of the other shareholders, the trial court properly cancelled his shares. Stone v. Martin, 85 N.C. App. 410, 355 S.E.2d 255, appeal dismissed and cert. denied, 320 N.C. 638, 360 S.E.2d 105 (1987).

§ 55-6-22. Liability of shareholders.

(a) A purchaser from a corporation of its own shares is not liable to the corporation or its creditors with respect to the shares except to pay the consideration for which the shares were authorized to be issued (G.S. 55-6-21) or specified in the subscription agreement (G.S. 55-6-20).

(b) Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct. (1893, c. 471; 1901, c. 2, s. 22; Rev., s. 1162; C.S., s. 1160; G.S., s. 55-65; 1955, c. 1371, s. 1; 1969, c. 751, s. 28; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

With the elimination of the concepts of par value and watered stock in 1980, the sole obligation of a purchaser of shares from the corporation, as set forth in section 6.22(a), is to pay the consideration established by the board of directors (or the consideration specified in the subscription, in the case of pre-incorporation subscriptions). The consideration for the shares may consist of promissory notes, contracts for future services, or tangible or intangible property or benefits, and, if the board of directors so decide, the delivery of the notes, contracts, or accrual of the benefits constitutes full payment for the shares. See the Official Comment to section 6.21. Upon the transfer to the corporation of the consideration so determined or specified, the shareholder has no further responsibility to the corporation or its creditors "with respect to the shares," though the shareholder may have continuing obligations under a contract or promissory note entered into in connection with the acquisition of shares.

Section 6.22(a) deals only with the responsibility for payment by the purchaser of shares from the corporation. The revised Model Act leaves to the Uniform Commercial Code questions with respect to the rights of subsequent purchasers of shares and the power of the corporation to cancel shares if the consideration is not paid when due. See sections 8-202 and 8-301 of the UNIFORM COMMERCIAL CODE.

Section 6.22(b) sets forth the basic rule of nonliability of shareholders for corporate acts or debts that underlies modern corporation law. Unless such liability is provided for in the articles of incorporation, see section 2.02(b)(v), shareholders are not liable for corporate obligations, though the last clause recognizes that such liability may be assumed voluntarily or by other conduct.

NORTH CAROLINA COMMENTARY

Former G.S. 55-53, a unique North Carolina provision dealing with "watered shares," has not been brought forward. Its provisions were deemed unnecessary in light of the provisions of G.S. 55-6-21. Former G.S. 55-53 basically codified fundamental legal principles of fiduciary duty that have not been changed by this Act.

Legal Periodicals. — For note on close corporations and personal liability from execution of shareholder agreements, see 16 Wake Forest L. Rev. 975 (1980).

For note discussing the liability of members of a professional corporation, in light of Nelson v. Patrick, 73 N.C. App. 1, 326 S.E.2d 45 (1985), see 64 N.C.L. Rev. 1216 (1986).

For article, "Defining the Scope of Controlling Shareholders' Fiduciary Responsibilities," see 22 Wake Forest L. Rev. 9 (1987).

For article, "Close Corporation Shareholder Reasonable Expectations: The Larger Context," see 22 Wake Forest L. Rev. 41 (1987).

For article, "The Statutory Protection Of Minority Shareholders In The United Kingdom," see 22 Wake Forest L. Rev. 81 (1987).

For article, "Using Alternative Dispute Resolution Techniques To Settle Conflicts Among Shareholders Of Closely Held Corporations," see 22 Wake Forest L. Rev. 105 (1987).

For comment, "North Carolina's Limited Liability Company Act: A Legislative Mandate for Professional Limited Liability," see 29 Wake Forest L. Rev. 857 (1994).

CASE NOTES

Editor's Note. — *Some of the cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Stockholders of an insolvent corporation are liable pro rata for their unpaid subscriptions to an amount necessary to liquidate the corporate debts. McIver v. Young Hdwe. Co., 144 N.C. 478, 57 S.E. 169 (1907); Whitlock v. Alexander, 160 N.C. 465, 76 S.E. 538 (1912); Claypoole v. McIntosh, 182 N.C. 109, 108 S.E. 433 (1921).

Unpaid Balances to Be Collected. — As the capital stock, paid or unpaid, of a corporation is a trust fund for the benefit of creditors, it is the duty of the courts, at the suit of creditors, to require unpaid subscriptions to be collected at least to the extent necessary to pay the unpaid debts of the corporation. Wilson Cotton Mills v. Randleman Cotton Mills, 115 N.C. 475, 20 S.E. 770 (1894).

And Used to Settle Outstanding Claims. — In case of insolvency any unpaid balance may, by proper proceedings, be made available to the extent required for the settlement of outstanding claims. Whitlock v. Alexander, 160 N.C. 465, 76 S.E. 538 (1912).

As to action by corporation to recover amount spent to purchase stock from shareholders, see Park Terrace, Inc. v. Burge, 249 N.C. 308, 106 S.E.2d 478 (1959), discussing right of creditors to require payment of purchase price.

Agreement for Release Ineffective Against Creditors. — No agreement or arrangement between a corporation and its stockholders, whereby the latter are to be released from indebtedness on their subscriptions, will be valid or of any force as against creditors. Marshall Foundry Co. v. Killian, 99 N.C. 501, 6 S.E. 680 (1888); Heggie v. People's Bldg. & Loan Ass'n, 107 N.C. 581, 12 S.E. 275 (1890). See also Gilmore v. Smathers, 167 N.C. 440, 83 S.E. 823 (1914).

Suspension of Corporate Enterprise Does Not Excuse Subscriber. — The mere fact that a proposed corporate enterprise has been suspended affords a subscriber to the capital stock no excuse for not paying his subscription according to his agreement. Raleigh Imp. Co. v. Andrews, 176 N.C. 280, 96 S.E. 1032 (1918), aff'd, 178 N.C. 328, 100 S.E. 514 (1919).

No Defense That Corporation Not Legally Organized. — Where a person has agreed to become a stockholder in a corporation and has enjoyed the benefits and privileges of membership, he cannot, in a suit by the corporation to recover his unpaid subscription, set up as a defense that the corporation was not legally organized. Tar River Nav. Co. v. Neal, 10 N.C. 520 (1825); Elizabeth City Academy v. Lindsey, 28 N.C. 476 (1846); Wilmington, C.R.R.R. v. Thompson, 52 N.C. 387 (1860); Marshall Foundry Co. v. Killian, 99 N.C. 501, 6 S.E. 680 (1888); Wadesboro Cotton Mills Co. v. Burns, 114 N.C. 353, 19 S.E. 238 (1894).

Setoffs Against Unpaid Subscriptions. — In a receiver's action to collect unpaid stock subscriptions, a subscriber cannot set off a debt due him by the corporation, nor can he credit himself with amounts he paid on another subscription. Vaughan-Robertson Drug Co. v. Grimes-Mills Drug Co., 173 N.C. 502, 92 S.E. 376 (1917).

Shareholders Not Personally Liable for Corporation's Acts. — Third-party plaintiff developer's indemnity complaint against third-party defendant shareholders concerning actions taken by their corporation in arranging for the excavation of a certain ditch failed because, pursuant to G.S. 55-6-22(b), and absent the application of certain exceptions that did not apply to the facts, the shareholders could not be personally liable for the corporation's acts. BNT Co. v. Baker Precythe Dev. Co., 151 N.C. App. 52, 564 S.E.2d 891, 2002 N.C. App. LEXIS 677 (2002), cert. denied, 356 N.C. 159, 569 S.E.2d 283 (2002).

§ 55-6-23. Share dividends.

(a) Unless the articles of incorporation provide otherwise, shares may be issued pro rata and without consideration to the corporation's shareholders or to the shareholders of one or more classes or series. An issuance of shares under this subsection is a share dividend.

(b) Shares of one class or series may not be issued as a share dividend in respect of shares of another class or series unless:

(1) The articles of incorporation so authorize,

(2) There are no outstanding shares of the class or series to be issued, or

(3) A majority of the votes entitled to be cast by the class or series to be issued approve the issuance of not more than a stated number of shares within a period of not more than one year after such approval.

(c) If the board of directors does not fix the record date for determining shareholders entitled to a share dividend, it is the date the board of directors authorizes the share dividend. (1955, c. 1371, s. 1; 1959, c. 1316, ss. 17, 18; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.8.)

OFFICIAL COMMENT

A share dividend is solely a paper transaction: No assets are received by the corporation for the shares and any "dividend" paid in shares does not involve the distribution of property by the corporation to its shareholders. Section 6.23 therefore recognizes that such a transaction involves the issuance of shares "without consideration," and section 1.40(6) excludes it from the definition of a "distribution." Such transactions were treated in a fictional way under the old "par value" and "stated capital" statutes, which treated a share dividend as involving transfers from a surplus account to stated capital and assumed that par value shares could be issued without receiving any consideration by reason of that transfer of surplus.

The par value statutory treatment of share dividend transactions distinguished a share "split" from a dividend. In a share "split" the par value of the former shares was divided among the new shares and there was no transfer of surplus into the stated capital account as in the case of a share "dividend." Since the Model Act has eliminated the concept of par value, the distinction between a "split" and a "dividend" has not been retained and both types of transactions are referred to simply as "share dividends." A distinction between "share dividends" and "share splits," however, continues to exist in other contexts—for example, in connection with transactions by publicly held corporations, see N.Y.S.E. LISTED COMPANY MANUAL § 703.02(a), or corporations that have optionally retained par value for their shares. The change made in the Model Act is not intended to affect the manner in which transactions by these corporations are handled or described but simply reflects the elimination of artificial legal distinctions based on the par value statutes.

A "reversed stock split" is not a share dividend under this section of the Model Act. A reverse split involves an amendment to the articles of incorporation reducing the number of authorized shares, not the issuance of additional shares.

Share dividends may create problems when a corporation has more than a single class of shares. The requirement that a share dividend be "pro rata" only applies to shares of the same class or series; if there are two or more classes entitled to receive a share dividend in different proportions, the dividend will have to be allocated appropriately.

The distribution of shares of one class to holders of another class may dilute the equity of the holders of the first class. Therefore, subsection (b) permits the distribution of shares of one class to the holders of another class only if one or more of the following conditions are met: (1) the articles of incorporation expressly authorize the transaction, (2) the holders of the class being distributed consent to the distribution, or (3) there are no holders of the class being distributed.

NORTH CAROLINA COMMENTARY

This section was clarified by rewriting subsection (b) to provide for a more specific authorization and to limit the effectiveness of the authorization to one year, whenever shares of one class or series are to be distributed to the holder of another class or series. This modification to the Model Act carries forward the limitations of former G.S. 55-51(b)(2).

As used in this section and throughout this Act, share dividends and share splits are equivalent.

§ 55-6-24. Rights, options, and warrants.

(a) A corporation may issue rights, options, or warrants for the purchase of shares of the corporation. The board of directors shall determine the terms upon which the rights, options, or warrants are issued, their form and content, and the consideration for which the shares are to be issued.

(b) In the case of a public corporation, the terms and conditions of such rights, options or warrants may include, without limitation, restrictions or conditions that preclude or limit the exercise, transfer or receipt of such rights, options or warrants by the holder or holders or beneficial owner or owners of a specified number or percentage of the outstanding voting shares of such public corporation or by any transferee of any such holder or owner, or that invalidate or void such rights, options or warrants held by any such holder or owner or by such transferee. Determinations by the board of directors whether to impose, enforce, waive or otherwise render ineffective any such restrictions or conditions may be judicially reviewed in an appropriate proceeding. (1955, c. 1371, s. 1; 1959, c. 1316, s. 11; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

A specific provision authorizing the creation of share options and share rights appears in many states statutes. Even though corporations doubtless have the inherent power to issue share options and share rights, specific authorization is desirable because of the economic importance of options and rights, and because of the need to establish the primacy of the board of directors in determining the consideration received by the corporation for rights and options. The creation of incentive compensation plans for directors, officers, agents, and employees is basically a matter of business judgment and the good faith determination by the board of directors should therefore be conclusive. This is as true for incentive plans that involve the issuance of share options or rights as for those that involve the payment of cash. In appropriate cases incentive plans may involve the granting of options at prices below the current market prices of the shares.

Section 6.24 does not require shareholder approval of share options or rights as incentive plans. Of course, prior shareholder approval may be required as a discretionary matter, in order to comply with the requirements of national security exchanges for the listing of securities, see N.Y.S.E. LISTED COMPANY MANUAL § 309.00, or to acquire the benefits of federal law conditioned upon shareholder approval of such plans, see S.E.C. Rule 16b-3(a), 17 C.F.R. § 240.16b-3(a).

The reference to the "form" of a right, option, or warrant in section 6.24 permits the board of directors to designate the interest issued under section 6.24 as options, warrants, rights, or by some other name, and to evidence these interests by certificates, contracts, letter agreements, or in other forms that are appropriate under the circumstances. Rights, options, or warrants may be issued together with or independently of the corporation's issue and sale of its shares or other securities.

Some publicly held corporations have delegated administration of programs involving inçentive compensation in the form of share rights or options to compensation committees composed of nonmanagement directors, subject to the general authority of the board of directors.

NORTH CAROLINA COMMENTARY

Subsection (a) is identical to section 6.24 of the Model Act and is intended to be very broad in authorizing the creation and issuance of options, convertible securities and rights to acquire shares and other kinds of securities and property. The Model Act's catchline for the section was changed to reflect this broad scope. Unlike former G.S. 55-45(a), the statute itself does not require shareholder approval of any options granted thereunder; but, as noted in the Official Comment, such approval may be required by other rules or regulations.

Subsection (b) contains special provisions that do not appear in either the prior law or the Model Act and are designed to eliminate uncertainty as to the validity of certain rights plans created by companies with a class of securities registered under the Securities Exchange Act of 1934. Such plans usually contain features that might otherwise be held to violate the letter or intent of the corporate statute as a whole. Specifically, the rights plans typically used as defenses to hostile takeovers (called "poison pills") create purchase or conversion rights that are not exercisable in the hands of a hostile bidder. Without explicit statutory language to the contrary, for example, such a discriminatory feature might be held to violate the requirement of G.S. 55-6-01 that all shares of the same class have the same rights, or the requirement of G.S. 55-6-23(a) that share dividends be issued pro rata. The drafters were of that view that rights plans should not be generally prohibited. Several states, including New York, Pennsylvania, Ohio, Wisconsin and Hawaii, have adopted explicit validating language similar to that included in this section.

The last sentence of subsection (b) was included to make it clear that the broad enabling language of the subsection was not intended to eliminate or limit the directors' duty, under G.S. 55-8-30(a) and otherwise, to act in good faith, with due care and in the best interests of the corporation. Thus, their action in creating and using a "poison pill" as a defensive device would be subject to judicial review in an appropriate proceeding in which the court may formulate or apply appropriate standards to insure that the directors' actions are in the best long-term interests and short-term interests of the corporation and its shareholders considering, without limitation, the prospects for potential growth, development, productivity and profitability of the corporation.

Legal Periodicals. — For article, "Competing Interests in the Corporate Opportunity Doctrine," see 67 N.C.L. Rev. 435 (1989).

§ 55-6-25. Form and content of certificates.

(a) Shares may but need not be represented by certificates. Unless this act or another statute expressly provides otherwise, the rights and obligations of shareholders are identical whether or not their shares are represented by certificates.

(b) At a minimum each share certificate must state on its face:

(1) The name of the issuing corporation and that it is organized under the law of North Carolina;

(2) The name of the person to whom issued; and

(3) The number and class of shares and the designation of the series, if any, the certificate represents.

(c) If the issuing corporation is authorized to issue different classes of shares or different series within a class, the designations, relative rights, preferences, and limitations applicable to each class and the variations in rights, preferences, and limitations determined for each series (and the authority of the board of directors to determine variations for future series) must be summarized on the front or back of each certificate. Alternatively, each certificate may state conspicuously on its front or back that the corporation will furnish the shareholder this information in writing and without charge.

(d) Each share certificate (1) must be signed (either manually or in facsimile) by two officers designated in the bylaws or by the board of directors and (2) may bear the corporate seal or its facsimile.

(e) If the person who signed in any capacity (either manually or in facsimile) a share certificate no longer holds office when the certificate is issued, the certificate is nevertheless valid. (1885, c. 265; 1901, c. 2, s. 94; Rev., ss. 1165, 1166; C.S., s. 1162; 1927, c. 173; 1949, c. 809; G.S., s. 55-67; 1955, c. 1371, s. 1; 1979, c. 91; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

This section sets forth the minimum requirements for share certificates. A corporation whose shares are not publicly traded will normally issue certificates that meet these minimum requirements and little more. Securities that are publicly traded, on the other hand, must contain reasonable safeguards against fraudulent duplication; for this reason, regulations by exchanges contain technical requirements relating to design, workmanship, engraving, and printing. Also, exchange requirements may require signatures of a transfer agent and registrar as well as designated corporate officers. All these requirements are in addition to the minimum requirements of the Model Act.

Certificateless shares are permitted under section 6.25(a) upon compliance with section 6.26. Section 6.25(a) makes it clear that there are no differences in the rights and obligations of shareholders, whether or not their shares are represented by certificates, other than mechanical differences, such as the means by which instructions for transfer are communicated to the issuer, necessitated by the use or nonuse of certificates. If share transfer restrictions are imposed, conspicuous references must appear on the certificate if they are to be binding on third persons without knowledge of the restrictions. See section 6.27.

Under section 6.25 all signatures on a share certificate may be facsimiles. This change, which has been adopted recently in several states, gives recognition to the fact that a purchaser of publicly traded shares will hardly ever be in a position to determine whether a manual signature on a stock certificate is in fact the authorized signature of an officer or the transfer agent or registrar. From the standpoint of the issuing corporation of publicly traded securities, if a share certificate requiring a manual signature is stolen and the signature thereafter forged, the corporation may defend on lack of genuineness under section 8-202(3) of the UNIFORM COMMERCIAL CODE. But this defense is not effective against a bona fide purchaser when the forged signature has been placed on the certificate by an employee of the issuer or registrar or transfer agent entrusted with handling the certificates

(UCC § 8-205). It is likely that a corporation would therefore follow the same security precautions for blank certificates requiring manual signatures as for those not requiring them. At the same time, the time and expense required for manual signatures has been eliminated.

NORTH CAROLINA COMMENTARY

This section and G.S. 55-6-26 authorize the issuance of uncertificated shares, which is a major change from the former law. Except for the addition of the words "in any capacity" to subsection (e) to make it clear that transfer agents and registrars are covered by the section, the section is identical to section 6.25 of the Model Act. Article 8 of the North Carolina UCC has been amended to add provisions dealing with uncertificated shares.

Cross References. — As to replacement certificates, see G.S. 25-8-405.

CASE NOTES

Editor's Note. *— Some of the cases below were decided under prior law.*

Nature of Stock Certificate. — A certificate of stock is simply a written acknowledgment by a corporation of the interest of the holder in its property and franchises. It has no value except that derived from the company issuing it, and its legal status is in the nature of a chose in action. Person v. Board of State Tax Comm'rs, 184 N.C. 499, 115 S.E. 336 (1922).

Evidence of Ownership of Stock. — A certificate for shares is not the stock itself, but constitutes only prima facie evidence of the ownership of that number of shares. Misenheimer v. Alexander, 162 N.C. 226, 78 S.E. 161 (1913).

Issuance of stock certificates is unnecessary to existence of the corporation. Powell Bros. v. McMullan Lumber Co., 153 N.C. 52, 68 S.E. 926 (1910).

Or to confer title to the stockholder. Powell Bros. v. McMullan Lumber Co., 153 N.C. 52, 68 S.E. 926 (1910).

Whether Stock Actually Issued in Consideration for Covenant-Not-To-Compete and Other Agreements. — In a business dispute involving asserted allegations of breach of a covenant-not-to-compete and other claims, a trial court erred by granting defendants summary judgment on the issue of whether there was consideration offered to defendants in exchange for signing the covenant-not-to-compete, confidentiality and non-solicitation agreement, and shareholders' agreement, as a genuine issue of material fact remained as to whether plaintiff actually issued stock shares promised to defendants, such that they constituted valuable consideration to make the covenant-not-to-compete and confidentiality and non-solicitation agreement valid and enforceable. Kinesis Adver., Inc. v. Hill, 187 N.C. App. 1, 652 S.E.2d 284, 2007 N.C. App. LEXIS 2251 (2007), review denied, appeal dismissed, 362 N.C. 177, 658 S.E.2d 485 (2008).

§ 55-6-26. Shares without certificate.

(a) Unless the articles of incorporation or bylaws provide otherwise, the board of directors of a corporation may authorize the issue of some or all of the shares of any or all of its classes or series without certificates. The authorization does not affect shares already represented by certificates until they are surrendered to the corporation.

(b) Within a reasonable time after the issue or transfer of shares without certificates, the corporation shall send the shareholder a written statement of the information required on certificates by G.S. 55-6-25(b) and (c), and if applicable, G.S. 55-6-27. (1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 6.26(a) authorizes the creation of uncertificated shares either by original issue or in substitution for shares previously represented by certificates. This subsection gives the board of directors the widest discretion so that a particular class and series of shares might be entirely represented by certificates, entirely uncertificated, or represented partly by each. The second sentence ensures that a corporation may not treat as uncertificated, and accordingly transferable on its books without due presentation of a certificate, any shares for which a certificate is outstanding.

The statement required by section 6.26(b) ensures that holders of uncertificated shares will receive from the corporation the same information that the holders of certificates receive when certificates are issued. There is no requirement that this information be delivered to purchasers of uncertificated shares before purchase.

Detailed rules with respect to the issuance, transfer, and registration of both certificated and uncertificated shares appear in article 8 of the UNIFORM COMMERCIAL CODE. In general terms there are no differences between certificated and uncertificated securities except in matters such as their manner of transfer. See the Official Comment to section 6.25.

CASE NOTES

Whether Stock Actually Issued in Consideration for Covenant-Not-To-Compete and Other Agreements. — In a business dispute involving asserted allegations of breach of a covenant-not-to-compete and other claims, a trial court erred by granting defendants summary judgment on the issue of whether there was consideration offered to defendants in exchange for signing the covenant-not-to-compete, confidentiality and non-solicitation agreement, and shareholders' agreement, as a genuine issue of material fact remained as to whether plaintiff actually issued stock shares promised to defendants, such that they constituted valuable consideration to make the covenant-not-to-compete and confidentiality and non-solicitation agreement valid and enforceable. Kinesis Adver., Inc. v. Hill, 187 N.C. App. 1, 652 S.E.2d 284, 2007 N.C. App. LEXIS 2251 (2007), review denied, appeal dismissed, 362 N.C. 177, 658 S.E.2d 485 (2008).

§ 55-6-27. Restriction on transfer of shares and other securities.

(a) The articles of incorporation, bylaws, an agreement among shareholders, or an agreement between shareholders and the corporation may impose restrictions on the transfer or registration of transfer of shares of the corporation. A restriction does not affect shares issued before the restriction was adopted unless the holders of the shares are parties to the restriction agreement or voted in favor of the restriction.

(b) A restriction on the transfer or registration of transfer of shares is valid and enforceable against the holder or a transferee of the holder if the restriction is authorized by this section, it is not unconscionable under the circumstances, and its existence is noted conspicuously on the front or back of the certificate or is contained in the information statement required by G.S. 55-6-26(b). Unless so noted, a restriction is not enforceable except against a person who receives actual written notice of the restrictions.

(c) A restriction on the transfer or registration of transfer of shares is authorized:

(1) To maintain the corporation's status when it is dependent on the number or identity of its shareholders;
(2) To preserve exemptions under federal or state securities law;
(3) For any other reasonable purpose.

(d) A restriction authorized by G.S. 55-6-27(c) may:

(1) Obligate the shareholder first to offer the corporation or other persons (separately, consecutively, or simultaneously) an opportunity to acquire the restricted shares;
(2) Obligate the corporation or other persons (separately, consecutively, or simultaneously) to acquire the restricted shares;
(3) Require the corporation, the holders of any class of its shares, or another person to approve the transfer of the restricted shares, if the requirement is not manifestly unreasonable;

(4) Prohibit the transfer of the restricted shares to designated persons or classes of persons, if the prohibition is not manifestly unreasonable;

(5) Contain any other provision reasonably related to an authorized purpose.

(e) For purposes of this section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares. (1989, c. 265, s. 1.)

OFFICIAL COMMENT

Share transfer restrictions are widely used by both publicly held and closely held corporations for a variety of appropriate purposes. Although most courts have upheld reasonable share transfer restrictions, a few have rigidly followed the common law rule that they constituted restraints on alienation and should be strictly construed. As a result, some cases have invalidated restrictions outright or construed them narrowly so as not to cover specific transfers. By prescribing reasonable rules to govern the use of transfer restrictions, section 6.27 should guide practitioners in their use and encourage a more uniform and favorable judicial reception.

Examples of the uses of share transfer restrictions include:

(1) a close corporation may impose share transfer restrictions to qualify for the close corporation election under the Model Statutory Close Corporation Supplement;

(2) a corporation with relatively few shareholders may impose share transfer restrictions to ensure that current shareholders will be able to control who may participate in the corporation's business;

(3) a corporation with relatively few shareholders may impose share transfer restrictions to ensure that shareholders who wish to retire will be able to liquidate their investment without disrupting corporate affairs;

(4) a corporation with few shareholders may impose share transfer restrictions in an effort to ensure that estates of deceased shareholders will be able to liquidate the closely held shares and that the Internal Revenue Service will accept the liquidated value of the shares as their value for estate tax purposes;

(5) a professional corporation may impose share transfer restrictions to ensure that its treatment of retiring or deceased shareholders is consistent with the canons of ethics applicable to the profession in question;

(6) a corporation may impose share transfer restrictions to ensure that its election of subchapter S treatment under the Internal Revenue Code will not be unexpectedly terminated; and

(7) a publicly held or closely held corporation issuing securities pursuant to an exemption from federal or state securities act registration may impose share transfer restrictions to ensure that subsequent transfers of shares will not result in the loss of the exemption being relied upon.

This listing, while not exhaustive, illustrates the flexibility of share transfer restrictions, their widespread use, and the importance of having a statute dealing with them.

Section 6.27(a) generally authorizes the imposition of transfer restrictions on "shares," although the caption of the section refers to "shares and other securities." Section 6.27(e) defines "shares" for purposes of section 6.27 to include securities "convertible into or carrying a right to subscribe for or acquire shares;" the phrase "other securities" in the title thus describes the broader scope of this section resulting from the definition in section 6.27(e).

Share transfer restrictions are usually created by provisions in the bylaws or articles of incorporation but may also be created by contract between the corporation and some or all the shareholders or between or among the shareholders themselves. However, if shares are originally issued free of restriction, they may not thereafter be subjected to a transfer restriction without the consent of the holder, evidenced by a vote in favor of the amendment to the articles or bylaws creating the restriction, or by being a party to the contract creating the restriction.

The terms of a restriction on transfer do not need to be set forth in full or summarized in detail on a certificate or information statement required by section 6.26(b) for uncertificated securities. Rather, section 6.27(b) provides that in the case of a certificated security, the existence of the restriction must be conspicuously set forth on the front or back of the certificate; in the case of an uncertificated security, the existence of the restriction must be noted in the information statement. There is no requirement that the notation on an information statement be conspicuous.

If a transferee knows of the restriction he is bound by it even though the restriction is not noted on the certificate or information statement.

Section 6.27(c) describes the purposes for which restrictions may be imposed while section 6.27(d) describes the types of restrictions that may be imposed.

Section 6.27(c) enumerates certain purposes for which share transfer restrictions may be imposed, but does not limit the purposes since section 6.27(c)(3) permits restrictions "for any other reasonable purpose." Examples of the "status" referred to in section 6.27(c)(1) are the election of close corporation status under the Model Statutory Close Corporation Supplement, the subchapter S election under the Internal Revenue Code, and entitlement to a program or eligibility for a privilege administered by governmental agencies or national securities exchanges. Specific references in section 6.27 to subchapter S and other statutes were not made because of the possibility that the Internal Revenue Code or other statute may be amended or recodified after the adoption of the Model Act.

Section 6.27(c)(2) permits restrictions on transfers of shares to ensure availability of exemptions under state or federal securities acts. Share transfer restrictions for other purposes are permitted by section 6.23(c)(3) so long as the purpose is reasonable. It is unnecessary to inquire into the reasonableness of the purposes specifically enumerated in section 6.27(c)(1) and (2).

The types of restrictions referred to in section 6.27(d)(1) (buy-sell agreements) and (2) (option agreements) are imposed as a matter of contractual negotiation and do not prohibit the outright transfer of shares. Rather, they designate to whom shares or other securities must be offered at a price established in the agreement or by a formula or method agreed to in advance. By contrast, the restrictions described in sections 6.27(d)(3) and (4) may permanently limit the market for shares by disqualifying all or some potential purchasers. As a result the restrictions imposed by these two provisions must not be "manifestly unreasonable."

NORTH CAROLINA COMMENTARY

The Model Act was modified in subsection (b) by inserting the language "it is not unconscionable under the circumstances." This modification addressed a concern that the Model Act's section 6.27 may allow the enforcement of unconscionable restrictions. The drafters noted that the Model Act's language in section 6.27 may not allow judicial discretion in a situation where there was initially a reasonable purpose in imposing a restriction but over time the effect of the restriction had become unreasonable because of a change in circumstances. Judicial discretion would allow a court in such a situation to judge the restriction at the time its validity and enforceability are questioned. The amendment does not represent an attempt to change the prior law in North Carolina with respect to unconscionable agreements, but rather to preserve expressly the equitable power of the courts to deny enforcement of agreements that are unconscionable under the circumstances.

Subsection (b) was also modified so that a restriction on transfer not noted on the certificate or in the information statement is enforceable only against a person who received actual written notice of the restriction.

The introductory language of subsection (d) was modified for clarity. Subdivision (d)(5) was added to clarify that subdivisions (1) through (4) are not exclusive. The use of the word "reasonably" in this subsection was not thought to conflict with the "unconscionable" language in subsection (b), because the two subsections have different purposes.

CASE NOTES

Stock Restriction Upheld. — When considering the enforcement of a stock restriction agreement pursuant to this section, a trial court may decline to specifically enforce the agreement if there has been a change of circumstances since its execution, such that its enforcement would be unconscionable; and found that where defendant, an employee at will, was terminated prior to the full vesting of his stock but for a justifiable business purpose, where the parties had discussed but rejected a "buyout" formula based on fair market value, and where defendant entered freely into an agreement based on adjusted book value, no change of circumstances existed rendering the arm's length agreement unconscionable and unenforceable. Crowder Constr. Co. v. Kiser, 134 N.C. App. 190, 517 S.E.2d 178, 1999 N.C. App. LEXIS 752 (1999), cert. denied, 351 N.C. 101, 541 S.E.2d 142 (1999).

Applied in Whitacre P'ship. v. BioSignia, Inc., 153 N.C. App. 608, 574 S.E.2d 475, 2002 N.C. App. LEXIS 1275 (2002).

§ 55-6-28. Expense of issue.

A corporation may pay the expenses of selling or underwriting its shares, and of organizing or reorganizing the corporation, from the consideration received for shares. (1989, c. 265, s. 1.)

OFFICIAL COMMENT

The original purpose of this section was to deal with the problems created by the concepts of "par value" and "stated capital;" it permitted the corporation to expend its capital for "the reasonable charges and expenses of" organization without fear of making the shares not fully paid or assessable because the assets were reduced below the aggregate par value of the issued shares.

Under the modern capitalization principles set forth in the Model Act (see the Official Comment to section 6.21), there is no basis for the fear that shares issued properly under section 6.21 can be made assessable because of the subsequent use of the proceeds. While section 6.28 thus may be technically unnecessary, it was believed to be desirable to retain in the Model Act a general authorization to the corporation to pay its expenses of formation and raising capital out of its original capitalization. The reference to "reasonable" charges and expenses was deleted on the theory that the test for these expenses should be no different from the test for expenses of any other type.

The concluding language in the original Model Act, "without rendering the shares not fully paid or assessable," was also deleted as unnecessary and confusing in the context of the revisions to the financial provisions of the Model Act.

This section has been rarely cited or referred to in court decisions even though it appears in a large number of state statutes.

§ 55-6-29: Reserved for future codification purposes.

Part 3. Subsequent Acquisition of Shares by Shareholders and Corporation.

§ 55-6-30. Shareholders' preemptive rights.

(a) The shareholders of a corporation do not have a preemptive right to acquire the corporation's unissued shares except to the extent the articles of incorporation or subsection (d) of this section so provide.

(b) A statement included in the articles of incorporation that "the corporation elects to have preemptive rights" (or words of similar import) means that the following principles apply except to the extent the articles of incorporation expressly provide otherwise:

(1) The shareholders of the corporation have a preemptive right, granted on uniform terms and conditions prescribed by the board of directors, to provide a fair and reasonable opportunity to exercise the right, to acquire proportional amounts of the corporation's unissued shares upon the decision of the board of directors to issue them.

(2) A shareholder may waive his preemptive right. A waiver evidenced by a writing is irrevocable even though it is not supported by consideration.

(3) There is no preemptive right with respect to (i) shares issued as compensation to directors, officers, agents, or employees of the corporation, its subsidiaries or affiliates; (ii) shares issued to satisfy conversion or option rights created to provide compensation to directors, officers, agents, or employees of the corporation, its subsidiaries or affiliates; (iii) shares authorized in articles of incorporation that are issued within six months from the effective date of incorporation; (iv) shares issued for considerations, other than money, deemed by the board of directors in good faith to be advantageous to the corporation's business.

(4) Holders of a share of any class have no preemptive rights with respect to shares of any other class.

(5) Reserved for future codification purposes.

(6) Shares subject to preemptive rights that are not acquired by shareholders may be issued to any person during a period of one year after

being offered to shareholders at a consideration set by the board of directors that is not lower than the consideration set for the exercise of preemptive rights. An offer at a lower consideration or after the expiration of one year is subject to the shareholders' preemptive rights.

(c) For purposes of this section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares.

(d) Notwithstanding the foregoing provision of this section, shareholders of a corporation incorporated before July 1, 1990, other than a public corporation, shall have a preemptive right to acquire the unissued shares of the corporation, to the extent provided in (and subject to the limitations of) subdivisions (b)(1)-(6) and subsection (c) of this section, except to the extent the articles of incorporation expressly provide otherwise. (1955, c. 1371, s. 1; 1969, c. 751, ss. 29-32; 1979, c. 508, s. 2; 1989, c. 265, s. 1; 1993, c. 552, s. 8.)

OFFICIAL COMMENT

Section 6.30(a) adopts an "opt in" provision for preemptive rights: Unless an affirmative reference to these rights appears in the articles of incorporation, no preemptive rights exist. Whether or not preemptive rights are elected, however, the directors' fiduciary duties extend to the issuance of shares. Issuance of shares at favorable prices to directors (but excluding other shareholders) or the issuance of shares on a nonproportional basis for the purpose of affecting control rather than raising capital may violate that duty. These duties, it is believed, form a more rational structure of regulation than the technical principles of traditional preemptive rights.

Section 6.30(b) provides a standard model for preemptive rights if the corporation desires to exercise the "opt in" alternative of section 6.30(a). The simple phrase, "the corporation elects to have preemptive rights," or words of similar import, results in the rest of subsection (b) becoming applicable to the corporation. But a corporation may qualify or limit any of the rules set forth in subsection (b) by express provisions in the articles of incorporation if the rules are felt to be undesirable or inappropriate for the specific corporation. The purposes of this standard model for preemptive rights are (1) to simplify drafting articles of incorporation and (2) to provide a simple checklist of business considerations for the benefit of attorneys who are considering the inclusion of preemptive rights in articles of incorporation.

The provisions of sections 6.30(b) establish rules for most of the problems involving preemptive rights. Thus subsection (b)(1) defines the general scope of the preemptive right giving appropriate recognition to the discretion of the board of directors in establishing the terms and conditions for exercise of that right. Subsection (b)(2) creates rules with respect to the waiver of these rights. Subsection (b)(3) lists the principal exceptions to preemptive rights, including a six-month period during which initial capital can be raised by a newly formed corporation without regard to the preemptive rights of persons who have previously acquired shares. Subsections (b)(4) and (b)(5) provide rules for the often-difficult problems created when preemptive rights are recognized in corporations with more than a single class of shares. These problems are discussed further below. Subsection (b)(6) defines the status of preemptive rights after a shareholder has elected not to exercise a proffered preemptive right: for a period of one year thereafter the corporation may dispose of the shares at the same or a higher price. A corporation deciding to offer shares at a lower price must reoffer the shares preemptively to the shareholders before selling them to third persons.

As indicated above, any portion of section 6.30(b) that is felt not to be appropriate for a specific corporation may be amended or deleted by appropriate provision in the articles of incorporation.

The model provision dealing with preemptive rights in section 6.30(b) is primarily designed to protect voting power within the corporation from dilution. For this reason, section 6.30(c) contains a special definition of "shares" to ensure that the preemptive rights of shareholders, if these rights are granted, apply to all securities that are convertible into or carry a right to acquire voting shares.

On the other hand, preemptive rights also may serve in part the function of protecting the equity participation of shareholders. This combination of functions creates no problem in a corporation that has authorized only a single class of shares but may occasionally create problems in corporations with more complex capital structures. In many multiple-class corporate financial structures, the issuance of additional shares of one class does not adversely affect other classes. For example, the issuance of additional general voting shares without preferential rights normally does not affect either the limited voting power or equity participation of holders of shares with preferential rights; holders of shares with preferential equity participation rights but without general voting rights should therefore have no preemptive rights with respect to general voting shares without preferential rights. See subsections (b)(4) and (b)(5). Classes of shares that may give rise to possible conflict between the protection of voting interests and equity participation when the board of directors desires to issue additional shares include classes of nonvoting shares without preferential rights and classes of shares with both preferential rights to distributions and general voting rights. Attorneys who draft articles of incorporation with classes of shares that may give rise to these conflicts should consider the precise application of section 6.30(b) with respect to preemptive rights for these classes and define more carefully the scope of the preemptive rights desired.

NORTH CAROLINA COMMENTARY

For corporations incorporated on or after July 1, 1990, this section adopts an "opt in" election for preemptive rights. In contrast to the prior law, unless an affirmative reference to these rights appears in the articles of incorporation, no preemptive rights exist. Former G.S. 55-56 provided for preemptive rights unless limited or denied by the articles of incorporation. Subsection (d) grants preemptive rights under this section to shareholders of corporations incorporated before July 1, 1990, except to the extent the articles of incorporation expressly provide otherwise.

The Model Act was modified in subdivision (b)(3)(iv) to require that the issuance of shares for consideration other than money be advantageous to the corporation's business.

The drafters concluded that subdivisions 6.30(b)(4) and (5) of the Model Act are unclear. They omitted subdivision (b)(5) and rewrote subdivision (b)(4) to make it clear that holders of one class of shares do not have any preemptive rights with respect to shares of another class.

§ 55-6-31. Corporation's acquisition of its own shares.

(a) A corporation may acquire its own shares and shares so acquired constitute authorized but unissued shares.

(b) If the articles of incorporation prohibit the reissue of the acquired shares, the number of authorized shares is reduced by the number of shares acquired, effective upon amendment of the articles of incorporation.

(c) Repealed by Session Laws 2005-268, s. 1, effective October 1, 2005. (1955, c. 1371, s. 1; 1957, c. 1039; 1959, c. 1316, s. 19; 1963, c. 666; 1967, c. 1163; 1969, c. 751, ss. 23-27, 45; 1973, c. 1067; 1985, c. 117, s. 3; 1989, c. 265, s. 1; 2005-268, s. 1.)

OFFICIAL COMMENT

The elimination of the concepts of "par value" and "stated capital" in the 1980 amendments to the Model Act (see the Official Comment to section 6.21) permitted the simplification of a number of other sections of the Act and the elimination of several historical concepts that primarily served the purpose of ameliorating problems created by retention of the concepts of "par value" and "stated capital."

One concept eliminated by the 1980 amendments was that of treasury shares. The status of once-issued but reacquired shares was an uneasy one under the traditional statutes. It was universally recognized that a corporation's shares in its own hands are not an asset any more than authorized but unissued shares. As an economic matter payments made by a corporation to repurchase its own shares must be viewed as a distribution of corporate assets by the corporation rather than as an acquisition of an asset. Further, conventional statutes gave treasury shares an intermediate status between issued and unissued: they were treated as outstanding shares for some purposes, and they could be resold or disposed of by the corporation (presumably) without regard to restrictions that might be imposed on the original issuance of shares by the corporation. Finally, the accounting treatment for treasury shares was complex, confusing, and to some extent unrealistic since the capital accounts often did not reflect transactions in treasury shares.

Under the 1980 revisions of the financial provisions in the Model Act the concept of treasury shares is unnecessary. Authorized but unissued shares of the corporation may be issued on the same basis and with the same freedom as treasury shares under earlier statutes. Attorneys' opinions on the legality of the issuance of shares under the revised Model Act will therefore be unaffected by the elimination of the technical distinction between original shares and treasury shares. A possible exception to these statements is that the concept of treasury shares may have permitted listed companies to save modestly on stock exchange listing fees in some cases that may not be available under the revised Model Act provisions.

Section 6.31(a) restates the fundamental power of a corporation to reacquire its own shares. Such a transaction constitutes a "distribution" by the corporation (see the definition of that term in section 1.40) and is subject to the limitations of section 6.40.

Shares that are reacquired by the corporation become authorized but unissued shares under section 6.31(b) unless the articles prohibit reissue, in which event they are cancelled. Section 6.31(c) requires a simplified official filing to reflect the reduction of authorized shares. This provision is included in order that there be a public record of the number of authorized shares that a corporation may issue. The amendment may be made without shareholder action. See section 10.02.

Until the amendment referred to in section 6.31(c) is effective, the corporation has power to reissue the reacquired shares despite a prohibition in the articles of incorporation. In such a case, the action of the directors in issuing the shares may be challengeable but the shares so issued would be fully paid and nonassessable if issued in conformity with section 6.21.

NORTH CAROLINA COMMENTARY

The concept of treasury shares is eliminated in this section.

The Model Act was modified in subsection (c) to provide that, when a corporation is prohibited from reissuing acquired shares, it must amend its articles of incorporation to reduce the number of authorized shares by the number of acquired shares. Such reduction is effective upon the filing of articles of amendment with the Secretary of State.

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

The provision for amending articles of incorporation to reflect a reduction in authorized shares when the corporation is prohibited from reissuing acquired shares referred to in the Official Comment is relocated to G.S. 55-10-02 effective October 1, 2005.

Legal Periodicals. — For article on the evolution of corporate combination law, see 76 N.C.L. Rev. 687 (1998).

CASE NOTES

Editor's Note. *— The cases below were decided under prior law.*

Former Law. — Under former law, a corporation, unless restrained by some provision of its organic law, could purchase its own stock from holders thereof, and the latter were entitled to all rights of other creditors of the corporation for the protection and enforcement of their demand for payment. Blalock v. Kernersville Mfg. Co., 110 N.C. 99, 14 S.E. 501 (1892).

Purpose of 1985 Amendment to Former § 55-52. — The 1985 amendment to former G.S. 55-52 was established to enable corporations to enter into written agreements with shareholders at the outset of the relationship for the issuance of stock redeemable at the shareholder's option. The statute was not designed to simply allow the corporation to enter into a written agreement with a shareholder to redeem stock out of and as an impairment to stated capital, which stock was already being held by the shareholder as common stock; rather, the purpose was to provide a new method for North Carolina corporations to raise needed capital by readily available cash infusions from shareholders in exchange for stock redeemable at their request. In re N.W. Oxygen, Inc., 99 Bankr. 703 (Bankr. M.D.N.C. 1989).

Agreement Entered into Prior to Amendment. — Where former shareholder had a note in exchange for the redemption of his shares in corporation, the note was unenforceable under former G.S. 55-52, as subdivision (c)(3), rather than subdivision (b)(4) thereof, applied. First, subdivision (b)(4) was an amendment to the original provision and was effective in 1985, while the agreement between former shareholder and debtor corporation was executed before the amendment was in effect; second, subdivision (b)(4) was established to enable corporations to enter agreements with shareholders for the issuance of stocks. In the instant case former shareholder and debtor entered into a written agreement some ten years after the issuance of the shares for the sale of the common stock which former shareholder owned. In re N.W. Oxygen, Inc., 99 Bankr. 703 (Bankr. M.D.N.C. 1989).

Solvency Test for Each Payment Under Former § 55-52(c). — Since former G.S. 55-52 specifically included the words "and pay for" in subsection (c), a solvency test for surplus had to occur each time a corporation made a payment on the indebtedness out of the assets of the corporation. In re N.W. Oxygen, Inc., 99 Bankr. 703 (Bankr. M.D.N.C. 1989).

Redemption Agreement Held Unenforceable. — Promissory note to a former shareholder in exchange for the redemption of his shares in corporation and underlying security interest were rendered unenforceable due to the corporation's subsequent insolvency and inability to make payment on the obligation out of sufficient surplus of corporate assets. In re N.W. Oxygen, Inc., 99 Bankr. 703 (Bankr. M.D.N.C. 1989).

§§ 55-6-32 through 55-6-39: Reserved for future codification purposes.

Part 4. Distributions.

§ 55-6-40. Distributions to shareholders.

(a) A board of directors may authorize and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in subsection (c).

(b) If the board of directors does not fix the record date for determining shareholders entitled to a distribution (other than one involving a purchase, redemption, or other acquisition of the corporation's shares), it is the date the board of directors authorizes the distribution.

(c) No distribution may be made if, after giving it effect:

(1) The corporation would not be able to pay its debts as they become due in the usual course of business; or

(2) The corporation's total assets would be less than the sum of its total liabilities plus (unless the articles of incorporation permit otherwise) the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

(d) The board of directors may base a determination that a distribution is not prohibited under subsection (c) on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances, and may determine asset values either on book values or on a fair valuation or other method that is reasonable in the circumstances.

(e) Except as provided in subsection (g), the effect of a distribution under subsection (c) is measured:

(1) In the case of distribution by purchase, redemption, or other acquisition of the corporation's shares, as of the earlier of (i) the date money or other property is transferred or debt incurred by the corporation or (ii) the date the shareholder ceases to be a shareholder with respect to the acquired shares;

(2) In the case of any other distribution of indebtedness, as of the date the indebtedness is distributed;

(3) In all other cases, as of (i) the date the distribution is authorized if the payment occurs within 120 days after the date of authorization or (ii) the date the payment is made if it occurs more than 120 days after the date of authorization.

(f) A corporation's indebtedness to a shareholder incurred by reason of a distribution made in accordance with this section is at parity with the corporation's indebtedness to its general, unsecured creditors except to the extent otherwise provided by agreement.

(g) Indebtedness of a corporation, including indebtedness issued as a distribution, is not considered a liability for purposes of determinations under subsection (c) if its terms provide that payment of principal and interest are made only if and to the extent that payment of a distribution to shareholders could then be made under this section. If an indebtedness with such terms is issued as a distribution, each payment of principal or interest is treated as a distribution the effect of which is measured on the date the payment is actually made.

(h) Any action by a shareholder to compel the payment of dividends may be brought against the directors, or against the corporation with or without joining the directors as parties. The shareholder bringing such action shall be entitled, in the event that the court orders the payment of a dividend, to recover from the corporation all reasonable expenses, including attorney's fees, incurred in maintaining such action. If a court orders the payment of a dividend, the amount ordered to be paid shall be a debt of the corporation.

(i) As used in this subsection, net profits shall mean such net profits as can lawfully be paid in dividends to a particular class of shares after making allowance for the prior claims of shares, if any, entitled to preference in the payment of dividends. If during its immediately preceding fiscal period a corporation having less than 25 shareholders on the final day of said period has not paid to any class of shares dividends in cash or property amounting to at least one-third of the net profits of said period allocable to that class, the holder or holders of twenty percent (20%) or more of the shares of that class may, within four months after the close of said period, make written demand upon the corporation for the payment of additional dividends for that period. After a corporation has received such a demand, the directors shall, during the then current fiscal period or within three months after the close thereof, either (i) cause dividends in cash or property to be paid to the shareholders of that class in an amount equal to the difference between the dividends paid in said preceding fiscal period to shareholders of that class and one-third of the net profits of said period allocable to that class, or in such lesser amount as may be demanded, or (ii) give notice pursuant to subsection (j) of this section to all shareholders making such demand. Such corporation shall not, however, be required to pay dividends pursuant to such demand insofar as (i) such payment would exceed fifty percent (50%) of the net profits of the current fiscal period in which such demand is made, or (ii) the net profits are being retained to eliminate a deficit, or (iii) the payment of dividends would be a breach of a bona fide agreement between the corporation and its creditors restricting the payment of dividends, or (iv) the directors of the corporation can show that its earnings are being retained to meet the reasonably anticipated needs of the business and that such retention of earnings is not inequitable in light of all the circumstances. Upon receipt of such a demand a corporation may elect to treat any dividend previously paid in the current fiscal period as having been paid in the preceding fiscal period, in which event the corporation shall so notify all shareholders. If a dividend is paid in satisfaction of a demand made in accordance with this subsection it shall be deemed to have been paid in the period for which it was demanded, and all shareholders shall be so informed concurrently with such payment.

(j) Upon receipt of a demand from the holders of twenty percent (20%) or more of the shares of any class of shares pursuant to subsection (i) of this section, the corporation receiving such demand may, during the then fiscal period or within three months after the close thereof, give written notice to each shareholder making such written demand that the corporation elects to redeem all shares held by such shareholder in lieu of the payment of dividends as provided in subsection (i) of this section and shall pay to such shareholder the fair value of his shares as of the day preceding the mailing or otherwise reasonably dispatching of the notice. A shareholder receiving such notice shall thereafter be entitled to withdraw his dividend demand by giving written notice of such withdrawal to the corporation within 10 days after receipt of the redemption notice of the corporation or, if no such withdrawal is made, to receive the fair value of his shares, subject only to the surrender by him of the certificate or certificates representing his shares and to the provisions of G.S. 55-6-31, which value shall be determined and paid as follows:

(1) If within 30 days after the date upon which a shareholder becomes entitled to payment for his shares under this subsection, the value of the shares is agreed upon between the shareholder and the corporation, payment therefor shall be made within 60 days after the agreement, upon surrender of the certificate representing the shares, whereupon the shareholder shall cease to have any interest in such shares or in the corporation.

(2) If within the such 30-day period the shareholder and the corporation do not agree as to the value of the shares, the shareholder may, within 60 days after the expiration of the 30-day period, file a petition in the superior court of the county of the registered office of the corporation asking for the appointment by the clerk of three qualified and disinterested appraisers to appraise the fair value of the shares. A summons as in other cases of special proceedings, together with a copy of the petition, shall be served on the corporation at least 10 days prior to the hearing of the petition by the court. The award of appraisers, or a majority of them, if no exceptions be filed thereto within 10 days after the award shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive, and the shareholder upon depositing the proper share certificates in court, shall be entitled to judgment against the corporation for the appraised value thereof as of the date prescribed in this section, together with interest thereon to the date of such confirmation. If either party files exceptions to such award within 10 days after the award shall have been filed in court, the case shall be transferred to the civil issue docket of the superior court for trial during term and shall be there tried in the same manner, as near as may be practicable, as is provided in Chapter 40A for the trial of cases under the eminent domain law of this State, and with the same right of appeal as is permitted in said Chapter. The court shall assess the cost of said proceedings as it shall deem equitable. Upon payment of the judgment, the shareholder shall cease to have any interest in the shares or in the corporation and the corporation shall be entitled to have said share certificates surrendered to it by the clerk of court for cancellation. Unless the shareholder shall file such petition within the time herein prescribed, he and all persons claiming under him shall have no right of payment hereunder but in that event nothing herein shall impair his status as shareholder.

(k) Nothing in this section shall impair any rights which a shareholder may have on general principles of equity to compel the payment of dividends. (Code, s. 681; 1901, c. 2, ss. 33, 52; Rev., ss. 1191, 1192; C.S., ss. 1178, 1179; 1927, c. 121; 1933, c. 354, s. 1; G.S., ss. 55-115, 55-116; 1955, c. 1371, s. 1; 1957, c. 1039; 1959, c. 1316, ss. 16, 19, 35; 1963, c. 666; 1965, c. 726; 1967, c. 1163; 1969, c. 751, ss. 21-27, 45; 1973, c. 469, ss. 17-20; c. 683; c. 1067; c. 1087, ss. 3-5; 1975, c. 19, s. 17; c. 304; 1985, c. 117, s. 3; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.9; 1991, c. 645, s. 4.)

OFFICIAL COMMENT

The reformulation of the statutory standards governing distributions is another important change made by the 1980 revisions to the financial provisions of the Model Act. It has long been recognized that the traditional "par value" and "stated capital" statutes do not provide significant protection against distributions of capital to shareholders. While most of these statutes contained elaborate provisions establishing "stated capital," "capital surplus," and "earned surplus" (and often other types of surplus as well), the net effect of most statutes was to permit the distribution to shareholders of most or all of the corporation's net assets — its capital along with its earnings — if the shareholders wished this to be done. However, statutes also generally imposed an equity insolvency test on distributions that prohibited distributions of assets if the corporation was insolvent or if the distribution had the effect of making the corporation insolvent or unable to meet its obligations as they were projected to arise.

The financial provisions of the revised Model Act, which are based on the 1980 amendments, sweep away all the distinctions among the various types of surplus but retain restrictions on distributions built around both the traditional equity insolvency and balance sheet tests of earlier statutes.

1. The scope of section 6.40

Section 1.40 defines "distribution" to include virtually all transfers of money, indebtedness of the corporation or other property to a shareholder in respect of the corporation's shares. It thus includes cash or property dividends, payments by a corporation to purchase its own shares, distributions of promissory notes or indebtedness, and distributions in partial or complete liquidation or voluntary or involuntary dissolution. Section 1.40 excludes from the definition of "distribution" transactions by the corporation in which only its own shares are distributed to its shareholders. These transactions are called "share dividends" in the revised Model Business Corporation Act. See section 6.23.

Section 6.40 imposes a single, uniform test on all distributions. Many of the old "par value" and "stated capital" statutes provided tests that varied with the type of distribution under consideration or did not cover certain types of distributions at all.

2. Equity insolvency test

As noted above, older statutes prohibited payment of dividends if the corporation was, or as a result of the payment would be, insolvent in the equity sense. This test is retained, appearing in section 6.40(c)(1).

For an on-going business enterprise the equity insolvency test requires that decisions be based on a cash flow analysis that is itself based on a business forecast and budget for a sufficient period of time to permit a conclusion that known obligations of the corporation can reasonably be expected to be satisfied over the period of time that they will mature. It is not sufficient simply to measure current assets against current liabilities, or determine that the present estimated "liquidation" value of the corporation's assets would produce sufficient funds to satisfy the corporation's existing liabilities.

In determining whether a corporation is, or as a result of a proposed distribution would be rendered, insolvent, the board of directors may rely on information supplied by the officers of the corporation. It is not necessary for them to know of the details of the cash flow analysis if the proposed distribution involves no significant risk of equity insolvency. Judgments, further, must of necessity be made on the basis of information in the hands of the board of directors when a distribution is authorized. See section 8.30.

3. Relationship to the federal bankruptcy act and other fraudulent conveyance statutes

The revised Model Business Corporation Act establishes the validity of distributions from the corporate law standpoint under section 6.40 and determines the potential liability of directors for improper distributions under sections 8.30 and 8.33. The federal Bankruptcy Act and state fraudulent conveyance statutes, on the other hand, are designed to enable the trustee or other representative to recapture for the benefit of creditors funds distributed to others in some circumstances. In light of these diverse purposes, it was not thought necessary to make the tests of section 6.40 identical with the tests for insolvency under these various statutes.

4. Balance sheet test

Section 6.40(c)(2) requires that, after giving effect to any distribution, the corporation's assets equal or exceed its liabilities plus (with some exceptions) the dissolution preferences of senior equity securities. Section 6.40(d) authorizes asset and liability determinations to be made for this purpose on the basis of either (1) financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or (2) a fair valuation or other method that is reasonable in the circumstances. The determination of a corporation's assets and liabilities and the choice of the permissible basis on which to do so are left to the judgment of its board of directors. In making a judgment under section 6.40(d), the board may rely under section 8.30 upon opinions, reports, or statements, including financial statements and other financial data prepared or presented by public accountants or others.

Section 6.40 does not incorporate technical accounting terminology and specific accounting concepts. Accounting terminology and concepts are constantly under review and subject to revision by the Financial Accounting Standards Board, the American Institute of Certified Public Accountants, the Securities and Exchange Commission, and others. In making determinations under this section, the board of directors may make judgments about accounting matters, taking into account its right to rely upon professional or expert opinion and its obligation to be reasonably informed as to pertinent standards of importance that bear upon the subject at issue.

In a corporation with subsidiaries, the board of directors may rely on unconsolidated statements prepared on the basis of the equity method of accounting (see American Institute of Certified Public Accountants, APB Opinion No. 18 (1971)) as to the corporation's investee corporations, including corporate joint ventures and subsidiaries, although other evidence would be relevant in the total determination.

a. Generally accepted accounting principles

The directors will normally be entitled to use generally accepted accounting principles and to give presumptive weight to the advice of professional accountants with respect to their application. But section 6.40 only requires the use of accounting practices and principles that are reasonable in the circumstances, and does not constitute a statutory enactment of generally accepted accounting principles. The widespread controversy concerning various accounting principles, and their continuous reevaluation, suggest that a statutory standard of reasonableness, rather than of generally accepted accounting principles, is appropriate. The Model Act does not reject generally accepted accounting principles; on the contrary, it is expected that their use will be the basic rule in most cases. The statutory language does, however, require informed business judgment applying particular accounting principles to the entire circumstances that exist at the time.

b. Other principles

If a corporation's financial statements are not presented in accordance with generally accepted accounting principles, a board of directors should normally consider the extent to which the assets may not be fairly stated or the liabilities may be understated in determining the aggregate amount of assets and liabilities.

Section 6.40(d) specifically permits determinations to be made under section 6.40(c)(2) on the basis of a fair valuation or other method that is reasonable in the circumstances. Thus the statute authorizes departures from historical cost accounting and sanctions the use of appraisal methods to determine the funds available for distributions. No particular method of valuation is prescribed in the statute, since different methods may have validity depending upon the circumstances, including the type of enterprise and the purpose for which the determination is made. For example, it is inappropriate to apply a "quick-sale liquidation" value to an enterprise in most cases, particularly with respect to the payment of normal dividends. On the other hand, a "quick-sale valuation" might be appropriate in certain circumstances for an enterprise in the course of liquidation or of reducing its asset or business base by a material degree. In most cases, a fair valuation method or a going-concern basis would be appropriate if it is believed that the enterprise will continue as a going concern.

In determining the value of assets, all of the assets of a corporation, whether or not reflected in the financial statements (e.g., a valuable executory contract), should be considered. Ordinarily a corporation should not selectively revalue assets. Likewise, all of a corporation's obligations and commitments should be considered and quantified to the extent appropriate and possible. In any event, section 6.40(d) imposes upon the board of directors the responsibility of applying under section 6.40(c)(2) a method of determining the aggregate amounts of assets and liabilities that is reasonable in the circumstances.

Section 6.40(d) also refers to some "other method that is reasonable in the circumstances." This phrase is inserted to comprehend within section 6.40(c)(2) the wide variety of possibilities that might not be considered to fall under a "fair valuation" but might be reasonable in the circumstances of a particular case.

5. PREFERENTIAL DISSOLUTION RIGHTS AND THE BALANCE SHEET TEST

Section 6.40(c)(2) provides that a distribution may not be made unless the total assets of the corporation exceed its liabilities plus the amount that would be needed to satisfy any shareholders' superior preferential rights upon dissolution if the corporation were to be dissolved at the time of the distribution. This requirement in effect treats preferential dissolution rights of classes or series of shares for distribution purposes as equivalent to liabilities rather than as equity interests, and carries forward analogous treatment of shares having preferential dissolution rights from earlier versions of the Model Act. In making the calculation of the amount that must be added to the liabilities of the corporation to reflect the preferential dissolution rights, the assumption should be made that the preferential dissolution rights are to be established pursuant to the articles of incorporation (or resolution creating a series having preferential dissolution rights) as of the date of the distribution or proposed distribution. The amount so determined must include arrearages in preferential dividends if the articles of incorporation or resolution require that they be paid upon the dissolution of the corporation. In the case of shares having both a preferential right upon dissolution and additional nonpreferential rights, only the preferential portion of the rights should be taken into account. The treatment of preferential dissolution rights of classes of shares set forth in section 6.40(c)(2) is applicable only to the balance sheet test and is not applicable to the equity insolvency test of section 6.40(c)(1). The treatment of preferential rights mandated by this section may always be eliminated by an appropriate provision in the articles of incorporation.

6. TIME OF MEASUREMENT

Section 6.40(e)(3) provides that the time for measuring the effect of a distribution for compliance with the insolvency and balance sheet tests for all distributions not involving the reacquisition of shares of the distribution of indebtedness is the date of authorization, if the payment occurs within 120 days following the authorization; if the payment occurs more than 120 days after the authorization, however, the date of payment must be used. If the corporation elects to make a distribution in the form of its own indebtedness under section 6.40(e)(2), the validity of that distribution must be measured as of the time of distribution.

Section 6.40(e)(1) provides a different rule for the time of measurement when the distribution involves a reacquisition of shares. See part 8a. below.

7. RECORD DATE

Section 6.40(b) fixes the record date (if the board of directors does not otherwise fix it) for distributions other than those involving a repurchase or reacquisition of shares as the date the board of directors authorizes the distribution. No record date is necessary for a repurchase or reacquisition of shares from one or more specific shareholders. The board of directors has discretion to set a record date for a repurchase or reacquisition if it is to be pro rata and to be offered to all shareholders as of a specified date.

8. APPLICATION TO REPURCHASES OR REDEMPTION OF SHARES

The application of the equity insolvency and balance sheet tests to distributions that involve the purchase or redemption of shares creates unique problems; section 6.40 provides specific rules for the resolution of these problems as described below.

a. Time of measurement

Section 6.40(e)(1) provides that the time for measuring the effect of a distribution under section 6.40(c), if shares of the corporation are reacquired, is the earlier of (i) the payment date, or (ii) the date the shareholder ceased to be a shareholder with respect to the shares.

b. When tests are applied to redemption-related debt

In an acquisition of its shares, a corporation may transfer property or incur debt to the former holder of the shares. The case law on the status of this debt is conflicting. However, share repurchase agreements involving payment for shares over a period of time are of special importance in closely held corporate enterprises. Section 6.40(e) provides a clear rule for this situation: the legality of the distribution must be measured at the time of the issuance or incurrence of the debt, not at a later date when the debt is actually paid. Of course, this does not preclude a later challenge of a payment on account of redemption-related debt by a bankruptcy trustee on the ground that it constitutes a preferential payment to a creditor.

c. Priority of debt distributed directly or incurred in connection with a redemption

Section 6.40(f) provides that indebtedness created to purchase shares or issued as a distribution is on a parity with the indebtedness of the corporation to its general, unsecured creditors, except to the extent subordinated by agreement. General creditors are better off in these situations than they would have been if cash or other property had been paid out for the shares or distributed (which is proper under the statute), and no worse off than if cash had been paid out to the shareholders, which was then lent back to the corporation, making the shareholders creditors. The parity created by section 6.40(f) therefore is logically consistent with the rule established by section 6.40(e) that these transactions should be judged at the time of the issuance of the debt.

AMENDED NORTH CAROLINA COMMENTARY

This section introduces significant changes from prior law in the criteria used to determine a corporation's legal capacity to pay dividends and reacquire its shares. The former surplus tests no longer apply. In addition, the provisions of former G.S. 55-52, which limited the circumstances under which a corporation could reacquire its shares, were not brought forward. All distributions to shareholders, whether by dividends or repurchases of shares, are determined by that distribution's impact on the corporation's solvency and the relationship between its assets and liabilities.

The Model Act was modified in subsection (d) to make it clear that for purposes of determining asset values under the equity insolvency and balance sheet tests of subsection (c), the board of directors may use either book values or a current valuation if it is reasonable under the circumstances. For purposes of determining liabilities and assets that are not revalued, the board of directors may rely on financial statements prepared in accordance with reasonable accounting practices and principles.

The Model Act was modified in subsection (f) to clarify that a corporation may agree to secure its indebtedness to a shareholder by granting a deed of trust or other security interest. The shareholder may also agree to subordinate the indebtedness, in whole or in part, to the corporation's indebtedness to its general, unsecured creditors. Absent an agreement either to secure or to subordinate a corporation's indebtedness to a shareholder, such indebtedness will be at parity with the corporation's indebtedness to its general, unsecured creditors.

Subsection (g) was added to the Model Act's provisions to address the question of how to treat a liability that by its own terms cannot be paid if its payment would violate this section. This change required the cross-reference added to subsection (e).

"Nimble dividends" (dividends paid out of current earnings) were expressly authorized under former G.S. 55-50(a)(2). That provision was not brought forward.

Subsections (h), (i), and (j) bring forward the provisions of former G.S. 55-50(k) through (m).

CASE NOTES

Editor's Note. — *Most of the cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Former § 55-50 allowed suit for improper withholding of dividend payments against corporation, directors, majority shareholders and officers of the corporation. Wilson v. Wilson-Cook Medical, Inc., 720 F. Supp. 533 (M.D.N.C. 1989).

Joinder of Suit for Failure to Declare Dividends with Cause of Action for Liquidation. — A stockholder in a corporation may sue the corporation, and join its directors as defendants, for failure to declare adequate dividends from the corporation's earnings; and may join therewith a second cause of action for liquidation and involuntary dissolution of the corporation based upon bad faith management in suppressing dividends and in deflating the value of the corporation's assets, thus precluding the plaintiff stockholder from obtaining either a fair dividend or a fair market value for his stock. Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

Failure to State a Cause of Action. — Claim against director of dissolved corporation did not state a cause of action where plaintiff only alleged that director was officer when corporation dissolved and where there was no allegation that corporation's assets were distributed by officers without providing for known or reasonably ascertainable liabilities. Heather Hills Home Owners Ass'n v. Carolina Custom Dev. Co., 100 N.C. App. 263, 395 S.E.2d 154 (1990), decided under former § 55-32.

Shareholder Held Entitled to Attorneys' Fees. — Plaintiff who brought action as the record owner of 42,748 shares of Preferred A stock of defendant corporation to recover a dividend was entitled to recover attorneys' fees under subsection (h) of former G.S. 55-50. McGladrey, Hendrickson & Pullen v. Syntek Fin. Corp., 98 N.C. App. 151, 389 S.E.2d 636 (1990), aff'd, 330 N.C. 602, 411 S.E.2d 585 (1992).

Disregard of Corporate Entity Upheld. — Trial court was justified in disregarding the corporate entity and holding defendant personally liable to the extent of plaintiff's damages under the contract where defendant, who was president and sole shareholder of company, received substantial compensation from the sale of the corporation's assets without informing plaintiff of the sale or making provision for contractual debt to plaintiff. Hudson v. Jim Simmons Pontiac-Buick, Inc., 94 N.C. App. 563, 380 S.E.2d 612 (1989), decided under the former Business Corporation Act.

As to suits in equity to compel declaration and payment of dividends, see Gaines v. Long Mfg. Co., 234 N.C. 331, 67 S.E.2d 355 (1951).

Creditors Lacked Standing. — Plaintiffs lacked standing to assert claims (1) that the joinder agreements executed by two defendants were fraudulent transfers in violation of G.S. 39-23.1 and unlawful distributions in violation of G.S. 55-8-33 and G.S. 55-6-40, for which all defendants were liable, or alternatively, (2) for unauthorized execution, because such claims could have been brought by any of the corporation's creditors who, like plaintiffs, were denied timely payment of the corporation's debts when execution of the joinder agreements led to its insolvency. Angell v. Kelly, 336 F. Supp. 2d 540, 2004 U.S. Dist. LEXIS 19003 (M.D.N.C. 2004).

Cited in McGladrey, Hendrickson & Pullen v. Syntek Fin. Corp., 330 N.C. 602, 411 S.E.2d 585 (1992).

ARTICLE 7.

Shareholders.

Part 1. Meetings.

§ 55-7-01. Annual meeting.

(a) A corporation shall hold a meeting of shareholders annually at a time stated in or fixed in accordance with the bylaws.

(b) Annual shareholders' meetings may be held in or out of this State at the place stated in or fixed in accordance with the bylaws. If no place is stated in or fixed in accordance with the bylaws, annual meetings shall be held at the corporation's principal office.

(c) The failure to hold an annual meeting at the time stated in or fixed in accordance with a corporation's bylaws does not affect the validity of any corporate action. Upon such failure, whether from lack of quorum or otherwise, a substitute annual meeting may be called in accordance with the provisions of G.S. 55-7-02 and any meeting so called may be designated as the annual meeting.

(d) Any matter relating to the affairs of a corporation that is appropriate for shareholder action is a proper subject for action at an annual meeting of shareholders, and unless required by some provision of this Chapter, the matter need not be specifically stated in the notice of meeting. (1901, c. 2, ss. 46, 49, 51; Rev., ss. 1179, 1188, 1190; C.S., ss. 1168, 1169, 1176; G.S., ss. 55-105, 55-106, 55-113; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 21, 22; 1985 (Reg. Sess., 1986), c. 801, s. 44; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 7.01(a) requires every corporation to hold an annual meeting each year of shareholders entitled to participate in the election of directors and to consider other matters coming before the meeting of shareholders. In most instances, the meeting will involve only the holders of a single class of voting shares. The principal action to be taken at the annual meeting is the election of directors pursuant to section 8.03, but the purposes of an annual meeting are not limited and all matters appropriate for shareholder action may also be considered at that meeting. An annual meeting is also the appropriate forum for a shareholder to raise any relevant question about the corporation's operations.

The requirement of section 7.01(a) that an annual meeting be held is phrased in mandatory terms to ensure that every shareholder entitled to participate in the meeting has the unqualified rights (1) to demand that the annual meeting be held and (2) to compel the holding of the meeting under section 7.03 if the corporation does not promptly hold the meeting. Many corporations, such as non-public subsidiaries and closely held corporations, do not regularly hold annual meetings, and if no shareholder objects, that practice creates no problem under section 7.01, since section 7.01(c) provides that failure to hold an annual meeting does not affect the validity of any corporate action. Rather than holding an annual meeting, the shareholders may elect directors and take other appropriate action by unanimous written consent under section 7.04. And, even if the shareholders fail to elect directors, the directors currently in office continue in office under section 8.05 beyond the expiration of their terms.

The time and place of the annual meeting may be "stated in or fixed in accordance with the bylaws." If the bylaws do not themselves fix a time and place for the annual meeting, authority to fix them may be delegated to the board of directors or to a specified corporate officer. This section thus gives corporations the flexibility to hold annual meetings in varying places at varying times as convenience may dictate.

The annual meeting may be held either inside or outside the state or in a foreign country, but if the bylaws do not fix, or state the method of fixing, the place of the meeting, the meeting must be held at the "principal office" of the corporation. The principal office is defined in section 1.40 as the location of the principal executive office of the corporation and may or may not be its registered or official office under section 5.01. Section 16.22 requires that the address of the principal office be specified in the corporation's annual report.

If the annual meeting is not held either within 6 months of the close of the corporation's fiscal year or within 15 months of the last annual meeting, a shareholder may compel an annual meeting to be held under section 7.03. In the absence of a demand for a meeting, a corporation can operate indefinitely without actually holding an annual meeting. The shareholders may act by unanimous consent under section 7.04, and in any event directors, once duly elected, remain in office until their successors are qualified. See section 8.05.

Authority granted to the board of directors or some individual to fix the time and place of the annual meeting must be exercised in good faith. See *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437 (Del. 1971).

NORTH CAROLINA COMMENTARY

The second sentence of subsection (c) was added to the Model Act's provisions to bring forward the provisions of former G.S. 55-61(b) regarding the holding of a substitute annual meeting. Subsection (d), which brings forward former G.S. 55-61(d), was added to make it clear that any matter appropriate for shareholder action is a proper subject for action at an annual meeting of shareholders.

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

§ 55-7-02. Special meeting.

(a) A corporation shall hold a special meeting of shareholders:

(1) On call of its board of directors or the person or persons authorized to do so by the articles of incorporation or the bylaws; or

(2) In the case of a corporation that is not a public corporation, within 30 days after the holders of at least ten percent (10%) of all the votes entitled to be cast on any issue proposed to be considered at the proposed special meeting sign, date, and deliver to the corporation's secretary one or more written demands for the meeting describing the purpose or purposes for which it is to be held. The written demand shall cease to be effective on the sixty-first day after the date of signature appearing on the demand unless prior to the sixty-first day the corporation has received effective written demands from holders sufficient to call the special meeting.

(b) If not otherwise fixed under G.S. 55-7-03 or G.S. 55-7-07, the record date for determining shareholders entitled to demand a special meeting is the date the first shareholder signs the demand.

(c) Special shareholders' meetings may be held in or out of this State at the place stated in or fixed in accordance with the bylaws. If no place is stated or fixed in accordance with the bylaws, special meetings shall be held at the corporation's principal office.

(d) Only business within the purpose or purposes described in the meeting notice required by G.S. 55-7-05(c) may be conducted at a special shareholders' meeting. (1901, c. 2, ss. 46, 49, 51; Rev., ss. 1179, 1188, 1190; C.S., ss. 1168, 1169, 1176; G.S., ss. 55-105, 55-106, 55-113; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 21, 22; 1985 (Reg. Sess., 1986), c. 801, s. 44; 1989, c. 265, s. 1; 1991, c. 645, s. 17(a); 2001-201, s. 15; 2002-58, s. 1.)

OFFICIAL COMMENT

1. Any meeting other than an annual meeting is a special meeting under section 7.02. The principal formal differences between an annual and a special meeting are that at an annual meeting directors are elected and, subject to the special notice requirements of section 7.05(b), any relevant issue pertaining to the corporation may be considered, while a special meeting must be called for specific purposes and may only consider matters within those purposes.

A special meeting may be called under section 7.02(a) by the board of directors or the person or persons authorized to do so by the articles of incorporation or bylaws. Typically, the person or persons holding certain designated offices within the corporation, e.g., the president, chairman of the board of directors, or chief executive officer, are given authority to call special meetings of the shareholders. In addition, the holders of at least 10 percent of the votes entitled to be cast on a proposed issue at the special meeting may require the corporation to hold a special meeting by signing, dating, and delivering one or more writings that demand a special meeting and set forth the purpose or purposes of the desired meeting. Shareholders demanding a special meeting do not have to sign a single piece of paper, but the writings signed must all describe essentially the same purpose or purposes. Upon receipt of writings evidencing a demand by holders of 10 percent of the votes, the corporation (through an appropriate officer) must call the special meeting at a reasonable time and place. The shareholders' demand may suggest a time and place but the final decision on such matters is the corporation's. If no meeting is held within the time periods specified in section 7.03, the shareholders may obtain a summary court order under that section requiring that the meeting be held.

Section 7.02(b) fixes a record date for determining the shareholders entitled to sign a demand for a special shareholders' meeting. Unless a record date is otherwise fixed for this purpose, the record date is the date the first shareholder signs the demand. If a shareholder initially signs a demand but later seeks to withdraw his demand, the corporation may permit the shareholder to do so.

2. Discretion as to calls of special meeting

Under section 7.02(a)(2) it is possible that more than one faction of shareholders may demand meetings at roughly the same time or that a single (or changing) faction of shareholders may request consecutive, overlapping, or repetitive meetings. The responsible corporate officers have some discretion as to the call and purposes of a meeting, and where demands are repetitious or overlapping, they may refuse to call a meeting for a purpose identical or similar to a purpose for which a previous special meeting was held in the recent past. Similarly, they may decline to call a special meeting when an annual meeting will be held in the near future. This limited discretion of the corporation to deny repetitive or overlapping demands may ultimately be tested under section 7.03, which itself gives the court discretion whether or not to compel the holding of a special meeting under these circumstances. See the Official Comment to section 7.03.

3. The business that may be conducted at a special meeting

Section 7.05(c) provides that a notice of a special meeting must include a "description of the purpose or purposes for which the meeting is called." Section 7.02(d) states that only business that is within that purpose or those purposes may be conducted at the special meeting. The word "within" was chosen, rather than a broader phrase like "reasonably related to," to describe the relationship between the notice and the authorized business to assure a shareholder who does not attend a special meeting that new or unexpected matters will not be considered in his absence.

NORTH CAROLINA COMMENTARY

The provision following the semicolon in subdivision (a)(2) was added to the Model Act's provisions to bring forward former G.S. 55-61(c), modified to change the threshold test from companies listed on a national securities exchange or held of record by more than 2000 shareholders to all public corporations (as defined in G.S. 55-1-40(18a)). This modification was designed to provide a clearer, "bright line" test, which has been employed throughout this Act.

Legal Periodicals. — For article, "Silencing the Shareholder's Voice," see 80 N.C.L. Rev. 1897 (2002).

§ 55-7-03. Court-ordered meeting.

(a) The superior court of the county where a corporation's principal office (or, if none in this State, its registered office) is located may, after notice is given to the corporation, summarily order a meeting to be held:

(1) On application of any shareholder if an annual meeting of the shareholders was not held within 15 months after the corporation's last annual meeting; or

(2) On application of a shareholder who signed a demand for a special meeting valid under G.S. 55-7-02, if the corporation does not proceed to hold the meeting as required by that section.

(b) The court may fix the time and place of the meeting, determine the shares entitled to participate in the meeting, specify a record date for determining shareholders entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting (or direct that the votes represented at the meeting constitute a quorum for action on those matters), enter other orders necessary to accomplish the purpose or purposes of the meeting, and award such reasonable expenses, including attorneys' fees, as it deems appropriate. (1901, c. 2, ss. 46, 49, 51; Rev., ss. 1179, 1188, 1190; C.S., ss. 1168, 1169, 1176; G.S., ss. 55-105, 55-106, 55-113; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 21, 22; 1985 (Reg. Sess., 1986), c. 801, s. 44; 1989, c. 265, s. 1; 1991, c. 645, s. 17(b).)

OFFICIAL COMMENT

Section 7.03 provides the remedy for shareholders if the corporation refuses or fails to hold a shareholders' meeting as required by section 7.01 or 7.02. A shareholder entitled to participate in a meeting may apply for a summary court order to command the holding of a meeting if (1) an annual meeting is not held within 6 months after the end of the corporation's fiscal year or 15 months after its last annual meeting, or (2) a special meeting is not properly noticed within 30 days after a valid demand is delivered to the secretary of the corporation or, if properly noticed, is not held in accordance with the notice. Since a meeting must be held within 60 days of the notice date under section 7.05, the maximum delay between the demand for a special meeting and the right to petition a court for a summary order is 90 days.

1. The court with jurisdiction to administer section 7.03

The identity of the specific court with jurisdiction to order a shareholder's meeting under section 7.03(a) must be supplied by each state when enacting this section. It is intended that this should be a court of general civil jurisdiction. Generally, all matters relating to a corporation should be addressed to the court in the county where the corporation's principal office is located in the state or, if the corporation does not have a principal office in the state, to the court in the county in which its registered office is located.

2. The discretion of the court

The court has discretion under section 7.03 since the language of the statute is that the court "may summarily order" that a meeting be held. A court, for example, may refuse to order a special meeting if the specified purpose is repetitive of the purpose of a special meeting held in the recent past. See the Official Comment to section 7.02. Alternatively, the court may view the demand as a good faith request for reconsideration of an action taken in the recent past and may order a meeting to be held. Similarly, even though a demand for an annual meeting is not a formal prerequisite for an application for a summary order under this section, the court may withhold setting a time and date for the annual meeting for a reasonably short period in order to permit the corporation to do so.

3. Burden of proof

In any event, a shareholder applying for a summary order to hold a meeting has the burden of showing that he is entitled to the order. In the case of a special meeting, he has the burden of showing that the demand was executed by the holders of at least 10 percent of the votes entitled to be cast on the record date and that the demand was duly delivered to the corporation's secretary.

4. Notice, time, place, and quorum requirements

If the court orders that a meeting be held, it may fix the time and place of the meeting, determine the voting groups entitled to participate in the meeting, set the record date, order notice to be given as required by section 7.05, and enter such other orders as may be appropriate for the holding of the meeting. The court may also establish the quorum requirements for specific matters to be considered at the meeting or direct that the votes represented at the meeting automatically constitute a quorum for the taking of any action without regard to section 7.25 or any provision to the contrary in the corporation's articles of incorporation or bylaws. The latter alternative prevents a holder of the majority of the votes (who may not desire that a meeting be held) from frustrating the court-ordered meeting by not attending to prevent the existence of a quorum. In order to prevent misunderstanding about a special quorum requirement, if one is imposed, it is appropriate for the court to order that the notice of the meeting state specifically and conspicuously that a special quorum requirement is applicable to the court-ordered meeting.

5. STATUS AS ANNUAL MEETING

The court may provide that a meeting it has ordered is to be the annual meeting. If so provided, the meeting should be viewed as compliance with section 7.01, precluding all other shareholder requests for an annual meeting for that year.

NORTH CAROLINA COMMENTARY

The language of the Model Act in the introductory clause of subsection (a) was modified to clarify that notice must be given to a corporation before a shareholders' meeting can be summarily ordered.

The Model Act was modified in subdivision (a)(1) to allow any shareholder, not just those entitled to participate in the meeting, to apply for a court-ordered annual meeting of shareholders if the meeting is not held within 15 months after the corporation's last annual meeting. The change reflects the principle that all shareholders have an interest in the corporation's holding shareholders' meetings. In addition, the Model Act permits a shareholder to petition for a court-ordered meeting if no annual meeting is held within the earlier of six months after the close of the corporation's fiscal year or 15 months after the last annual meeting. The drafters concluded that the six months' limitation was undesirably restrictive and effectively mandated meetings during a particular part of the year. This provision was therefore omitted.

The Model Act was modified in subdivision (a)(2) to clarify that a demand must actually be received by the corporation's secretary.

The Model Act was modified in subsection (b) to allow reasonable expenses, including attorneys' fees, to be awarded to an applying shareholder in the discretion of the court.

§ 55-7-04. Action without meeting.

(a) Action required or permitted by this Chapter to be taken at a shareholders' meeting may be taken without a meeting and without prior notice except as required by subsection (d) of this section, if the action is taken by all the shareholders entitled to vote on the action or, subject to subsection (a1) of this section, if so provided in the articles of incorporation of a corporation that is not a public corporation at the time the action is taken, by shareholders having not less than the minimum number of votes that would be necessary to take the action at a meeting at which all shareholders entitled to vote were present and voted. The action must be evidenced by one or more unrevoked written consents bearing the date of signature and signed by shareholders sufficient to take the action without a meeting, before or after such action, describing the action taken and delivered to the corporation for inclusion in the minutes or filing with the corporate records. To the extent the corporation has agreed pursuant to G.S. 55-1-50, a shareholder's consent to action taken without meeting or revocation thereof may be in electronic form and delivered by electronic means.

(a1) Notwithstanding subsection (a) of this section, the following actions may be taken without a meeting only by all the shareholders entitled to vote on the action:

(1) If cumulative voting is not authorized, the election of directors at the annual meeting; or

(2) If cumulative voting is authorized, the election of directors and the removal of a director unless the entire board of directors is to be removed, and if G.S. 55-7-28(e) applies to the corporation, an amendment to the articles of incorporation to deny or limit the right of shareholders to vote cumulatively and an amendment to the articles of incorporation or bylaws to decrease the number of directors.

(b) A shareholder's written consent to action to be taken without a meeting shall cease to be effective on the sixty-first day after the date of signature appearing on the consent unless prior to the sixty-first day the corporation has received unrevoked written consents sufficient under subsection (a) of this section to take the action without meeting. If not otherwise fixed under G.S. 55-7-03 or G.S. 55-7-07, the record date for determining shareholders entitled to take action without a meeting is the earliest date of signature appearing on any consent that is to be counted in satisfying the requirements of subsection (a) of this section. A shareholder may only revoke a written consent if such shareholder delivers to the corporation a written revocation prior to the corporation's receipt of unrevoked written consents sufficient under subsection (a) of this section to take the action.

(c) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

(d) Unless the articles of incorporation otherwise provide, if shareholder approval is required by this Chapter for (i) an amendment to the articles of incorporation pursuant to Article 10 of this Chapter, (ii) a plan of merger or share exchange pursuant to Article 11 of this Chapter, (iii) a plan of conversion pursuant to Part 2 of Article 11A of this Chapter, (iv) the sale, lease, exchange, or other disposition of all, or substantially all, of the corporation's property pursuant to Article 12 of this Chapter, or (v) a proposal for dissolution pursuant to Article 14 of this Chapter, and the approval is to be obtained through action without meeting, the corporation must give its shareholders, other than shareholders who consent to the action, written notice of the proposed action at least 10 days before the action is taken. The notice shall contain or be accompanied by the same material that, under this Chapter, would have been required to be sent to shareholders not entitled to vote on the action in a notice of meeting at which the proposed action would have been submitted to shareholders for action.

(e) If action is taken without a meeting by fewer than all shareholders entitled to vote on the action, the corporation shall give written notice to all shareholders who have not consented to the action and who, if the action had been taken at a meeting, would have been entitled to notice of the meeting with the same record date as the action taken without a meeting, within 10 days after the action is taken. The notice shall describe the action and indicate that the action has been taken without a meeting of shareholders. Failure to comply with the requirements of this subsection shall not invalidate any action taken that otherwise complies with this section. (1955, c. 1371, s. 1; 1969, c. 751, s. 33; 1989, c. 265, s. 1; 2001-387, s. 11; 2001-487, ss. 62(b), 62(c); 2005-268, ss. 2, 3.)

OFFICIAL COMMENT

Section 7.04 provides that all the shareholders entitled to vote on an issue may validly act by unanimous written consent without a meeting. Unanimous written consent is obtainable, as a practical matter, only on matters on which there are only a relatively few shareholders entitled to vote.

Section 7.04 is based on the fundamental premise that if all the voting shareholders desire some action to be taken, no purpose is served by requiring the formality of holding a meeting of shareholders. Action by unanimous written consent has the same effect as a meeting vote and may be described as such in any document, including documents delivered to the secretary of state for filing. Section 7.04 is applicable to any shareholder action, including, without limitation, election of directors, approval of mergers or sales of substantially all the corporate property not in the ordinary course of business, amendments of articles of incorporation, and dissolution.

1. Form of written consent

To be effective, consents must be in writing, signed by all the shareholders entitled to vote, and delivered to the secretary of the corporation. The phrase "one or more written consents" is included in section 7.04(a) to make it clear that all shareholders do not need to sign the same piece of paper. The record date for determining who is entitled to vote, if not otherwise fixed by or in accordance with the bylaws, is the date the first shareholder signs the consent.

2. Revocation of consent

Action by unanimous written consent is effective only when the last shareholder has signed the appropriate written consent and all consents have been delivered to the secretary of the corporation. Before that time, any shareholder may withdraw his consent simply by advising the secretary of that fact. Cf. *Calumet Industries, Inc. v. McClure,* 464 F. Supp. 19 (N.D. Ill. 1978). The withdrawal of a single consent, of course, destroys the unanimous written consent required by this section. If a shareholder seeks to withdraw his consent after all shareholders have signed written consents and filed them with the secretary of the corporation, the corporation may treat the attempted withdrawal as too late or give it effect, thereby requiring the matter to be presented at a shareholders' meeting.

3. Consent to fundamental corporate changes

Section 7.04 is applicable to all shareholder actions, including the approval of fundamental corporate changes described in chapters 10, 11, 12, and 14. If these actions were taken at an annual or special meeting, shareholders who were not entitled to vote on the matter would nevertheless be entitled to receive notice of the meeting, including a description of the transaction proposed to be considered at the meeting. See, e.g., sections 10.03 (notice of proposed amendment), 11.03 (notice of proposed merger). In order to ensure that nonvoting shareholders have essentially the same right if action is taken by consent rather than at a meeting, section 7.04(d) provides that all nonvoting shareholders must be given at least 10 days' written notice of the fundamental corporate changes that are proposed for approval by consent.

NORTH CAROLINA COMMENTARY

The Model Act was modified in subsection (a) to incorporate the provisions of former G.S. 55-63, which provided that unanimous written consent to action without a meeting can be given either before or after the date of the action.

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2001)

Effective January 1, 2002, this section was amended to permit less than unanimous shareholder action without meeting for corporations other than public corporations. Subsection (b) was amended to add a requirement that written consents to an action must be obtained from shareholders within a period of 60 days. Subsection (d) was amended to require advance notice of proposed shareholder action on certain fundamental corporate changes to all shareholders (other than shareholders who consent to the action) rather than only to holders of nonvoting shares. Advance notice is not required if the articles of incorporation so provided. Subsection (e) was added to provide that if action is taken by less than unanimous written consent, notice of the action must be given within 10 days after the action is taken to all shareholders who have not consented to the action and who would have been entitled to notice of the proposed action if the action had been taken at a meeting.

Editor's Note. — Session Laws 2001-387, s. 154(a) authorizes the Revisor of Statutes to cause to be printed all explanatory comments of the drafters of the act as the Revisor deems appropriate.

Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Effective October 1, 2005, this section is amended to add a provision recognizing that a shareholder may revoke in writing the shareholder's written consent to action before the corporation has received consents sufficient to take the action. The Official Comment indicates that this was the case even before this amendment. However, the Official Comment also indicates that a corporation may elect to give effect to a revocation received after the corporation has received consents sufficient to take the action. In keeping with changes in the Model Business Corporation Act made since the Official Comment was written, this section as amended provides that the revocation must be received by the corporation before the corporation has received consents sufficient to take the action.

Legal Periodicals. — For article, "Silencing the Shareholder's Voice," see 80 N.C.L. Rev. 1897 (2002).

§ 55-7-05. Notice of meeting.

(a) A corporation shall notify shareholders of the date, time, and place of each annual and special shareholders' meeting no fewer than 10 nor more than 60 days before the meeting date. Unless this Chapter or the articles of incorporation require otherwise, the corporation is required to give notice only to shareholders entitled to vote at the meeting.

(b) Unless this Chapter or the articles of incorporation require otherwise, notice of an annual meeting need not include a description of the purpose or purposes for which the meeting is called.

(c) Notice of a special meeting must include a description of the purpose or purposes for which the meeting is called.

(d) If not otherwise fixed under G.S. 55-7-03 or G.S. 55-7-07, the record date for determining shareholders entitled to notice of and to vote at an annual or special shareholders' meeting is the close of business on the day before the first notice is delivered to shareholders.

(e) Unless the bylaws require otherwise, if an annual or special shareholders' meeting is adjourned to a different date, time, or place, notice need not be given of the new date, time, or place if the new date, time, or place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under G.S. 55-7-07, however, notice of the adjourned meeting must be given under this section to persons who are shareholders as of the new record date. (1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Shareholders entitled to notice must be given notice of annual and special meetings pursuant to section 7.05 unless the notice is waived pursuant to section 7.06. Notice must be given at least 10 but not more than 60 days before the meeting date.

1. SHAREHOLDERS ENTITLED TO NOTICE

Generally, only shareholders who are entitled to vote at a meeting are entitled to notice. Thus, notice usually needs to be sent only to holders of shares entitled to vote for an election of directors or generally on other matters (in the case of an annual meeting), and on matters within the specified purposes set forth in the notice (in the case of a special meeting), and only to holders of shares of those classes or series of shares on the record date. The last sentence of section 7.05(a), however, recognizes that other sections of the Act require that notice of meetings at which certain types of fundamental corporate changes are to be considered must be sent to all shareholders, including holders of shares who are not entitled to vote on any matter at the meeting. See sections 10.03, 11.03, 12.02, and 14.02. In addition, the articles of incorporation may require that notice of meetings be given to all or specified voting groups of shareholders who are not entitled to vote on the matters considered at those meetings.

2. STATEMENT OF MATTERS TO BE CONSIDERED AT AN ANNUAL MEETING

Notice of all special meetings must include a description of the purpose or purposes for which the meeting is called and the matters acted upon at the meeting are limited to those within the notice of meeting. By contrast, the notice of an annual meeting usually need not refer to any specific purpose or purposes, and any matter appropriate for shareholder action may be considered. As recognized in subsection (b), however, other provisions of the revised Model Act provide that certain types of fundamental corporate changes may be considered at an annual meeting only if specific reference to the proposed action appears in the notice of meeting. See sections 10.03, 11.03, 12.02, and 14.02. In addition, if the board of directors chooses, a notice of an annual meeting may contain references to purposes or proposals not required by statute. In either event, if a notice of an annual meeting refers specifically to one or more purposes, the meeting is not limited to those purposes.

3. Record date

Section 7.05(d) is a catch-all record date provision for both annual and special meetings. If the record date for notice and for voting entitlement is not otherwise fixed pursuant to sections 7.03 or 7.07, the record date for purposes of determining who is entitled to notice and to vote at the meeting is the close of business on the day before the notice is mailed to the voting groups of shareholders. If notice is mailed to shareholders over a period of more than one day, the day before the notice is delivered to the first shareholders is the record date.

The selection of the close of business on the day before the notice is mailed as the catch-all record date is intended to permit the corporation to mail notices to shareholders on a given day without regard to any requests for transfer that may have been received during that day. For this reason, this section is not inconsistent with the general principle set forth in the last sentence of section 7.07(a) that the board of directors may not fix a retroactive record date.

4. Notice of adjourned meetings

Section 7.05(e) provides rules for adjourned meetings and determines whether new notice must be given to shareholders. Under this subsection a meeting may be adjourned to a different date, time, or place without additional notice to the shareholders (unless the bylaws require otherwise) if the new date, time, or place is announced before adjournment. But new notice is required if a new record date is or must be fixed under section 7.07(c). If a new record date is or must be fixed, the 10-to-60-day notice requirement and all other requirements of section 7.05 must be complied with as notice is given to the persons who are shareholders as of the new record date. A new quorum for the adjourned meeting must also be established. See section 7.25.

Section 7.25 provides that if a quorum exists for a meeting, it is deemed to continue to exist automatically for an adjourned meeting unless a new record date is or must be set for the adjourned meeting.

§ 55-7-06. Waiver of notice.

(a) A shareholder may waive any notice required by this Chapter, the articles of incorporation, or bylaws before or after the date and time stated in the notice. The waiver must be in writing, be signed by the shareholder entitled to the notice, and be delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(b) A shareholder's attendance at a meeting:

(1) Waives objection to lack of notice or defective notice of the meeting, unless the shareholder at the beginning of the meeting objects to holding the meeting or transacting business at the meeting;

(2) Waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the shareholder objects to considering the matter before it is voted upon. (1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 7.06(a) permits any shareholder to waive any notice required by section 7.05 by a written waiver, signed by the shareholder and delivered to the corporation. A waiver is effective even though it is signed at or after the time set for the meeting.

1. Informal waiver of notice

A notice of shareholder meetings serves two principal purposes: (1) it advises shareholders of the date, time, and place of the annual or special meeting, and (2) in the case of a special meeting (or an annual meeting at which fundamental changes may be made), it advises shareholders of the purposes of the meeting. If a shareholder attends a meeting, he has probably received some form of notice of the date, time, and place of the meeting whether from the corporation or from another source. As a result, section 7.06(b)(1) provides that attendance at a meeting constitutes waiver of any failure to receive the notice or defects in the statement of the date, time, and place of any meeting. Defects waived by attendance for this purpose include a failure to send the notice altogether, delivery to the wrong address, a misstatement of the date, time, or place of the meeting, and a failure to notice the meeting within the time periods specified in section 7.05(a). If a shareholder believes that the defect in or failure of notice was in some way prejudicial, he may preserve his objection by stating at the beginning of the meeting that he objects to holding the meeting or transacting any business. If this objection is made, the corporation may correct the defect by sending proper notice to the shareholders for a subsequent meeting or by obtaining written waivers of notice from all shareholders who did not receive the notice required by section 7.05.

For purposes of this section, "attendance" at a meeting involves the presence of the shareholder in person or by proxy. A shareholder who attends a meeting solely for the purpose of objecting to the notice may be counted as present for purposes of determining whether a quorum is present. See the Official Comment to section 7.25.

In the case of special meetings, or annual meetings at which fundamental corporate changes are considered, a second purpose of the notice is to tell shareholders what is to be considered at the meeting. An objection that a particular matter is not within the stated purposes of the meeting obviously cannot be raised until the matter is presented. Thus section 7.06(b)(2) provides that a shareholder waives this kind of objection if he fails to object promptly after the matter is first presented. If this objection is made, the corporation may correct the defect by sending proper notice to the shareholders for a subsequent meeting or obtaining written waivers of notice from all shareholders. Of course, whether or not a specific matter is within a stated purpose of a meeting is ultimately a matter for judicial determination, typically in a suit to invalidate action taken at the meeting brought by a shareholder who was not present at the meeting or who was present at the meeting and preserved his objection under section 7.06(b).

The purpose of both waiver rules in section 7.06(b) is to require shareholders with technical objections to holding the meeting or considering a specific matter to raise them at the outset and not reserve them to be raised only if they are unhappy with the outcome of the meeting. The rules set forth in this section differ in some respects from the waiver rules for directors set forth in section 8.23 where a waiver is inferred if the director acquiesces in the action taken at a meeting even if he raised a technical objection to the notice of a meeting at the outset.

2. Waiver of notice where fundamental corporate actions are considered

Other sections of the Model Act require that shareholders who are not entitled to vote are entitled to notice of meetings at which certain fundamental corporate changes are to be considered. See sections 10.03, 11.03, 12.02, and 14.02. In order to obtain an effective waiver of notice for these meetings under this section, waivers must be obtained from the nonvoting shareholders who are entitled to notice as well as from the voting shareholders.

NORTH CAROLINA COMMENTARY

At the end of subdivision (b)(2), the more specific words "before it is voted upon" were substituted for the Model Act's language "when it is presented."

§ 55-7-07. Record date.

(a) The bylaws may fix or provide the manner of fixing the record date for one or more voting groups in order to determine the shareholders entitled to notice of a shareholders' meeting, to demand a special meeting, to vote, or to take any other action. If the bylaws do not fix or provide for fixing a record date, the board of directors of the corporation may fix a future date as the record date.

(b) A record date fixed under this section may not be more than 70 days before the meeting or action requiring a determination of shareholders.

(c) A determination of shareholders entitled to notice of or to vote at a shareholders' meeting is effective for any adjournment of the meeting unless the board of directors fixes a new record date, which it must do if the meeting is adjourned to a date more than 120 days after the date fixed for the original meeting.

(d) If a court orders a meeting adjourned to a date more than 120 days after the date fixed for the original meeting, it may provide that the original record date continues in effect or it may fix a new record date. (1955, c. 1371, s. 1; 1973, c. 469, s. 45.1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 7.07 authorizes the board of directors to fix record dates for any action unless the bylaws themselves fix or provide for the fixing of a record date. A separate record date may be established for each voting group entitled to vote separately on a matter at a meeting, or a single record date may be established for all voting groups entitled to participate in the meeting. If neither the bylaws nor the board of directors fix a record date for a specific action, the section of this Act that deals with that action itself fixes the record date. For example, section 7.05(d), relating to giving notice of a meeting, provides that the record date for determining who is entitled to notice of a meeting (if not fixed by the directors or the bylaws) is the close of business on the day before the date the corporation first gives notice to shareholders of the meeting.

A record date may not be fixed more than 70 days before the meeting or action in question and may not be fixed retroactively. Once set, the same record date may be utilized for an adjournment of the meeting that reconvenes within 120 days after the date fixed for the original meeting or the board of directors may fix a new record date. If the adjourned meeting takes place more than 120 days after the date fixed for the original meeting, section 7.07(c) requires that a new record date be fixed. But if an adjournment is ordered by a court, section 7.07(d) allows the court to provide that the original record date continues to be applicable or to fix a different date. In any event, if a different record date is or must be fixed under this section, section 7.05 requires that new notice be given to the persons who are shareholders as of the new record date, and section 7.25 requires that a quorum be reestablished for that meeting.

§ 55-7-08. Attendance.

To the extent authorized by a corporation's board of directors, a shareholder or the shareholder's proxy not physically present at a meeting of shareholders may attend the meeting by electronic or other means of remote communication that allow the shareholder or proxy (i) to read or to hear the meeting proceedings substantially concurrently as the proceedings occur, (ii) to be read or to be heard substantially concurrently as the shareholder or proxy communicates, and (iii) to vote on matters to which the shareholder or proxy is entitled to vote. (2001-387, s. 12.)

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§§ 55-7-09 through 55-7-19: Reserved for future codification purposes.

Part 2. Voting.

§ 55-7-20. Shareholders' list for meeting.

(a) After fixing a record date for a meeting, a corporation shall prepare an alphabetical list of the names of all its shareholders who are entitled to notice of a shareholders' meeting. The list must be arranged by voting group (and within each voting group by class or series of shares) and show the address of and number of shares held by each shareholder.

(b) The shareholders' list must be available for inspection by any shareholder, beginning two business days after notice of the meeting is given for which the list was prepared and continuing through the meeting, at the corporation's principal office or at a place identified in the meeting notice in the city where the meeting will be held. A shareholder, personally or by or with his representative, is entitled on written demand to inspect and, subject to the requirements of G.S. 55-16-02(c), to copy the list, during regular business hours and at his expense, during the period it is available for inspection.

(c) The corporation shall make the shareholders' list available at the meeting, and any shareholder, personally or by or with his representative, is entitled to inspect the list at any time during the meeting or any adjournment. The corporation is not required to make the list available through electronic or other means of remote communication to a shareholder or proxy attending the meeting by remote communication pursuant to G.S. 55-7-08.

(d) If the corporation refuses to allow a shareholder or his representative to inspect the shareholders' list before or at the meeting (or copy the list as permitted by subsection (b)), the superior court of the county where a corporation's principal office (or, if none in this State, its registered office) is located, on application of the shareholder, after notice is given to the corporation, may summarily order the inspection or copying at the corporation's expense and may postpone the meeting for which the list was prepared until the inspection or copying is complete.

(e) Refusal or failure to prepare or make available the shareholders' list does not affect the validity of action taken at the meeting. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1993, c. 552, s. 9; 2001-387, s. 13.)

OFFICIAL COMMENT

Section 7.20 requires the preparation of a list of shareholders entitled to notice of a meeting and requires that this list be made available on request to shareholders within two business days after the meeting notice is given.

The list of shareholders is often referred to as the "voting list" and usually the list will include only the names of those shareholders entitled to vote at the meeting. The list, however, must also include the names and shareholdings of shareholders of nonvoting shares if they are entitled to notice of the meeting by reason of the nature of the actions proposed to be taken at the meeting. See section 7.05 and its Official Comment.

Making the list of shareholders available before the meeting marks a change from the 1969 version of the Model Act. Through this device, a shareholder may learn the identity of the owners of substantial blocks of shares or the owners of shares similarly situated and communicate with them to see if his concerns are shared and should be pursued.

1. When the list must be available

The list must generally be available for inspection two business days after notice of the meeting is given and continuously thereafter until the meeting occurs. If, however, notice of the meeting is waived by all the shareholders, the list need be available only at the meeting itself under section 7.20(c) unless one or more waivers are conditioned upon receipt of the list.

2. Where the list must be maintained

Section 7.20(b) permits the list to be maintained either at the corporation's principal office or at another location in the city in which the meeting is to be held, the precise location to be designated in the notice of meeting. If the corporation changes the location of its annual meeting, it thus may correspondingly change the location of the list of shareholders pursuant to this subsection.

Section 7.20(c) also requires a copy of the shareholders' list to be available at the meeting itself for inspection. This list may be used to determine attendance, the presence or absence of a quorum, and the right to vote.

3. The form in which the list is maintained

Section 7.20 does not require the list of shareholders to be in any particular form. It may be maintained, for example, in electronic form. If the list is maintained in other than written form, however, suitable equipment must be provided so that a comprehensible list may be inspected by a shareholder as permitted by this section.

4. Consequences of failing to prepare the list or refusal to make it available

Section 7.20 creates a corporate obligation rather than an obligation imposed upon a corporate officer. If the corporation fails to prepare the list or refuses to permit a shareholder to inspect it, either before the meeting as required by section 7.20(b) or at the meeting itself as required by section 7.20(c), a shareholder may apply to the appropriate court under section 7.20(d) for a summary order permitting inspection of the list; the court may further order the meeting to be postponed for a reasonable time. If the court orders a copy of the list to be provided to the shareholders, the copying is at the corporation's expense; if the corporation produces the list voluntarily pursuant to section 7.20(b) or (c), any inspection and copying are at the shareholder's expense.

This judicial remedy is the only sanction for violation of section 7.20 since section 7.20(e) provides that the failure to prepare, maintain, or produce the list does not affect the validity of any action taken at the meeting.

5. THE RIGHT TO OBTAIN A COPY OF THE LIST

Section 7.20(b) permits shareholders to "inspect" the list without limitation, but permits the shareholder to "copy" the list only if the shareholder complies with the requirement of section 16.02(c), that the demand be "made in good faith and for a proper purpose." The right to copy the list includes, if reasonable, the right to receive a copy of the list upon payment of a reasonable charge. See sections 16.03(b) and (c). The distinction between "inspection" and "copying" set forth in section 7.20(b) reflects an accommodation between competing considerations of permitting shareholders access to the list before a meeting and possible misuse of the list.

6. RELATIONSHIP TO RIGHT TO INSPECT CORPORATE RECORDS GENERALLY

Section 7.20 creates a right of shareholders to inspect a list of shareholders in advance of and at a meeting that is independent of the rights of shareholders to inspect corporate records under chapter 16A. A shareholder may obtain the right to inspect the list of shareholders as provided in chapter 16A without regard to the provisions relating to the pendency of a meeting in section 7.20, and similarly the limitations of chapter 16A are not applicable to the right of inspection created by section 7.20 except to the extent the shareholder seeks to copy the list in advance of the meeting.

The right to inspect under chapter 16A is also broader in the sense that in some circumstances the shareholder may be entitled to receive copies of the documents he may inspect. See section 16.03.

NORTH CAROLINA COMMENTARY

An "or" was inserted in the second sentence of subsection (b) following the word "shareholders" in order to clarify that the disjunctive is *either* the shareholder *or* his agent or attorney. Subsection (d) was modified from the Model Act to make it clear that notice must be given to the corporation before a court enters a summary order.

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

CASE NOTES

Editor's Note. *— The case below was decided under the Business Corporation Act adopted in 1955.*

As to applicability of former section relating to shareholders' voting list to building and loan associations, see White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

§ 55-7-21. Voting entitlement of shares.

(a) Except as provided in subsections (b) and (c) or unless the articles of incorporation provide otherwise, each outstanding share, regardless of class, is entitled to one vote on each matter voted on at a shareholders' meeting.

(b) Absent special circumstances, the shares of a corporation are not entitled to vote if they are owned, directly or indirectly, by a second corporation, domestic or foreign, and the first corporation owns, directly or indirectly, a majority of the shares entitled to vote for directors of the second corporation.

(c) Subsection (b) does not limit the power of a corporation to vote any shares, including its own shares, held by it in a fiduciary capacity.

(d) Redeemable shares are not entitled to vote after notice of redemption is given to the holders and a sum sufficient to redeem the shares has been deposited with a bank, trust company, or other financial institution under an irrevocable obligation to pay the holders the redemption price on surrender of the shares. (Rev., ss. 1183, 1184; 1907, c. 457, s. 1; 1909, c. 827, s. 1; C.S., s. 1173; 1945, c. 635; G.S., s. 55-110; 1951, c. 265, s. 2; 1953, c. 722; 1955, c. 1371, s. 1; 1959, c. 768; c. 1316, s. 23; 1963, c. 1065; 1969, c. 751, ss. 34, 35; 1985, c. 419; 1985 (Reg. Sess., 1986), c. 801, s. 45; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 7.21 deals with the entitlement of shareholders to vote, while section 7.22 deals with voting by proxy and section 7.24 establishes rules for the corporation's acceptance or rejection of proxy votes.

1. Voting power of shares

Section 7.2(a) provides that each outstanding share, regardless of class, is entitled to one vote per share unless otherwise provided in the articles of incorporation. See section 6.01 and its Official Comment. The articles of incorporation may provide for multiple or fractional votes per share, and may provide that some classes of shares are nonvoting on some or all matters, or that some classes have multiple or fractional votes per share while other classes have a single vote per share or different multiple or fractional votes per share, or that some classes constitute one or more separate voting groups and are entitled to vote separately on the matter.

The articles of incorporation may also authorize the board of directors to create classes or series of shares with preferential rights, which may be voting or nonvoting in whole or in part. See section 6.02 and its Official Comment.

Fractional or multiple votes per share, or nonvoting shares, are often used in the planning of business ventures, particularly closely held ventures, when the contributions of participants vary in kind or quality. It is possible through these devices, for example, to give persons with relatively small financial contributions a relatively large voting power within the corporation.

The power to vary or condition voting power is also often used to give increased protection to financial interests in the corporation. It is customary, for example, to make classes of shares with preferential rights nonvoting, but the power to vote may be granted to those classes if distributions are omitted for a specified period. This conditional right to vote may permit the class of shares with preferential rights to vote separately as a voting group to elect one or more directors or to vote with the shares having general voting rights in the election of the directors.

In order to reflect the possibility that shares may have multiple or fractional votes per share, all provisions relating to quorums, voting, and similar matters in the Model Act are phrased in terms of "votes" rather than "shares."

2. Voting power of nonshareholders

Under the last sentence of section 7.21(a), the power to vote cannot be granted generally to nonshareholders. The statutes of some states permit bondholders to be given the power to vote under certain specified circumstances; this option is not available under the Model Act. But creditors may in effect be given the power to vote, e.g., by creating a special class of redeemable voting shares for them, by creating a voting trust at the time the credit is extended with power in the creditors to name the voting trustees, by registering the shares in the name of the creditors as pledgees with power to vote, or by granting the creditors a revocable or irrevocable proxy to vote some or all of the outstanding shares. See the Official Comment to section 7.22.

3. Circular holdings

Section 7.21(b) prohibits the voting of shares held by a domestic or foreign corporation that is itself a majority-owned subsidiary of the corporation issuing the shares. The purpose of this prohibition is to prevent management from using a corporate investment to perpetuate itself in power. Similar public policy considerations may be present in situations where the issuing corporation owns a large but not a majority interest in the corporation voting the shares. The inclusion of section 7.21(b) is not intended to affect the possible application of common law principles that may invalidate circular holding situations not within its literal prohibition. As to the possible existence of these common law principles, see, e.g., Cleveland Trust Co. v. Eaton, 11 Ohio Misc. 151, 229 N.E.2d 850 (1967), rev'd on the basis of statutory amendment, 20 Ohio St.2d 129, 256 N.E.2d 198 (1970). The phrase "absent special circumstances" is included to enable a court to permit the voting of shares where it deems that the purpose of the section is not violated.

4. Shares held in a fiduciary capacity

Section 7.21(c) makes the prohibition against voting of circularly-owned shares of section 7.21(b) inapplicable to shares held in a fiduciary capacity. Compare DEL. GEN. CORP. LAW § 160(c). The Ohio statute involved in the Eaton case authorized a bank to vote its own shares that were held by it in a fiduciary capacity. A state may grant or prohibit such voting by another statute; section 7.21(c) provides only that such voting is not prohibited by the Model Act.

5. Redeemable shares

Redeemable shares are often redeemed in connection with a transaction such as a merger or the issuance of a new senior class of shares that requires shareholder approval. Section 7.21(d) avoids subjecting a transacting to approval by a class of redeemable shares that will be redeemed as a result of the transaction if adequate provision has been made to ensure that the holders of the redeemable shares will in fact receive the amount payable to them on redemption.

NORTH CAROLINA COMMENTARY

The last sentence of subsection 7.21(a) of the Model Act, which specifies that only shares are entitled to vote, was omitted because G.S. 55-7-21.1 permits a corporation to provide to holders of debt securities the right to vote in certain circumstances. Subsection (d) was modified by substituting "given" for the Model Act's word "mailed" in order to make the provision consistent with the definition of "notice" in G.S. 55-1-41.

Legal Periodicals. — For article on the evolution of corporate combination law, see 76 N.C.L. Rev. 687 (1998).

CASE NOTES

Editor's Note. *— The cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Agreement Depriving Stockholders of Right to Vote. — See Harvey v. Linville Imp. Co., 118 N.C. 693, 24 S.E. 489 (1896); Sheppard v. Rockingham Power Co., 150 N.C. 776, 64 S.E. 894 (1909).

When Trustee May Vote. — See Haywood v. Wright, 152 N.C. 421, 67 S.E. 982 (1910).

Vote of One Trustee as Act of All Trustees. — The vote of one trustee ordinarily is the act of all the trustees where the trust owns shares of corporate stock. Fulk & Needham, Inc. v. United States, 411 F.2d 1403 (4th Cir. 1969).

§ 55-7-21.1. Rights of holders of debt securities.

In addition to any rights otherwise lawfully conferred, the articles of incorporation of the corporation may confer upon the holders of any bonds, debentures or other debt obligations issued or to be issued by the corporation any one or more of the following powers and rights upon such terms and conditions as may be prescribed in the articles of incorporation:

(1) The power to vote on any matter either in conjunction with or to the full or partial exclusion of its shareholders, notwithstanding G.S. 55-6-01(c)(1), and in determination of votes and voting groups, the holders of such debt obligations shall be treated as shareholders;

(2) The right to inspect the corporate books and records;

(3) Any other rights concerning the corporation which its shareholders have or may have.

Any such power or right shall not be diminished, as to bonds, debentures or other obligations then outstanding, except by an amendment of the articles of incorporation approved by the vote or written consent of the holders of a majority in principal amount thereof or such larger percentage as may be specified in the articles of incorporation. (1969, c. 751, s. 19; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.10; 1991, c. 645, s. 5.)

NORTH CAROLINA COMMENTARY

This section, which does not appear in the Model Act, was added to bring forward the provisions of former G.S. 55-44.1(1), which enabled a corporation to confer upon the holders of debt securities the right to vote and to exercise other rights of shareholders in certain circumstances.

§ 55-7-22. Proxies.

(a) A shareholder may vote his shares in person or by proxy.

(b) A shareholder may appoint one or more proxies to vote or otherwise act for the shareholder by signing an appointment form, either personally or by the shareholder's attorney-in-fact. Without limiting G.S. 55-1- 50, an appointment in the form of an electronic record that bears the shareholder's electronic signature and that may be directly reproduced in paper form by an automated process shall be deemed a valid appointment form within the meaning of this section. In addition, a public corporation may permit a shareholder may to appoint one or more proxies by any kind of telephonic transmission, even if not accompanied by written communication, under circumstances or together with information from which the corporation can reasonably assume that the appointment was made or authorized by the shareholder.

(c) An appointment of a proxy is effective when received by the secretary or other officer or agent authorized to tabulate votes. An appointment is valid for 11 months unless a different period is expressly provided in the appointment form.

(d) An appointment of a proxy is revocable by the shareholder unless the appointment form conspicuously states that it is irrevocable and the appointment is coupled with an interest. Appointments coupled with an interest include the appointment of:

(1) A pledgee;
(2) A person who purchased or agreed to purchase the shares;
(3) A creditor of the corporation who extended it credit under terms requiring the appointment;
(4) An employee of the corporation whose employment contract requires the appointment; or
(5) A party to a voting agreement created under G.S. 55-7-31.

(e) The death or incapacity of the shareholder appointing a proxy does not affect the right of the corporation to accept the proxy's authority unless notice of the death or incapacity is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises his authority under the appointment.

(f) An appointment made irrevocable under subsection (d) shall be revocable when the interest with which it is coupled is extinguished.

(g) A transferee for value of shares subject to an irrevocable appointment may revoke the appointment if he did not know of its existence when he acquired the shares and the existence of the irrevocable appointment was not noted conspicuously on the certificate representing the shares or on the information statement for shares without certificates.

(h) Subject to G.S. 55-7-24 and to any express limitation on the proxy's authority appearing on the face of the appointment form, a corporation is entitled to accept the proxy's vote or other action as that of the shareholder making the appointment. (1955, c. 1371, s. 1; 1959, c. 1316, s. 24; 1973, c. 469, ss. 23-25; 1989, c. 265, s. 1; 1999-138, s. 1; 2001-387, s. 14.)

OFFICIAL COMMENT

Section 7.22 provides that shareholders may vote in person or by proxy and establishes the basic rules for appointing a proxy. As business organizations have increased in size and complexity, the number of shareholders has also increased. As a result, proxy voting is an essential step in the governance of many corporations.

1. Nomenclature

The word "proxy" is often used ambiguously, sometimes referring to the grant of authority to vote, sometimes to the document granting the authority, and sometimes to the person to whom the authority is granted. In the revised Model Act the word "proxy" is used only in the last sense; the term "appointment form" is used to describe the document appointing the proxy; and the word "appointment" is used to describe the grant of authority to vote.

2. Appointment of proxy

A shareholder may appoint a proxy to vote for him simply by signing an appointment form, either personally or by his attorney-in-fact. The appointment is effective when it is received by the secretary or other officer or agent authorized to receive and tabulate votes. The proxy has the same power to vote as that possessed by the shareholder, unless the appointment form contains an express limitation on the power to vote or direction as to how to vote the shares on a particular matter, in which event the corporation must tabulate the votes in a manner consistent with that limitation or direction. See section 7.22(h).

3. Duration of proxy

An appointment form that contains no expiration date is valid for 11 months. See section 7.22(c). This ensures that in the normal course a new appointment will be solicited at least once every 12 months. But an appointment form may validly specify a longer period if the parties agree.

The appointment of a proxy is essentially the appointment of an agent and is revocable in accordance with the principles of agency law unless it is "coupled with an interest." See section 7.22(d). Thus, an appointment may be revoked either expressly or by implication, as when a shareholder later executes a second appointment form inconsistent with an earlier one, or attends the meeting in person and seeks to vote on his own behalf. The revised Model Act does not attempt to codify these common law principles of agency law.

While death or incapacity of the appointing shareholder revokes an agency appointment under common law principles, section 7.22(e) modifies the common law rule to provide that the corporation may accept the vote of the proxy until the appropriate corporate officer or agent receives notice of the shareholder's death or incapacity. In view of the widespread dispersal of shareholders in many corporations, it is not feasible for the corporation to learn of these events independently of notice. On the other hand, section 7.22(e) does not affect the validity of the proxy appointment or its manner of exercise as between the proxy and the personal representatives of the decedent or incompetent. That relationship is governed by the law of agency independent of the Model Act.

4. Irrevocable proxies

Section 7.22(d) deals with the irrevocable appointment of a proxy. The general test adopted is the common law test that all appointments are revocable unless "coupled with an interest." But section 7.22(d) provides considerable certainty since it describes several accepted forms of relationship as examples of "proxies coupled with an interest." These examples are not exhaustive and other arrangements may also be held to be "coupled with an interest." See Comment, "The Irrevocable Proxy and Voting Control of Small Business Corporations," 98 U. PA. L. REV. 401, 405-7 (1950); see generally I RESTATEMENT OF AGENCY (SECOND) § 138 (1958).

Section 7.22(f) provides that an irrevocable proxy is revoked when the interest with which it was coupled is extinguished — for example, by repayment of the loan or release of the pledge.

A transferee for value of shares that are subject to an irrevocable appointment takes free of the appointment if (1) he did not know of the existence of the appointment and (2) the existence of the irrevocable appointment was not noted conspicuously on the certificate or information statement. See section 7.22(g). Under this subsection, both the appointment and the irrevocable nature of the appointment must conspicuously appear on the certificate.

NORTH CAROLINA COMMENTARY

The second sentence of subsection (b), which was contained in substance in former G.S. 55-68, was added to the Model Act's provisions to broaden the permissible forms of proxies. The use of a variety of methods of modern communication to transmit a proxy is especially useful for public corporations.

The Model Act was modified in the second sentence of subsection (c) by changing "longer" to "different" to permit proxy appointments for less than 11 months.

The Model Act was modified in subsection (f) to provide that an irrevocable proxy appointment is revocable (but not automatically revoked) when the interest with which it is coupled is extinguished. The drafters concluded that the automatic revocation in the Model Act could create reliance problems for third parties.

Former G.S. 55-68(b) provided that no proxy was valid for more than 10 years from the date of its execution unless it was renewed or extended for an additional period of not more than 10 years. This limitation was not brought forward.

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2001)

Effective January 1, 2002, subsection (b) was amended to coordinate this section with the North Carolina Uniform Electronic Transactions Act.

Editor's Note. — Session Laws 2001-387, s. 154(a) authorizes the Revisor of Statutes to cause to be printed all explanatory comments of the drafters of the act as the Revisor deems appropriate.

Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Legal Periodicals. — For comment on the proxy system in the corporate electoral process, see 60 N.C.L. Rev. 145 (1981).

For article, "Should Corporate Statutes Providing Special Protection for Directors Be Limited to Publicly Traded Corporations?," see 24 Wake Forest L. Rev. 79 (1989).

CASE NOTES

Editor's Note. *— The case below was decided under prior law.*

Assignment Reserving Possession and Right to Dividends. — A written agreement assigning stock in a corporation with authority to vote, reserving to the assignors who retain possession the right to all dividends, amounts only to a proxy. Bridgers v. Staton, 150 N.C. 216, 63 S.E. 892 (1909).

§ 55-7-23. Shares held by nominees.

(a) A corporation may establish a procedure by which the beneficial owner of shares that are registered in the name of a nominee is recognized by the corporation as a shareholder. The extent of this recognition may be determined in the procedure.

(b) The procedure may set forth:

(1) The types of nominees to which it applies;

(2) The rights or privileges that the corporation recognizes in a beneficial owner;

(3) The manner in which the procedure is selected by the nominee;

(4) The information that must be provided when the procedure is selected;

(5) The period for which selection of the procedure is effective; and

(6) Other aspects of the rights and duties created. (1989, c. 265, s. 1.)

OFFICIAL COMMENT

Traditionally, a corporation recognizes only the registered owner as the owner of shares. Indeed, section 1.40 defines "shareholder" basically as the registered owner of shares. But it has become a common practice for persons purchasing shares to have them registered in the "street name" of a broker-dealer or other financial institution, principally to facilitate transfer by eliminating the need for the beneficial owner's signature and delivery. In addition, in order to avoid the burdens of processing securities transfers, which caused a crisis in the securities industry in the late 1960s, a system of securities depositories (defined as "clearing corporations" in section 8-102(3) of the UNIFORM COMMERCIAL CODE) has been developed. In this system, financial institutions deposit securities with the depository, which becomes the registered owner of the shares. Transfers between depositories are then accomplished by book entry of the depository. As a result, there may be two entities interposed between the corporation and the beneficial owner with the depository being the registered owner for the account of the brokerage firm that in turn holds the shares for the account of the beneficial owner.

The purpose of section 7.23 is to facilitate direct communication between the corporation and the beneficial owner by authorizing the corporation to create a procedure for bypassing both the registered owner and intermediate brokerage firms. The adoption of this procedure is discretionary with each corporation and affirmative action by the corporation is necessary to accomplish it. The procedure is also discretionary with the shareholder, who must elect to follow the applicable procedure prescribed by the corporation. The shareholder retains all of his rights except those granted to the beneficial owner.

The corporation may limit or qualify the procedure as it deems appropriate. For example, the corporation may:

(1) limit the procedure to certain classes of shareholders, such as depositories, broker-dealers and banks, or their nominees, or make the procedure available to all shareholders;

(2) permit a shareholder to adopt the procedure with respect to some but not all of the shares registered in his name (and in that case he continues to be treated as the shareholder with respect to the balance);

(3) specify the purpose or purposes for which the certification is effective, e.g., for giving notice of, and voting at, shareholders' meetings, for the distribution of proxy statements and annual reports, or for payment of cash dividends;

(4) specify the form of the certification, e.g., a written list, computer tape, or some other form of compatible input;

(5) specify the type of information that must be provided, e.g., the name and address of the beneficial owner, his taxpayer identification number, and the number of shares registered directly in his name;

(6) establish deadlines for receipt of the certifications after the establishment of a record date so that the corporation may schedule its mailings;

(7) provide that a new certification is required following each record date or that a certification as of a certain date may continue until changed by the certifying shareholder.

This listing is illustrative and not exhaustive. It is expected that experimentation with various devices under this section may reveal other areas which the corporation's plan should address.

The definition of "shareholder" in section 1.40 includes beneficial owners to the extent they obtain the rights of shareholders pursuant to the procedure authorized by this section.

§ 55-7-24. Corporation's acceptance of votes.

(a) If the name signed on a vote, consent, waiver, or proxy appointment corresponds to the name of a shareholder, the corporation if acting in good faith is entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the shareholder.

(b) If the name signed on a vote, consent, waiver, or proxy appointment does not correspond to the name of its shareholder, the corporation if acting in good faith is nevertheless entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the shareholder if:

(1) The shareholder is an entity and the name signed purports to be that of an officer or agent of the entity;

(2) The name signed purports to be that of an administrator, executor, guardian, or conservator representing the shareholder and, if the corporation requests, evidence of fiduciary status acceptable to the corporation has been presented with respect to the vote, consent, waiver, or proxy appointment;

(3) The name signed purports to be that of a receiver or trustee in bankruptcy of the shareholder and, if the corporation requests, evidence of its status acceptable to the corporation has been presented with respect to the vote, consent, waiver, or proxy appointment;

(4) The name signed purports to be that of a pledgee, beneficial owner, or attorney-in-fact of the shareholder and, if the corporation requests, evidence acceptable to the corporation of the signatory's authority to sign for the shareholder has been presented with respect to the vote, consent, waiver, or proxy appointment;

(5) Two or more persons are the shareholder as co-tenants or fiduciaries and the name signed purports to be the name of at least one of the co-owners and the person signing appears to be acting on behalf of all the co-owners.

(c) The corporation is entitled to reject a vote, consent, waiver, or proxy appointment if the secretary or other officer or agent authorized to tabulate votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the shareholder.

(d) The corporation and its officer or agent who accepts or rejects a vote, consent, waiver, or proxy appointment in good faith and in accordance with the standards of this section or G.S. 55-7-22(b) are not liable in damages to the shareholder for the consequences of the acceptance or rejection.

(e) Corporate action based on the acceptance or rejection of a vote, consent, waiver, or proxy appointment under this section is valid unless a court of competent jurisdiction determines otherwise. (1901, c. 2, ss. 42, 43; c. 474, ss. 1, 2; Rev., ss. 1185, 1186, 1187; C.S., s. 1174; G.S., s. 55-111; 1955, c. 1371, s. 1; 1957, c. 1039; 1959, c. 1316, s. 36; 1989, c. 265, s. 1; 2005-268, ss. 4, 5.)

OFFICIAL COMMENT

Corporations are often asked to accept written instrument as evidence of action by a shareholder. These instruments usually involve appointment forms for a proxy to vote the shares, but may also include waivers of notice, consents to action without a meeting, requests for a special meeting of shareholders, and similar instruments involving action by the shareholders. Usually the corporation or its officers will have no personal knowledge of the circumstances under which the instrument was executed and no way of verifying whether the signature on the instrument is in fact the signature of the shareholder. This problem is particularly acute in large corporations with thousands of shareholders.

Section 7.24 establishes general rules permitting the corporation and its officers or agents to accept these instruments if they appear to be executed by the shareholder or by a person who has authority to execute the instrument for the shareholder and they are accompanied by whatever authenticating evidence the corporation reasonably requests. The rules set forth in this section are not exclusive and may be supplemented by additional rules established by the corporation pursuant to section 2.06(b). Section 7.24(a) authorizes acceptance of an instrument if the name appearing on the instrument "corresponds" to the name of the shareholder, while section 7.24(b) permits the acceptance of an instrument executed by a person other than the shareholder if there is a designation or evidence of the capacity of the person executing the instrument that indicates the act of the person is the act of the shareholder. On the other hand, section 7.24(c) permits rejection of an instrument if the officer or agent tabulating votes has a "reasonable basis for doubt" about the validity of the signature or about the authority of the person acting on behalf of the shareholder. These principles are described in greater detail below.

The purpose of section 7.24 is to protect the corporation and its officers or agents from liability for damages to the shareholder if action is taken in accordance with the section. Thus section 7.24(d) provides that there is no liability to the shareholder if the corporation's officer or agent, acting in good faith, accepts an instrument that meets the requirements of section 7.24(a) or (b), even if it turns out that the execution was invalid or unauthorized; similarly, no liability exists if the officer or agent, again acting in good faith, rejects an instrument because of a "reasonable basis for doubt," even though it turns out that the instrument was properly executed by the shareholder. But section 7.24 does not address the question whether an action was properly or improperly taken or approved, and section 7.24(e) makes clear that the validity or invalidity of corporate action is ultimately a matter for judicial resolution through review of the results of an election in a suit to enjoin or compel corporate action. It is contemplated that any such suit will be brought promptly, typically before the corporate action is consummated or the corporation's position otherwise changes in reliance on the vote, and that any suit that is not brought promptly under the circumstances would normally be barred because of laches.

Similarly, section 7.24 does not address the liability of the proxy to the shareholder for exercising authority beyond that granted to him or for disobeying instructions. These matters are governed by the law of agency and not by section 7.24.

The American Society of Corporate Secretaries has established principles for the acceptance of proxy appointments in routine elections in which there is no proxy contest. Many of the examples of the application of section 7.24 set forth below are based on these principles.

1. EXAMPLES OF EXECUTIONS "CORRESPONDING WITH" THE NAME OF THE SHAREHOLDER

a. Assuming that shares are registered in the name of an individual, an instrument may be accepted as corresponding to the name of the shareholder:

(1) Whether executed in ink, pencil, ballpoint, crayon, etc.
(2) Regardless of where the signature appears on the instrument (whether or not in the space provided), if there is no reason to doubt the intent to execute.
(3) Whether the name is handwritten, handprinted, or rubberstamped in facsimile-signature or printed form.
(4) Whether there are deviations between the registered name and the signature, provided that the deviations are not inconsistent with the registered name. For example, if the shares are registered in the name of "John F. Smith," the following are acceptable: "J. Foster Smith," "J. Smith," "J.F. Smith," "J.F.S.," "J.S.," "John F.," and even simply "Smith." Similarly, if "John Smith" is the name of the shareholder, "John F. Smith" and "J. Foster Smith" are also acceptable.
(5) If marked by an "X" and witnessed by one other person.
(6) If not executed at all, a signed letter or telegram from the shareholder states that he has signed the instrument or approves of the action taken by the instrument.
(7) The signature is illegible, unless it cannot reasonably be considered to be the signature of the shareholder. For example, if shares are registered in the name of "John F. Smith," the signature is not acceptable if the first letter of the signature is clearly an "M" or the first word is "Mark."

b. If the shares are registered in the maiden name of a woman, e.g., Mary Smith, and the instrument is executed:
(1) In her married name, clearly indicated as such, e.g., "Mary Smith Jones (formerly Mary Smith)" or "Mary Smith (now Mrs. Mary Smith Jones)."
(2) In her married name or in a form that implies her married status, e.g., "Mary Smith Anderson," "Mrs. Mary S. Anderson," "Mrs. Mary Smith Anderson," or "Mrs. Mary Anderson."

c. If the shares are registered in the name "Peter Smith, Sr." but the designation "Sr." is omitted, e.g., "Peter Smith." The execution "Peter Smith, Jr.," however, does not correspond with the shareholder.

2. Examples of executions that "indicate the capacity" of the person signing

In all the following instances, the corporation may request additional evidence of authority but is not required to do so; officers and agents are protected from liability if they routinely accept the instrument without requiring additional evidence.

a. Assuming that the shares are registered in the name of a partnership, e.g., "Smith Bros.," an instrument may be accepted if executed either in the form "Smith Bros. by John Able, Partner" or simply "Smith Bros."

b. Assuming that the shares are registered in the name of a corporation, e.g., "Smith Corporation," an instrument may be accepted if executed in the name of the corporation, by an officer or agent designated as holding a responsible position, by a person with a surname similar to the corporate name, or simply in the name of the corporation, e.g., "Smith Corporation by John Able, President," "Smith Corporation by Peter Apt, Agent," "Smith Corporation by John Smith," or "Smith Corporation."

c. Assuming that the shares are registered in the name of an individual who is deceased, incompetent, a minor, in bankruptcy, or in receivership, an instrument may be accepted if it is executed by an executor, administrator, guardian, receiver, or trustee who signs as such. Shares registered in the name of a minor may be voted by a parent of the shareholder if he is identified as such, e.g., "Ralph Able by John Able, Father."

d. Assuming that the shares are registered in the name of an individual, an instrument may be accepted if it is executed by another individual who indicates (1) that he is signing as an agent or attorney-in-fact for the shareholder (see section 7.22); (2) that he has a close family or other relationship with the shareholder from which authority can be inferred; or (3) that he is the beneficial owner of shares, a pledgee of the shares, or a donee of the shares. For example: if shares are registered in the name of "Peter Jones," "Ed Smith, Agent," "Paul Smith, Son," "Mary Smith Jones, Wife," "Emelia Able, Attorney," "Arthur Peters, Private Secretary," "Paul Jones, Trustee under Deed of Trust dated April 1, 1980," or "Mary Smith, Donee," are all acceptable absent some indication that the execution was unauthorized.

e. Assuming that the shares are registered in the names of two or more persons — as joint tenants or tenants in common, executors or administrators, guardians or conservators, a committee for an incompetent, or trustees — an instrument may be accepted if signed by or on behalf of fewer than all the persons named. This conclusion proceeds on the assumption that the signer or signers have authority to act for the others and there is nothing on the face of the instrument that rebuts this assumption.

3. Examples of "reasonable basis for doubt"

The phrase "reasonable basis for doubt" about the validity of a signature or about the signer's authority creates an objective standard for the exercise of the authority granted by section

7.24(c) to reject proffered instruments. In the absence of a proxy fight or a seriously contested issue, instruments should be rejected only if there seems to be no basis for finding the execution regular on its face. In a proxy fight or other contested issue, the possibility of illegal or unauthorized execution is greatly increased, and a more cautious attitude should therefore be adopted. The following are examples in which a "reasonable basis for doubt" could be found to exist:

a. The shares are registered in the name of "John F. Smith" and the instrument is executed by "Joseph F. Smith" or by "Frank W. Smith."

b. The shares are registered in the name of "Ellen Smith, a Minor" or "John Smith, Custodian for Ellen Smith, a Minor," and the instrument is executed by "Ellen Smith." There is no "reasonable basis for doubt," however, if the instrument is accompanied by evidence satisfactory to the corporation that the shareholder is no longer a minor.

c. A proxy appointment is received that is regular on its face, and the secretary or other corporate officer or agent receives a telephone call from a person who identifies himself as the shareholder and says either that he wishes to revoke the appointment or that he did not authorize its original execution.

d. Shares are registered in the name of two or more persons as co-owners, the instrument is executed by fewer than all of them, and the instrument shows on its face that not all the registered owners granted authority to the signers, as where the instrument states that it was not possible to obtain all the coowners' signatures or that some refused to sign. For the normal rule of acceptability of proxies executed by fewer than all co-owners, however, see section 7.24(b)(5) and part 2.e of this Official Comment.

e. The corporation receives a copy of letters of appointment of a receiver, executor, administrator or other fiduciary, and the instrument is executed in the name of the shareholder rather than by the fiduciary.

4. OTHER PRINCIPLES APPLICABLE TO PROXY APPOINTMENTS

As indicated in the Official Comment to section 7.22, a proxy is simply an agent of the shareholder, and his appointment therefore involves primarily the law of agency. The law of agency determines the rights and duties of the shareholder and the proxy, and it is important to recognize that section 7.24 is not intended to affect these rights and duties. Rather, it recognizes that the great bulk of instruments executed in the name of a shareholder or on his behalf are in fact authorized and the corporation and its officers should be encouraged to accept them rather than to adopt unduly narrow requirements.

NORTH CAROLINA COMMENTARY

The word "pledgee," which appears immediately prior to the words "beneficial owner" in subdivision 7.24(b)(4) of the Model Act, was omitted as misleading, since a pledgee does not automatically have the right to vote pledged shares.

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

Effective October 1, 2005, subdivision (b)(4) is amended to refer to "pledgee" in conformity with the Model Business Corporation Act. A corporation may require evidence that the pledgee has been granted authority to sign for the pledgor but the corporation is not obligated to do so. Also effective October 1, 2005, a reference to the proxy appointment provisions in G.S. 55-7-22(b) is added to subsection (d).

Legal Periodicals. — For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966); 46 N.C.L. Rev. 520 (1968).

§ 55-7-25. Quorum and voting requirements for voting groups.

(a) Shares entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of that voting group exists with respect to that matter, except that, in the absence of a quorum at the opening of any meeting of shareholders, such meeting may be adjourned from time to time by the vote of a majority of the votes cast on the motion to adjourn. Unless the articles of incorporation, a bylaw adopted by the shareholders, or this act provides otherwise, a majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group for action on that matter.

(b) Once a share is represented for any purpose at a meeting, it is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless a new record date is or must be set for that adjourned meeting.

(c) If a quorum exists, action on a matter (other than the election of directors) by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast opposing the action, unless the articles of incorporation, a bylaw adopted by the shareholders, or this Chapter requires a greater number of affirmative votes.

(d) An amendment of the articles of incorporation or bylaws adding, changing, or deleting a quorum or voting requirement for a voting group greater than specified in subsection (a) or (c) is governed by G.S. 55-7-27.

(e) The election of directors is governed by G.S. 55-7-28. (1901, c. 2, s. 39; Rev., s. 1182; C.S., s. 1175; 1927, c. 138; G.S., s. 55-112; 1955, c. 1371, s. 1; 1973, c. 469, ss. 21, 22; 1989, c. 265, s. 1; 1991, c. 645, s. 16(a).)

OFFICIAL COMMENT

Section 7.25 establishes general quorum and voting requirements for voting groups for purposes of the Act. As defined in section 1.40, a "voting group" consists of all shares of one or more classes or series that under the articles of incorporation or the Revised Model Business Corporation Act are entitled to vote and be counted together collectively on a matter. Shares entitled to vote "generally" on a matter (that is, all shares entitled to vote on the matter by the articles of incorporation or this Act that do not expressly have the right to be counted or tabulated separately) are a single voting group. The determination of which shares form part of a single voting group must be made from the provisions of the articles of incorporation and of this Act. On most matters coming before shareholders' meetings, only a single voting group, consisting of a class of voting shares, will be involved, and action on such a matter is effective when approved by that voting group pursuant to section 7.25. See section 7.26(a).

The voting group concept permits a single section of the Revised Model Act to deal with quorum and voting rules applicable to a variety of single and multiple voting group situations. Section 7.25 covers, for example, quorum and voting requirements for all actions by the shareholders of a corporation with a single class of voting shares; it also covers quorum and voting requirements for a matter on which only a class of shares with preferential rights is entitled to vote under the articles of incorporation because of a default in the payment of dividends (a vote which is often described as a "class vote"); and it covers quorum and voting requirements for a matter on which both common and preferred shares are entitled to vote, either together as a single voting group under the articles of incorporation or separately as two voting groups under either the articles of incorporation or this Act.

1. Determination of Voting Groups Under the Model Act

Under the Revised Model Act, classes or series of shares are generally not entitled to vote separately by voting group except to the extent specifically authorized by the articles of incorporation. But sections 10.04 and 11.03 of the Act grant classes or series of shares the right to vote separately when fundamental changes are proposed that may adversely affect that class. Section 10.04 provides, further, that when two or more series are affected in essentially the same way, the series are lumped together and must vote as a single voting group rather than as multiple voting groups on the matter. Under the Revised Model Act even a class or series of shares that is expressly described as nonvoting under the articles of incorporation may be entitled to vote separately on a matter affecting the class or series in a designated way. See section 10.04(e).

In addition to the provisions of this Act, separate voting by voting group may be authorized by the articles of incorporation in such instances and on such terms as may be desired (except that the statutory privilege of voting by separate voting groups cannot be diluted or reduced). Finally, on some matters the board of directors may condition their submission of matters to shareholders on their approval by specific voting groups designated by the board of directors. Sections 7.25 and 7.26 establish the mechanics by which all voting by single or multiple voting groups is carried out.

In some situations, shares of a single class may be entitled to vote in two different voting groups. See the Official Comment to section 7.26.

2. Quorum and voting requirements in general

Implicit in section 7.25 is the concept that the determination of the voting groups entitled to vote, and the quorum and voting requirements applicable thereto, must be determined separately for each "matter" coming before a meeting. As a result, different quorum and voting requirements may be applicable to different portions of a meeting, depending on the matter being considered. In this respect, sections 7.25 and 7.26 differ in structure from earlier versions of the Model Act and state statutes which contemplated that a single set of quorum and voting requirements would be applicable to a "meeting." There is no difference in substance, however, since it was generally recognized that different quorum and voting requirements should be applicable in class voting situations. And, under the Revised Model Act, in the normal case where only a single voting group is entitled to vote on all matters coming before a meeting of shareholders, a single quorum and voting requirement will usually be applicable to the entire meeting.

3. Quorum requirements for action by voting group

Sections 7.25(a) and (b) provide standard rules for the determination of a quorum for each voting group required to act at a shareholders' meeting on a matter. In the absence of a provision in the articles of incorporation, section 7.25(a) provides that a quorum consists of a majority of the votes entitled to be cast on the matter at the meeting.

Section 7.25(b) retains the common law view that once a share is present at a meeting, it is deemed present for quorum purposes throughout the meeting. Thus, a voting group may continue to act despite the withdrawal of persons having the power to vote one or more shares in an effort "to break the quorum." In this respect, a meeting of shareholders is governed by a different rule than a meeting of directors, where a sufficient number of directors must be present to constitute a quorum at the time action is taken. See section 8.24 and its Official Comment.

Once a share is present at a meeting it is also deemed to be present at any adjourned meeting unless a new record date is or must be set for that adjourned meeting. See section 7.07. If a new record date is set, new notice must be given to holders of shares of a voting group and a quorum must be established from within the holders of shares of that voting group on the new record date.

The shares owned by a shareholder who comes to the meeting to object on grounds of lack of notice may be counted toward the presence of a quorum. Similarly, the holdings of a shareholder who attends a meeting solely for purposes of raising the objection that a quorum is not present is counted toward the presence of a quorum. Attendance at a meeting, however, does not constitute a waiver of other objections to the meeting such as the lack of notice. Such waivers are governed by section 7.06(b).

As used in sections 7.25 and 7.26, "represented at the meeting" means the physical presence of the shareholder (whether in person or by his written authorization) in the meeting room after the meeting has been called to order or the presiding officer has commenced consideration of the business of the meeting, and before the final adjournment of the meeting. If a person owns shares of different classes or series that are entitled to vote in separate voting groups, the presence of the person at the meeting constitutes representation at the meeting of all the shares owned by that person.

4. Voting requirements for approval by voting group

Section 7.25(c) provides that an action (other than the election of directors, which is governed by section 7.28) is approved by a voting group at a meeting at which a quorum is present if the votes cast in favor of the action exceed the votes cast opposing the action. This section changes the traditional rule appearing in earlier versions of the Model Act and many state statutes that an action is approved at a meeting at which a quorum is present if it receives the affirmative vote "of a majority of the shares represented at that meeting." The traditional rule in effect treated abstentions as negative votes; the Revised Model Act treats them truly as abstentions. The rule set forth in section 7.25(c) is considered desirable in part because it permits action to be taken by the shareholders when considered appropriate by a majority of those with views on the matter in question. Potential concern about the effect of abstentions in publicly held corporations has also been increased by changes in the SEC proxy regulations that permit shareholders of publicly held companies to abstain on issues.

The treatment of abstaining votes under the traditional rule gave rise to anomalous results in some situations. For example, if a corporation has 1,000 shares of a single class outstanding, all entitled to cast one vote each, a quorum consists of 501 shares; if 600 shares are represented and the vote on a proposed action is 280 in favor, 225 opposed, and 95 abstaining, the action is not approved since fewer than a majority of the 600 shares attending voted in favor of the action. This is anomalous since if the shares abstaining had not been present at the meeting at all, a quorum would have been present and the action would have been approved. Under section 7.25(c) the action would not be defeated by the 95 abstaining votes.

In the absence of specific provision in the articles of incorporation, shares of classes or series that are entitled by statute to vote as a separate voting group are entitled to one vote per share. See section 7.21.

5. Modification of standard requirements

The articles of incorporation may modify the quorum and voting requirements of section 7.25 for a single voting group or for all voting groups entitled to vote on any matter. The articles of incorporation may increase the quorum and voting requirements to any extent desired up to and including unanimity upon compliance with section 7.27; they may also require that shares of different classes or series are entitled to vote separately or together on specific issues or provide that actions are approved only if they receive the favorable vote of a majority of the shares of a voting group present at a meeting at which a quorum is present. The articles may also decrease the quorum requirement as desired. Earlier versions of the Model Act limited the power to reduce the quorum to a minimum of one-third; this restriction was eliminated from the Revised Model Act because it was thought to be unreasonably confining in certain situations, such as where a class of shares with preferential rights is given a limited right to vote that may be exercisable only rarely.

Section 7.25(d) provides that section 7.27 governs the adoption or amendment of provisions in the articles of incorporation that impose greater quorum or voting requirements than provided for in this section.

6. Special approval requirements

The phrase "or this Act" in section 7.25(a) and (c) makes clear that wherever the provisions of the Model Act provide more stringent voting or quorum requirements, they control over section 7.25. More stringent requirements are provided for the approval of certain fundamental corporate changes — for example, certain amendments to the articles of incorporation, mergers, and the sale of all or substantially all the corporate property not in the ordinary course of business. See sections 10.03, 11.03, and 12.02. See also section 8.31, which imposes a special voting and quorum requirement for approval of conflict of interest transactions by members of the board of directors.

NORTH CAROLINA COMMENTARY

The Model Act was modified in subsection (a) to bring forward the provisions of former G.S. 55-65(d), which permitted adjournment of a meeting in the absence of a quorum until a quorum is present. Subsections (a), (c) and (d) were modified to provide that special quorum and voting requirements can be established by a bylaw adopted by the shareholders, as well as by the articles of incorporation or the provisions of this Act.

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2001)

The definition of "represented at the meeting" appearing under the heading "3. QUORUM REQUIREMENTS FOR ACTION BY VOTING GROUP" in the Official Comment to Section 7.25 of the Model Act is subject to G.S. 55-7-08. Under G.S. 55-7-08, a share is also "represented at the meeting" if the shareholder or his or her proxy attends the meeting by remote communication pursuant to G.S. 55-7-08.

Editor's Note. — Session Laws 2001-387, s. 154(a), authorizes the Revisor of Statutes to cause to be printed all explanatory comments of the drafters of the act as the Revisor deems appropriate.

CASE NOTES

Editor's Note. *— The cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Derivative Action by FDIC. — Plaintiff FDIC, which had suffered a loss as an equitable shareholder in defendant corporation, was entitled to maintain a derivative action, and the FDIC's individual claim did not preclude its derivative claim. FDIC v. Kerr, 650 F. Supp. 1356 (W.D.N.C. 1986).

Effect of Illegal Motion of Adjournment on Election of Officers. — When a motion to adjourn a stockholders' meeting has been carried, and a sufficient number have withdrawn to reduce the number of those present below a majority of all the stock issued and outstanding, an election of officers cannot be lawfully held thereafter at that meeting, though the adjournment was carried by an illegal vote. Bridgers v. Staton, 150 N.C. 216, 63 S.E. 892 (1909).

§ 55-7-26. Action by single and multiple voting groups.

(a) If the articles of incorporation, a bylaw adopted by the shareholders, or this Chapter provides for voting by a single voting group on a matter, action on that matter is taken when voted upon by that voting group as provided in G.S. 55-7-25.

(b) If the articles of incorporation, a bylaw adopted by the shareholders, or this Chapter provides for voting by two or more voting groups on a matter, action on that matter is taken only when voted upon by each of those voting groups counted separately as provided in G.S. 55-7-25. Action may be taken by one voting group on a matter even though no action is taken at the same time by another voting group entitled to vote on the matter. (1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 7.26(a) provides that when a matter is to be voted upon by a single voting group, action is taken when the voting group votes upon the action as provided in section 7.25. In most instances the single voting group will consist of all the shares of the class or classes entitled to vote by the articles of incorporation; voting by two or more voting groups as contemplated by section 7.26(b) is the exceptional case.

Section 7.26(b) basically requires that if more than one voting group is entitled to vote on a matter, favorable action on a matter is taken only when it is voted upon favorably by each voting group, counted separately. Implicit in this section are the concepts that (1) different quorum and voting requirements may be applicable to different matters considered at a single meeting and (2) different quorum and voting requirements may be applicable to different voting groups voting on the same matter. See the Official Comment to section 7.25. Thus, each group entitled to vote must independently meet the quorum and voting requirements established by section 7.25. But if a quorum is present for one or more voting groups but not for all voting groups, section 7.26(b) provides that the voting groups for which a quorum is present may vote upon the matter.

A single meeting, furthermore, may consider matters on which action by several voting groups is required and also matters on which only a single voting group may act. Action may be taken on the matters on which the single voting group may act even though no quorum is present to take action on other matters. For example, in a corporation with one class of nonvoting shares with preferential rights ("preferred shares") and one class of general voting shares without preferential rights ("common shares"), a matter to be considered at the annual meeting may be a proposed amendment to the articles of incorporation that reduces the cumulative dividend right of the preferred shares (a matter on which the preferred shares have a statutory right to vote as a separate voting group). Other matters to be considered may include the election of directors and the appointment of an auditor, both matters on which the preferred shares have no vote. If a quorum of the voting group consisting of the common shares but no quorum of the voting group consisting of the preferred shares is present, the common shares may proceed to elect directors and appoint the auditor. The common shares voting group may also vote to approve the proposed amendment to the articles of the incorporation, but that amendment will not be approved until the preferred shares voting group also votes to approve the amendment.

1. Voting requirements on multiple voting group matters

In many multiple voting group situations under the Model Act, proposals are adopted only if a majority of all the votes entitled to be cast by each voting group approve the proposal. This percentage of votes is higher than that required by section 7.25, and is required, for example, under sections 10.03(e)(1) and 10.04(b) for all amendments to articles of incorporation that create dissenters' rights with respect to part or all of the shares of the voting group.

2. Participation of shares in multiple voting groups

As described in section 7.26(b), if voting by multiple voting groups is required, the votes of members of each voting group must be separately tabulated. Normally, each class or series of shares will participate in only a single voting group. But since holders of shares entitled by the articles of incorporation to vote generally on a matter are always entitled to vote in the voting group consisting of the general voting shares, in some instances classes or series of shares may be entitled to be counted simultaneously in two voting groups. This will occur whenever a class or series of shares entitled to vote generally on a matter under the articles of incorporation is affected by the matter in a way that gives rise to the right to have its vote counted separately as an independent voting group under the Act. For example, assume that corporation Y has outstanding one class of general voting shares without preferential rights ("common shares"), 500 shares issued, and one class of shares with preferential rights ("preferred shares"), 100 shares issued, that also have full voting rights under the articles of incorporation, i.e., the preferred may vote for election of directors and on all other matters on which common may vote. The preferred and the common therefore are part of the general voting group. The directors propose to amend the articles of incorporation to change the preferential dividend rights of the preferred from cumulative to noncumulative. All shares are present at the meeting and they divide as follows on the proposal to adopt the amendment:

Yes — Common 230
— Preferred 80
No — Common 270
— Preferred 20.

Both the preferred and the common are entitled to vote on the amendment to the articles of incorporation since they are part of a general voting group pursuant to the articles. But the vote of the preferred is also entitled to be counted separately on the proposal by section 10.04(a)(4) of the Model Act. The result is that the proposal passes by a vote of 310 to 290 in the voting group consisting of the shares entitled to vote generally and 80 to 20 in the voting group consisting solely of the preferred shares:

(a) First voting group
Yes: Common 230
Preferred 80
310
No: Common 270
Preferred 20
290

(b) Second voting group (preferred)
Yes: Preferred 80
No: Preferred 20

In this situation, in the absence of a special quorum requirement, a meeting could approve the proposal to amend the articles of incorporation if — and only if — a quorum of each voting group is present, i.e., at least 51 shares of preferred and 301 shares of common and preferred were represented at the meeting.

NORTH CAROLINA COMMENTARY

The Model Act was modified in subsections (a) and (b) to permit a bylaw adopted by the shareholders to provide for voting by a single voting group on a particular matter.

§ 55-7-27. Greater quorum or voting requirements.

(a) The articles of incorporation or a bylaw adopted by the shareholders may provide for a greater quorum or voting requirement for shareholders (or voting groups of shareholders) than is provided for by this Chapter. Any such bylaw adopted by the shareholders after the effective date of this section must be approved by a quorum and vote sufficient to amend the articles of incorporation for that purpose.

(b) Any provision in the articles of incorporation or bylaws prescribing the quorum or vote required for any purpose as permitted by this section may not itself be amended by a quorum or vote less than the quorum or vote therein prescribed. (1955, c. 1371, s. 1; 1959, c. 1316, ss. 2, 3; 1973, c. 469, ss. 4, 22; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 7.27(a) permits the articles of incorporation to increase the quorum or voting requirements for approval of an action by shareholders up to any desired amount including unanimity. These provisions may relate to ordinary or routine actions by the general voting group (which otherwise may be acted upon under section 7.25 if the number of affirmative votes exceeds the number of negative votes at a meeting at which a quorum of that voting group is present) or to one or more other voting groups or to actions for which the Model Act provides a greater voting requirement — for example, changes of a fundamental nature in the corporation like certain amendments to articles of incorporation (section 10.03), mergers (section 11.03), sales of all or substantially all the property of a corporation not in the ordinary course of business (section 12.02), and dissolution (section 14.02). Generally, the Model Act requires these fundamental changes to receive the affirmative vote of a majority of the votes entitled to be cast on the proposal by each voting group entitled to vote thereon rather than by a majority of the shares voting affirmatively or negatively at a meeting at which a quorum is present.

A provision that increases the requirement for approval of an ordinary matter or a fundamental change is usually referred to as a "supermajority" provision.

Section 7.27(b) requires any amendment of the articles of incorporation that adds, modifies, or repeals any supermajority provision to be approved by the greater of the proposed quorum and vote requirement or by the quorum and vote required by the articles before their amendment. Thus, a supermajority provision that requires an 80 percent affirmative vote of all eligible votes of a voting group present at the meeting may not be removed from the articles of incorporation or reduced in any way except by an 80 percent affirmative vote. If the 80 percent requirement is coupled with a quorum requirement for a voting group that shares representing two-thirds of the total votes must be present in person or by proxy, both the 80 percent voting requirement and the two-thirds quorum requirement are immune from reduction except at a meeting of the voting group at which the two-thirds quorum requirement is met and the reduction is approved by an 80 percent affirmative vote. If the proposal is to increase the 80 percent voting requirement to 90 percent, that proposal must be approved by a 90 percent affirmative vote at a meeting of the voting group at which the two-thirds quorum requirement is met; if the proposal is to increase the two-thirds quorum requirement to three-fourths without changing the 80 percent voting requirement, that proposal must be approved by an 80 percent affirmative vote at a meeting of the voting group at which a three-fourths quorum requirement is met.

NORTH CAROLINA COMMENTARY

This section differs from the Model Act by permitting a bylaw adopted by the shareholders to establish greater quorum or voting requirements for shareholders. If adopted after July 1, 1990, such a bylaw must be approved by a quorum and vote sufficient to amend the articles of incorporation for that purpose. Any such provision, whether in the articles of incorporation or in the bylaws, may not itself be amended by a quorum or vote less than the quorum or vote therein prescribed.

§ 55-7-28. Voting for directors; cumulative voting.

(a) Unless otherwise provided in the articles of incorporation or in an agreement valid under G.S. 55-7-31, directors are elected by a plurality of the votes cast by the shares entitled to vote in the election at a meeting at which a quorum is present.

(b) Except as provided in subsection (e) of this section, shareholders do not have a right to cumulate their votes for directors unless the articles of incorporation so provide.

(c) A statement included in the articles of incorporation that "[all] [a designated voting group of] shareholders are entitled to cumulate their votes for directors" (or words of similar import) means that the shareholders designated are entitled to multiply the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and cast the product for a single candidate or distribute the product among two or more candidates.

(d) Shares otherwise entitled to vote cumulatively may not be voted cumulatively at a particular meeting unless:

(1) The meeting notice or proxy statement accompanying the notice states conspicuously that cumulative voting is authorized; or

(2) A shareholder or proxy who has the right to cumulate his votes announces in open meeting, before voting for directors starts, his intention to vote cumulatively; and if such announcement is made, the chair shall declare that all shares entitled to vote have the right to vote cumulatively and shall announce the number of votes represented in person and by proxy, and shall thereupon grant a recess of not less than one hour nor more than four hours, as he shall determine, or of such other period of time as is unanimously then agreed upon.

(e) Shareholders of a corporation incorporated in this State shall have the right to cumulate their votes for directors if

(1) The corporation was in existence prior to July 1, 1957, under a charter which does not grant the right of cumulative voting and at the time of the election the stock transfer book of such corporation discloses, or it otherwise appears, that there is at least one stockholder who owns or controls more than one-fourth of the voting stock of such corporation (shares represented at a meeting by revocable proxy relating to that meeting or adjourned meetings thereof shall not be deemed shares "controlled" within the meaning of this subsection), or if

(2) The corporation was incorporated on or after July 1, 1957, and before July 1, 1990,

unless, when the stock transfer books are closed or at the record date fixed to determine the shareholders entitled to receive notice of and to vote at the meeting of shareholders, the corporation is a public corporation as defined in G.S. 55-1-40(18a). This right to vote cumulatively may be denied or limited by amendment to the articles of incorporation, but no such amendment shall be made when the number of shares voting against the amendment would be sufficient to elect a director by cumulative voting if such shares are entitled to be voted cumulatively for the election of directors. (Rev., ss. 1183, 1184; 1907, c. 457, s. 1; 1909, c. 827, s. 1; C.S., s. 1173; 1945, c. 635; G.S., s. 55-110; 1951, c. 265, s. 2; 1953, c. 722; 1955, c. 1371, s. 1; 1959, c. 768; c. 1316, s. 23; 1963, c. 1065; 1969, c. 751, ss. 34, 35; 1985, c. 419; 1985 (Reg. Sess., 1986), c. 801, s. 45; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.11; 1991, c. 645, ss. 16(b), 19.)

OFFICIAL COMMENT

Section 7.28(a) provides that directors are elected by a plurality of the votes cast in an election of directors at a meeting at which a quorum is present of the voting group entitled to participate in the election. A "plurality" means that the individuals with the largest number of votes are elected as directors up to the maximum number of directors to be chosen at the election. In elections in which several factions are competing within a voting group, the individuals elected may have fewer than a majority of all the votes cast in the election. The articles of incorporation or bylaws of the corporation may, however, provide a different manner of election of directors.

The entire board of directors may be elected by a single voting group or the articles of incorporation may provide that different voting groups are entitled to elect a designated number or fraction of the board of directors. See section 8.04. Elections are contested only within specific voting groups.

Under section 7.28(b) each corporation may determine whether or not to elect its directors by cumulative voting. If directors are elected by different voting groups, the articles of incorporation may provide that specified voting groups are entitled to vote cumulatively while others are not. Cumulative voting affects the manner in which votes may be cast by shares participating in the election but does not affect the plurality principle set forth in section 7.28(a).

1. THE MANNER OF ELECTING CUMULATIVE VOTING

Section 7.28(b) provides basically for an "opt in" election. A corporation has cumulative voting with respect to a voting group only if an affirmative provision to that effect appears in its articles of incorporation. Under section 7.28(c) this election may be made simply by inserting a statement that "all directors are elected by cumulative voting" or "holders of class A shares are entitled to cumulate their votes," or words of similar import. The effect of such a statement is to make applicable automatically the detailed provisions of subsections (c) and (d) describing the cumulative right to vote at elections of directors by the voting group or groups specified.

2. THE MECHANICS OF CUMULATIVE VOTING

Section 7.28(c) describes the mechanics of cumulative voting: each shareholder may multiply the number of votes he is entitled to cast (based on the number of shares held by him) by the number of directors to be elected by the voting group at the meeting and may cast the product for a single candidate or distribute the product among two or more candidates. By casting all his votes for a single candidate or a limited number of candidates, a minority shareholder increases his voting power and may be able to elect one or more directors.

Section 7.28(d) applies only if cumulative voting is potentially available under section 7.28(b). It is designed to ensure that all shareholders participating in the election understand the rules and to avoid the distortions that may be created when some shareholders vote cumulatively while others do not. Cumulative voting will be employed if the notice of meeting or accompanying proxy statement conspicuously announces that a shareholder is entitled to cumulate his votes or a shareholder who is entitled to vote gives notice to the corporation of his intent to do so at least 48 hours before the meeting. This notice puts the corporation and all shareholders who are entitled to vote in the election with that shareholder on notice that voting will be on a cumulative basis. If this notice is given by any shareholder, all other shareholders who are part of the same voting group are entitled to vote cumulatively without giving further notice.

The proxy regulations of the Securities and Exchange Commission require proxy statements to include a statement that persons have the right to vote cumulatively, if that is the case, and briefly to describe that right.

AMENDED NORTH CAROLINA COMMENTARY

The Model Act was modified in subsection (a) to clarify that an agreement valid under G.S. 55-7-31 may modify the vote by which directors are elected.

For corporations incorporated on or after July 1, 1990, subsection (b) changes prior law, which mandated cumulative voting except with respect to corporations having shares listed on national securities exchanges or held by more than 2,000 holders of record. A corporation may elect to retain cumulative voting by a provision in its articles of incorporation or in a shareholders' agreement complying with G.S. 55-7-31.

The provisions of subdivision (d)(2) were modified from the Model Act to conform with prior law with respect to the manner of electing to vote cumulatively.

Subsection (e) is a transitional provision that preserves cumulative voting for substantially all corporations that had cumulative voting by law prior to July 1, 1990.

CASE NOTES

Editor's Note. — *The cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

The right of cumulative voting in an election of corporate directors was granted by former G.S. 55-68(c). Stancil v. Bruce Stancil Refrigeration, Inc., 81 N.C. App. 567, 344 S.E.2d 789, cert. denied, 318 N.C. 418, 349 S.E.2d 601 (1986).

When Cumulative Voting Applies. — See Bridgers v. Staton, 150 N.C. 216, 63 S.E. 892 (1909).

Requirements for Exercise of Cumulative Voting. — Under former G.S. 55-68, before the right of cumulative voting may be exercised, four things must be done: (1) A shareholder must announce in the open meeting, before the voting starts, that he intends to vote cumulatively; (2) upon such an announcement, the chair must declare that all shares have the right to vote cumulatively; (3) the chair must announce the number of shares present in person or by proxy; and (4) the chair must declare a recess of not less than one hour nor more than four hours, unless a different time period is unanimously agreed upon. Stancil v. Bruce Stancil Refrigeration, Inc., 81 N.C. App. 567, 344 S.E.2d 789, cert. denied, 318 N.C. 418, 349 S.E.2d 601 (1986).

Same — Purpose. — The four requirements imposed by former G.S. 55-68(c) for the exercise of cumulative voting were designed, among other things, (1) to prevent a shareholder, by a surprise announcement of his intention to vote cumulatively, from taking unfair advantage of other shareholders, and (2) to permit the shareholders an opportunity to determine how their votes may be distributed to their best advantage. Stancil v. Bruce Stancil Refrigeration, Inc., 81 N.C. App. 567, 344 S.E.2d 789, cert. denied, 318 N.C. 418, 349 S.E.2d 601 (1986).

Lack of Recess. — Where the only person who could possibly have been prejudiced by the fact that no recess was taken after the announcement by the holder of 50% of the stock that he intended to vote cumulatively had been made was the owner of the other 50% of the stock, whose duty it was, as chairman of the meeting, to declare a recess, he would not be permitted, by his own violation of the statute, to defeat his fellow shareholder's proper exercise of a right to vote cumulatively, nor to void an otherwise valid election. Stancil v. Bruce Stancil Refrigeration, Inc., 81 N.C. App. 567, 344 S.E.2d 789, cert. denied, 318 N.C. 418, 349 S.E.2d 601 (1986).

§ **55-7-29:** Reserved for future codification purposes.

Part 3. Voting Trusts and Agreements.

§ 55-7-30. Voting trusts.

(a) One or more shareholders may create a voting trust, conferring on a trustee the right to vote or otherwise act for them, by signing an agreement setting out the provisions of the trust (which may include anything consistent with its purpose) and transferring their shares to the trustee. When a voting trust agreement is signed, the trustee shall prepare a list of the names and addresses of all owners of beneficial interests in the trust, together with the number and class of shares each transferred to the trust, and deliver copies of the list and agreement to the corporation's principal office.

(b) A voting trust becomes effective on the date the first shares subject to the trust are registered in the trustee's name. A voting trust is valid for not more than 10 years after its effective date unless extended under subsection (c).

(c) All or some of the parties to a voting trust may extend it for additional terms of not more than 10 years each by signing an extension agreement and obtaining the voting trustee's written consent to the extension. An extension is valid for not more than 10 years from the date the first shareholder signs the extension agreement. The voting trustee must deliver copies of the extension agreement and list of beneficial owners to the corporation's principal office. An extension agreement binds only those parties signing it. (1955, c. 1371, s. 1; 1963, c. 1233; 1973, c. 469, ss. 26-28; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

A voting trust is a device by which one or more shareholders divorce the voting rights of their shares from the ownership, retaining the latter but transferring the former to one or more trustees in whom the voting rights of all the shareholders who are parties to the trust are pooled. Following the long established pattern of earlier versions of the Model Act and the statutes of many states, a voting trust under section 7.30(b) is valid for a maximum of 10 years after its effective date.

At common law, voting trusts were often viewed with hostility and were narrowly construed. They are, however, a reasonable voting device to accomplish legitimate objectives. As a result, much of the original judicial hostility to these arrangements has disappeared. See, e.g., *Oceanic Exploration Co. v. Grynberg,* 428 A.2d 1 (Del. 1981).

1. Creation of a voting trust

Section 7.30(a) provides a simple and direct procedure for the creation of an enforceable voting trust. The shareholders agreeing to participate in the trust and the trustees must sign the trust agreement and the shares must be registered in the name of the trustee. Typically, the trust agreement provides that all attributes of beneficial ownership other than the power to vote are retained by the beneficial owners. In addition, the voting trustees may issue to the beneficial owners voting trust certificates which may be transferable in much the same way as shares.

Upon the creation of the voting trust, the trustees must prepare a list of the beneficial owners and deliver it, together with a copy of the agreement, to the corporation's principal office, where both documents are available for inspection by shareholders under section 7.20. This simple disclosure requirement eliminates the possibility that the voting trust may be used to create "secret, uncontrolled combinations of stockholders to acquire control of the corporation to the possible detriment of nonparticipating shareholders." *Lehrman v. Cohen,* 222 A.2d 800, 807 (Del. 1966).

The purpose of section 7.30 is not to impose narrow or technical requirements on voting trusts. For example, a voting trust that by its terms extends beyond the 10-year maximum should be treated as being valid for the maximum permissible term of 10 years.

2. EXTENSION OR RENEWAL OF VOTING TRUST

Section 7.30(c) permits a voting trust to be extended for successive terms of 10 years commencing with the date the first shareholder signs the extension agreement. Shareholders who do not agree to an extension are entitled to the return of their shares upon the expiration of the original term.

NORTH CAROLINA COMMENTARY

The Model Act was modified in the second sentence of subsection (c) to insert "not more than" in order to clarify that a voting trust may be extended for any period less than 10 years.

Legal Periodicals. — For note, "Voting Trusts — Should Trust Principles Apply to Close Corporations?", see 48 N.C.L. Rev. 342 (1970).

§ 55-7-31. Shareholders' agreements.

(a) An agreement between two or more shareholders, if in writing and signed by the parties thereto, may provide that in the exercise of any voting rights of shares held by the parties, including any vote with respect to directors, such shares shall be voted as provided by the agreement, or as the parties may agree, or as determined in accordance with any procedure (including arbitration) specified in the agreement. Such agreement shall be valid as between the parties thereto for not more than 10 years from the date of its execution. A voting agreement created under this section may be extended or renewed in like manner as a voting trust may be extended or renewed as provided by G.S. 55-7-30(c), but is not otherwise subject to the provisions of G.S. 55-7-30.

(b) Except in the case of a public corporation, no written agreement to which all of the shareholders have actually assented, whether embodied in the articles of incorporation or bylaws or in any side agreement in writing and signed by all the parties thereto, and which relates to any phase of the affairs of the corporation, whether to the management of its business or division of its profits or otherwise, shall be invalid as between the parties thereto, on the ground that it is an attempt by the parties thereto to treat the corporation as if it were a partnership or to arrange their relationships in a manner that would be appropriate between partners. A transferee of shares covered by such agreement who acquires them with knowledge thereof is bound by its provisions.

(c) A written agreement between all or less than all of the shareholders, whether solely between themselves or between one or more of them and a party who is not a shareholder, is not invalid as between the parties thereto on the ground that it so relates to the conduct of the affairs of the corporation as to interfere with the discretion of the board of directors. The effect of any such agreement shall be to relieve the directors and impose upon the shareholders who are parties to the agreement the liability for managerial acts or omissions which is imposed on directors to the extent and so long as the discretion or powers of the board in its management of corporate affairs is controlled by such agreement. (1955, c. 1371, s. 1; 1973, c. 469, s. 29; 1981 (Reg. Sess., 1982), c. 1163; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 7.31(a) explicitly recognizes agreements among two or more shareholders as to the voting of shares and makes clear that these agreements are not subject to the rules relating to a voting trust. These agreements are often referred to as "pooling agreements." The only formal requirements are that they be in writing and signed by all the participating shareholders; in other respects their validity is to be judged as any other contract. They are not subject to the 10-year limitation applicable to voting trusts.

Section 7.31(b) provides that voting agreements may be specifically enforceable. A voting agreement may provide its own enforcement mechanism, as by the appointment of a proxy to vote all shares subject to the agreement; the appointment may be made irrevocable under section 7.22. If no enforcement mechanism is provided, a court may order specific enforcement of the agreement and order the votes cast as the agreement contemplates. This section recognizes that damages are not likely to be an appropriate remedy for breach of a voting agreement, and also avoids the result reached in *Ringling Bros. Barnum & Bailey Combined Shows v. Ringling,* 53 A.2d 441 (Del. 1947), where the court held that the appropriate remedy to enforce a pooling agreement was to refuse to permit any voting of the breaching party's shares.

NORTH CAROLINA COMMENTARY

The provisions of the Model Act relating to voting agreements were omitted entirely and replaced by the provisions, slightly modified, of former G.S. 55-73, which relate to shareholders' agreements generally. The threshold requirement of subsection (b) was changed from the prior law to provide a clearer, "bright line" test.

Legal Periodicals. — For note, "Voting Trusts — Should Trust Principles Apply to Close Corporations?", see 48 N.C.L. Rev. 342 (1970).

For comment on tax and corporate aspects of professional incorporation in North Carolina, see 48 N.C.L. Rev. 573 (1970).

For note on unanimous approval of corporate bylaws and creation of shareholder agreements, see 1 Campbell L. Rev. 153 (1979).

For note on the amendment of shareholder agreements of close corporations in North Carolina, see 15 Wake Forest L. Rev. 531 (1979).

For note on close corporations and personal liability from execution of shareholder agreements, see 16 Wake Forest L. Rev. 975 (1980).

For article, "Defining the Scope of Controlling Shareholders' Fiduciary Responsibilities," see 22 Wake Forest L. Rev. 9 (1987).

For note discussing shareholder agreements in close corporations, in light of Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985), see 22 Wake Forest L. Rev. 147 (1987).

CASE NOTES

I. General Consideration.
II. Decisions under Former § 55-73(b).
III. Amendment and Termination.

I. GENERAL CONSIDERATION.

Editor's Note. *— The cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Intent of Statute. — Former G.S. 55-73 was not intended to, and it did not, define "shareholders' agreements" to mean only those arrangements which were an attempt to treat the corporation as if it were a partnership or which arranged relationships in a manner that would be appropriate only between partners. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

The authorization of shareholders' agreements was a recognition of the needs of stockholders in a close corporation to be able to protect themselves from each other and from hostile invaders. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

The reason for phrasing the provisions of the statute mainly in the negative was to provide latitude to both the shareholders who enter into agreements which relate to the affairs of the corporation and to the courts which must construe and assess their contracts. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

The provisions of former G.S. 55-73 were designed to permit the management of close corporations by shareholders thereof who act by other than normal corporate procedures, and such actions by the shareholders, if so intended, must perforce bind the corporation. Snyder v. Freeman, 300 N.C. 204, 266 S.E.2d 593 (1980).

Principal Provision as to Close Corporations. — With respect to close corporations, the heart of the North Carolina Business Corporation Act was former G.S. 55-73. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

By means of a shareholders' agreement a small group of investors who seek gain from direct participation in their business and not from trading its stock or securities in the open market can adopt the decision-making procedures of partnership, avoid the consequences of majority rule (the standard operating procedure for corporations), and still enjoy the tax advantages and limited liability of a corporation. Such businesses are often called "incorporated partnerships." Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

Shareholders' Agreement Defined. — A shareholders' agreement is a contract between shareholders which may apply broadly to the rights of the shareholders in conducting the business of the corporation, so long as their purposes are legal and not contrary to public policy. Blount v. Taft, 29 N.C. App. 626, 225 S.E.2d 583 (1976), aff'd, 295 N.C. 472, 246 S.E.2d 763 (1978).

In a broad sense the term "shareholders' agreement" refers to any agreement among two or more shareholders regarding their conduct in relation to the corporation whose shares they own. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

Terms "bylaw" and "shareholders' agreement" are not mutually exclusive. Bylaws which are unanimously enacted by all the shareholders of a corporation are also shareholders' agreements. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

Function of Shareholders' Agreement. — Ordinarily the function of a shareholders' agreement is to avoid the consequences of majority rule or other statutory norms imposed by the corporate form. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

Partnership-Like Management Enabled. — The statute enables the shareholders of a close corporation by agreement in writing assented to by all to provide for the management and operation of the corporation in a manner similar to a partnership. Blount v. Taft, 29 N.C. App. 626, 225 S.E.2d 583 (1976), aff'd, 295 N.C. 472, 246 S.E.2d 763 (1978).

No particular title, phrasing or content is necessary for a consensual arrangement among all shareholders to constitute a "shareholders' agreement." Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

Form and Substance May Vary. — The form and substance of a shareholders' agreement will vary with the nature of the business and the objectives of the parties. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

Who May Be Party to Agreement. — A shareholders' agreement may be between stockholders in a corporation the shares of which are publicly traded or one whose shares are closely held. However, agreements among shareholders are primarily a feature of close corporations. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

Agreement as to Voting Is Valid Absent Fraud or Prejudice. — North Carolina is aligned with the majority of jurisdictions which hold that a contract entered into between corporate stockholders to which they agree to vote their stock in a specified manner, including agreements for the election of directors and corporate officers, is not invalid, unless it is inspired by fraud or will prejudice the other stockholders. Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964); Stein v. Capital Outdoor Adv., Inc., 273 N.C. 77, 159 S.E.2d 351 (1968).

Agreements for Future Management Must Be "Otherwise Lawful". — Both former G.S. 55-24 and 55-73 required that contemplated agreements providing for the future management and control of a corporation be "otherwise lawful." Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964).

When Such Agreements Held Invalid. — Agreements providing for the future management and control of a corporation which violate the express charter or statutory provision, contemplate an illegal object, involve any fraud, oppression or wrong against other stockholders or are made in consideration of a private benefit to the promisor, will be declared invalid. Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964).

Invalidation of Agreements. — A shareholders' agreement is not valid and enforceable merely because it fits the specifications of this section. It can be invalidated under the law of contracts upon any ground which would entitle a party to such relief. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

Burden of Proof of Valid Agreement. — Those who have the burden of proving a valid shareholders' agreement could ease this burden by offering an agreement in writing signed by all shareholders, or if embodied in the charter or bylaws, explicit designation therein of a shareholders' agreement and provision for alteration of the agreement if different from the alteration or amendment provisions applicable to the charter or bylaw provisions which are not within the agreement. Blount v. Taft, 29 N.C. App. 626, 225 S.E.2d 583 (1976), aff'd, 295 N.C. 472, 246 S.E.2d 763 (1978).

Enforcement of Agreements. — Agreements by shareholders to vote their shares so as to cause their corporation to take certain action are generally enforceable against the shareholders. Snyder v. Freeman, 300 N.C. 204, 266 S.E.2d 593 (1980).

Agreements Construed and Enforced Like Contracts. — Since consensual arrangements among shareholders are agreements — the products of negotiation — they should be construed and enforced like any other contract so as to give effect to the intent of the parties as expressed in their agreements, unless they violate the express charter or statutory provision, contemplate an illegal object, involve fraud, oppression or wrong against other shareholders, or are made in consideration of a private benefit to the promisor. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978); Snyder v. Freeman, 300 N.C. 204, 266 S.E.2d 593 (1980).

II. DECISIONS UNDER FORMER § 55-73(B).

Intent. — Subsection (b) of former G.S. 55-73 was intended to supply a legal framework within which partner-like arrangements having a reasonable business purpose could be worked out with substantial assurance of legal validity. Blount v. Taft, 29 N.C. App. 626, 225 S.E.2d 583 (1976), aff'd, 295 N.C. 472, 246 S.E.2d 763 (1978).

Subsection (b) of former G.S. 55-73 simply abrogated, as to agreements within its purview, certain judicial doctrines which had formerly invalidated particular shareholders' agreements on those grounds which the statute disallowed. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

Language in subsection (b) of former § 55-73 was widely borrowed for the close corporations statutes of several other jurisdictions. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

Effect of Subsection (b) of Former § 55-73 Generally. — Subsection (b) of former G.S. 55-73 created no distinctions between a shareholders' agreement in which the parties sought to deal with the corporation as a partnership and any other stockholders' agreement which related to any phase of the affairs of the corporation. It added nothing, either expressly or impliedly, to the words of the agreement; nor did it suspend the rules of contract law relating to its construction, modification or rescission. It merely provided that a shareholders' agreement in which the parties sought to deal with affairs of the corporation in a manner which would be appropriate only between partners was not invalid for that reason. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

To meet the requirements of subsection (b) of former § 55-73 for establishing a valid shareholders' agreement in a close corporation, there had to be an agreement in writing of all shareholders; but the writing could consist of a written provision in the charter or bylaws of the corporation which could be based on an oral agreement which had been embodied therein. Blount v. Taft, 29 N.C. App. 626, 225 S.E.2d 583 (1976), aff'd, 295 N.C. 472, 246 S.E.2d 763 (1978).

Consensual agreements coming within subsection (b) of former § 55-73 were shareholders' agreements whether embodied in the bylaws or in a duly executed side agreement. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

III. AMENDMENT AND TERMINATION.

Amendment of Agreement in Charter or Bylaws. — When parties to a shareholders' agreement choose to embody it in the charter or bylaws, it must be concluded that they intended for statutory or common-law norms governing amendment to apply, absent an expressed intention to deviate from them. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

If a shareholders' agreement is made a part of the charter or bylaws it will be subject to amendment as provided therein, or in the absence of an internal provision governing amendments, as provided by statutory norms. Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978).

How Altered or Terminated. — A shareholders' agreement may not be altered or terminated except as provided by the agreement, or by all the parties, or by operation of law. Blount v. Taft, 29 N.C. App. 626, 225 S.E.2d 583 (1976), aff'd, 295 N.C. 472, 246 S.E.2d 763 (1978).

§§ 55-7-32 through 55-7-39: Reserved for future codification purposes.

Part 4. Derivative Proceedings.

§ 55-7-40. Shareholders' derivative actions.

Subject to the provisions of G.S. 55-7-41 and G.S. 55-7-42, a shareholder may bring a derivative proceeding in the superior court of this State. The superior court has exclusive original jurisdiction over shareholder derivative actions. (1973, c. 469, s. 12; 1989, c. 265, s. 1; 1995, c. 149, s. 1.)

OFFICIAL COMMENT

Section 7.40 deals with the procedural requirements applicable to derivative suits. A great deal of controversy has surrounded the derivative suit, and widely different perceptions as to the value and efficacy of this litigation continue to exist. On the one hand, the derivative action has historically been the principal method of challenging allegedly improper, illegal, or unreasonable action by management. On the other hand, it has long been recognized that the derivative suit may be instituted more with a view to obtaining a settlement favorable to the plaintiff and his attorney than to righting a wrong to the corporation (the so-called "strike suit").

Earlier versions of section 7.40, and similar statutes in many states, imposed a series of procedural requirements designed in part to deter or prevent strike suits. The FEDERAL RULES OF CIVIL PROCEDURE, rule 23.1, also imposes procedural requirements on derivative litigation brought in federal court. There has thus been a great deal of experience with procedural devices to control abuses of the derivative suit. Section 7.40 reflects a reappraisal of these devices in light of major developments in corporate governance, the public demand for corporate accountability, and the corporate response in the form of greater independence and sense of responsibility in boards of directors.

1. PROCEDURAL REQUIREMENTS

The procedural requirements imposed by section 7.40 are as follows:

a. The plaintiff may be either a registered or beneficial owner of shares held by a nominee in his behalf

Many statutes, including earlier versions of the Model Act, required the plaintiff to be a shareholder "of record." This limiting requirement was dropped in revising section 7.40, in light of the widespread use of street name or nominee ownership of shares. At the same time, it was determined that the beneficial owner of shares held in a voting trust should also be permitted to serve as a plaintiff in a derivative suit. These changes were accomplished by the addition of a special definition of "shareholder" in subsection (e) to broaden the definition of that term in section 1.40.

b. The plaintiff must have been an owner of shares at the time of the transaction in question

The Model Act and the statutes of many states have long imposed a "contemporaneous ownership" rule, i.e., the plaintiff must have been an owner of shares at the time of the transaction in question. This rule has been criticized as being unduly narrow and technical and unnecessary to prevent the transfer or purchase of lawsuits. A few states, particularly California, Cal. G.C.L. § 800(B), have relaxed this rule to the extent of allowing some subsequent purchasers of shares to be plaintiffs in limited circumstances.

The decision to retain the contemporaneous ownership rule in section 7.40 was based primarily on the view that it was simple, clear, and easy to apply while the California approach might encourage litigation on peripheral issues like the extent of the plaintiff's knowledge of the transaction in question when he acquired his shares. Further, there has been no persuasive showing that the contemporaneous ownership rule has prevented the litigation of substantial suits since there appear to be many persons who might qualify as plaintiffs to bring suit even if subsequent purchasers are disqualified.

c. The complaint must be verified

Section 7.40(b) requires the complaint in a derivative suit to be verified, i.e., sworn to. Compare FEDERAL RULES OF CIVIL PROCEDURE, rule 23.1; *Surowitz v. Hilton Hotels Corp.,* 383 U.S. 363 (1966). This requirement provides some protection against groundless litigation without deterring suits brought in good faith.

d. Option holders and convertible debenture holders are not permitted to sue

Arguments may be made that long-term creditors and investors with the privilege of becoming shareholders by the exercise of options or conversion rights should be permitted to bring derivative suits. These arguments, however, appear to involve the substantive rights of these various classes of investors more than the procedures required for the assertion of derivative rights on behalf of the corporation. See, e.g., *Harff v. Kerkorian,* 324 A.2d 215 (Del. Ch. 1974), rev'd in part, 347 A.2d 133 (Del. 1975). Therefore, section 7.40(a) does not permit option holders or convertible debenture holders to serve as derivative plaintiffs.

e. There must be prior notice and demand on directors in most circumstances

The purpose of a demand on the board of directors is to stimulate the board of directors to enforce the rights of the corporation on its own. Modern trends in corporate governance—particularly the increasing number of outside directors and greater directors sensitivity to their roles in the corporation and to the possibility of personal liability—improve the likelihood that the board of directors will weigh carefully the shareholder's demand. Therefore, section 7.40(b) requires an allegation with particularity of the demand made, if any, on the board of directors. On the other hand, there may be circumstances showing that a demand on the board of directors would be useless, and in those circumstances it should be sufficient to allege the reasons why the plaintiff did not make the demand.

Of itself, the rejection by the board of directors of the shareholder's demand neither permits nor precludes the shareholder's suit. See paragraph 2a. below.

f. There need be no prior notice to or demand on shareholders

Rule 23.1 of the FEDERAL RULES OF CIVIL PROCEDURE requires that, in addition to a demand on the board of directors, a demand be made on shareholders "if necessary." The statutes of a number of states, including California and New York, require demands only on boards of directors.

Although a demand on shareholders seems generally consistent with the broad doctrine of requiring exhaustion of all internal avenues of relief before commencement of suit, the board of directors, not the shareholders, is charged with governance of the corporation, including the commencement and management of litigation. Further, to require a demand on shareholders would virtually require the plaintiff to engage in a preliminary proxy contest and, in the case of publicly held corporations, would greatly increase the costs of filing all derivative suits, discouraging even legitimate cases.

For these reasons, it was concluded that the requirement of a demand on shareholders would add uncertainty, expense, and delay without commensurately improving the prospects of resolving the substantive issues.

g. A court may stay a derivative suit while the board of directors investigate

The last sentence of section 7.40(b) provides that if the corporation undertakes an investigation, the court may stay the proceeding until the investigation of the charges made in the demand or complaint is completed. The purpose of this stay is to preserve the right of the board of directors to consider whether or not to seek to enforce on its own the corporation's claim.

h. Plaintiffs are not required to post bond as security for expenses

Earlier versions of the Model Act and the statutes of many states required a plaintiff to give security for reasonable expenses, including attorneys' fees, if his holdings of shares did not reach a specified size or value—five percent of the outstanding shares or a value of $25,000 in the earlier version of the Model Act. This requirement has been deleted. The security for expenses requirement, to the extent it was based on the size or value of the plaintiff's holdings rather than on the apparent good faith of his claim, was subject to criticism that it unreasonably discriminated against small shareholders.

The basic policy question with respect to the requirement of a bond for small shareholders is how far to go in protecting the corporation and its officers and directors from suits. The choice is between making the right to sue widely available, without obstacles except in obviously baseless cases, or imposing obstacles in the way of the small shareholder without imposing a similar obstacle in the way of the large shareholder. Moreover, no bond requirement exists for class actions, antitrust cases, or individual actions for personal injury, all of which involve the corporation in substantial expense of defending against suit.

Several states have concluded on the basis of these considerations that the bond requirement for small plaintiffs should be repealed or not adopted.

i. Recovery of reasonable expenses of suit, including attorneys' fees, if suit brought without good cause

In lieu of the bond requirement, section 7.40(d) provides that on termination of a proceeding the court may require the complainant to pay the defendants' reasonable expenses, including attorneys' fees, if it finds that the proceeding "was commenced without reasonable cause." This test is similar to but not identical with the test utilized in section 13.31, relating to dissenters' rights, where the standard for award of expenses and attorneys' fees is that dissenters "acted arbitrarily, vexatiously or not in good faith" in demanding a judicial appraisal of their shares. The derivative action situation is sufficiently different from the dissenters' rights situation to justify a different and less onerous test for imposing costs on the plaintiff. The test of section 7.40 that the action was brought without reasonable cause is appropriate to deter strike suits, on the one hand, and on the other hand to protect plaintiffs whose suits have a reasonable foundation.

Section 7.40(d) does not refer to the award of expenses, including attorneys' fees, to successful plaintiffs. The right of successful plaintiffs in derivative suits to this recovery is so universally recognized, both by statute and on the theory of a recovery of a fund or benefit for the corporation, that specific reference was thought to be unnecessary. The intention is to preserve fully these nonstatutory rights of reimbursement. Therefore, no negative inference should be drawn from section 7.40(d) as to the rights of plaintiffs to reimbursement.

Abuses in the conduct of derivative litigation may occur on the part of defendants and their counsel as well as by plaintiffs and their counsel. Abuses may occur with respect to motions, pleadings, requests for discovery and resistance to discovery when conducted either in bad faith or without good cause. Sanctions to deal with such conduct are not included in this Act because courts possess adequate power to impose appropriate sanctions under rules of civil procedure or the general equity power of courts. See *Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980).

j. Settlement or discontinuance of derivative litigation requires judicial approval

Section 7.40(c) follows the FEDERAL RULES OF CIVIL PROCEDURE, and the statutes of a number of states, including New York and Michigan, and requires that all proposed settlements and discontinuances must receive judicial approval. This requirement seems a natural consequence of the proposition that a derivative suit is brought on behalf of the class of all shareholders and avoids many of the evils of the strike suit by preventing the individual shareholder-plaintiff from settling privately with the defendants.

Section 7.40(c) also requires notice to all affected shareholders if the court determines that the proposed settlement may substantially affect the interest of one or more classes of shareholders. Unlike the statutes of some states, however, section 7.40(c) does not address the issue of which party should bear the cost of giving this notice. That is a matter left to the discretion of the court reviewing the proposed settlement.

2. Issues unresolved by section 7.40

Several issues relating to section 7.40 were reserved for future consideration because it was felt that further experience or experimentation was desirable before their resolution was encapsulated in model statutory language. The issues so reserved include the following:

a. Should a decision by the board of directors that maintenance of a derivative suit is against the corporation's interest bar the suit?

The case law concerning the power of the board of directors or of an independent committee of the board to bar a derivative suit without judicial review is in a state of flux. See, e.g., *Burks v. Lasker,* 441 U.S. 471 (1979); *Auerbach v. Bennett,* 47 N.Y.2d 619, 419 N.Y.S.2d 920, 393 N.E.2d 994 (1979); *Zapata Corp. v. Maldonado,* 430 A.2d 779 (Del. 1981); *Aronson v. Lewis,* 473 A.2d 805 (Del. 1984). For the present it should be permitted to continue to develop. Moreover, this issue may be the subject of an amendment to the Model Act at a later date.

b. Should the method of calculating attorneys' fees be specified?

Courts are today scrutinizing plaintiffs' fees more closely than they have in the past. This trend should be encouraged, and it was therefore concluded that the subject was not appropriate for statutory language at the present time. It is believed that the problem is more acute with respect to plaintiffs' fees recoverable under general principles of derivative litigation than it is under section 7.40(d).

c. Should there be a maximum limit on an individual's liability?

The sums involved in claims of alleged wrongdoing by a corporation and its officers and directors are often extremely large when viewed in the light of the personal resources of even an affluent person. Claims for millions of dollars may create a high leverage to settle, and the potential exposure to these claims is an undesirable deterrent to service on the board of directors, particularly by outside directors. The proposed Federal Securities Code imposes a limit on individual liability resulting from certain violations of the Code and similar suggestions have also been made by others. On the other hand, where a director's or officer's conduct has proved to be wrongful and detrimental to the corporation, he should clearly be required to disgorge the entire benefit, and it also may be appropriate to require him rather than the victimized corporation and shareholders to bear any other loss suffered.

Since no state has yet adopted a limitation of liability provision, and there is no experience with these provisions, it was thought inappropriate at the present time to discard the principle of unlimited liability.

NORTH CAROLINA COMMENTARY

The provisions of the Model Act relating to the procedures in derivative proceedings were omitted in their entirety. The provisions of former G.S. 55-55, with minor modifications, have become subsections (a), (b), (d), (e), and (f). The second sentence of subsection (b) was added to permit the stay of any proceeding in the discretion of the court during pendency of an investigation by the corporation of the charges made in the demand or complaint.

Subsection (c) permits a recently developed procedure whereby two or more disinterested directors or other disinterested persons determine whether a corporation should pursue a particular legal right or remedy and report their findings to the court, which may then determine whether or not the derivative proceedings should be continued.

Subsection (g), which had no equivalent under prior law, imposes additional conditions upon plaintiffs who bring derivative proceedings on behalf of public corporations.

Subsection (h), which also had no equivalent under prior law, assures availability of the normal corporate attorney-client privilege in derivative proceedings.

Legal Periodicals. — For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

For note, "Alford v. Shaw: North Carolina Adopts a Prophylactic Rule to Prevent Termination of Shareholders' Derivative Suits Through Special Litigation Committees," see 64 N.C.L. Rev. 1228 (1986).

For article, "The Corporate Fox and the Shareholders' Hen House: Reflections on Alford v. Shaw," see 65 N.C.L. Rev. 569 (1987).

For article, "The Perils Of Caesar's Wife: Special Litigation Committees v. The Judiciary; Is Anyone Above Reproach?," see 22 Wake Forest L. Rev. 57 (1987).

For note discussing presumption of good faith in deliberations by special litigation committees, in light of Alford v. Shaw, see 22 Wake Forest L. Rev. 127 (1987).

For article discussing derivative suit litigation, see 66 N.C.L. Rev. 565 (1988).

For note, "Shareholder Derivative Suits Under the New North Carolina Business Corporation Act," see 68 N.C. L. Rev. 1091 (1990).

CASE NOTES

Editor's Note. — *Many of the cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Derivative actions are brought by one or more shareholders to enforce the rights of the corporation. Robbins v. Tweetsie R.R., Inc., 126 N.C. App. 572, 486 S.E.2d 453 (1997), cert. denied, 347 N.C. 402, 494 S.E.2d 418 (1997).

There is no individual recovery where a shareholder alleges mere injury to the corporation and nothing more. Robbins v. Tweetsie R.R., Inc., 126 N.C. App. 572, 486 S.E.2d 453 (1997), cert. denied, 347 N.C. 402, 494 S.E.2d 418 (1997).

No Standing to Bring Suit Without Beneficial Interest. — Plaintiff had no standing to bring suit challenging action of corporation where he failed to maintain his status as a holder of a beneficial interest in the stock of that corporation throughout the pendency of the litigation. Ashburn v. Wicker, 95 N.C. App. 162, 381 S.E.2d 876 (1989), decided under the former Business Corporation Act.

Plaintiff had no standing to challenge a loan made by defendant corporation to other defendant when plaintiff's beneficial interest, if any, in the defendant corporation consisted of a pledge of stock which secured a debt that was paid by another pledgee of the stock before plaintiff filed suit. Ashburn v. Wicker, 95 N.C. App. 162, 381 S.E.2d 876 (1989), decided under the former Business Corporation Act.

Effect of Futility Doctrine. — The futility doctrine does not allow a shareholder to bring a claim directly. Rather, it simply allows a shareholder to bring a derivative claim without first making demand upon corporate management. Thus, this doctrine offered no support to plaintiff's attempt to recover directly for the breach of his fellow directors' fiduciary duty to corporation. Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993).

Pledgee of corporate stock has a significant beneficial interest to have standing to sue the corporation derivatively for mismanagement, provided he maintains an equitable interest in the collateral. Ashburn v. Wicker, 95 N.C. App. 162, 381 S.E.2d 876 (1989), decided under the former Business Corporation Act.

Demand for Action by Directors as Prerequisite. — Former G.S. 55-55(b) codified the prior case law of this and other jurisdictions that in order for an individual as a shareholder to bring suit against the directors of a corporation for breach of their duties to the corporation, he must show that he has exhausted his intracorporate remedies by making demand upon the board to do that which he seeks to have done. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

In the absence of circumstances indicating that such a step would be futile, a demand that the directors act is a prerequisite of a shareholder suing upon behalf of the corporation. Roney v. Joyner, 86 N.C. App. 81, 356 S.E.2d 401 (1987).

Exhaustion of intracorporate remedies (that is, "demand") is a procedural prerequisite to the filing of a derivative action in this state. Alford

v. Shaw, 320 N.C. 465, 358 S.E.2d 323 (1987).

Minutes of board of directors meeting introduced into evidence by plaintiff confirmed that plaintiff made a motion that the corporation retain counsel to investigate the usurpation of a commercial leasing deal, and that this motion died for lack of a second. This action satisfied the demand requirement of this section, and any further demand would have been futile. Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993).

An equitable exception to the demand requirement may be invoked when the directors who are in control of the corporation are the same ones (or under the control of the same ones) as were initially responsible for the breaches of duty alleged; in such a case, the demand of a shareholder upon the directors to sue themselves or their principals would be futile and therefore is not required for the maintenance of the action. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979); Alford v. Shaw, 320 N.C. 465, 358 S.E.2d 323 (1987).

Mere negligence of the directors in evaluation of a purchase or in relying upon the advice of accounting and investment experts does not excuse a shareholder from demanding action by the board of directors before suing to enforce a corporate right. Roney v. Joyner, 86 N.C. App. 81, 356 S.E.2d 401 (1987).

Pleading of Damages and Defenses Thereto. — The pleading of the damages is an issue which is central to the merits of a derivative action and was not an area in which the corporation had standing to assert a defense. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

Business Judgment Rule. — The business judgment rule, stated simply, provides that when a corporation's decision not to assert a claim represents a good faith business judgment by its directors, a shareholder will not be permitted to substitute his judgment for that of the company's management by asserting the claim in a derivative action. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

Business Judgment Defense Involves Question of Good Faith. — Where the business judgment question is presented to the court as a ground for dismissal, the sole issue for determination is whether the decision was made in good faith. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

When Defense of "Business Judgment" Available to Corporation. — The defense of business judgment is not available to the corporation in a derivative action where a majority of its directors are implicated in the allegations of the suit, as it is a defense on the merits which may properly be interposed only by the directors and management of the corporation, unless the corporation is a real defendant as to some meritorious issue in the suit. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

Recommendation of Special Litigation Committee. — To rely blindly on the report of a corporation-appointed special litigation committee is to abdicate the judicial duty to consider the interests of shareholders imposed by statute; this abdication is particularly inappropriate in a case where shareholders allege serious breaches of fiduciary duties owed to them by the directors controlling the corporation. Alford v. Shaw, 320 N.C. 465, 358 S.E.2d 323 (1987).

The fact that a special litigation committee appointed by directors charged with self-dealing recommends that derivative action should not proceed, while carrying weight, is not binding upon the trial court; rather, the court must make a fair assessment of the report of the special committee, along with all the other facts and circumstances in the case, in order to determine whether the defendants will be able to show that the transaction complained of was just and reasonable to the corporation. Alford v. Shaw, 320 N.C. 465, 358 S.E.2d 323 (1987).

The burden is on the movant, usually the corporation on whose behalf the suit was initiated, to prove the independence, disinterestedness, and appropriate qualifications of the committee and that it conducted a reasonable investigation in good faith of the matters alleged in the complaint. The committee is not entitled to a presumption of independence, disinterestedness, good faith, or reasonableness. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Corporation as Defendant Where Interest Adverse to Plaintiff's. — In some situations, the corporation in whose interest the derivative action is purportedly brought will have interests adverse to those of the nominal plaintiffs bringing the action derivatively, and will of necessity be more than a nominal defendant. Such situations would include an action to enjoin the performance of a contract by the corporation, to appoint a receiver, to interfere with a corporate reorganization, or to interfere with internal management, where there is no allegation of fraud or bad faith. Swenson v.

Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

Corporation's Right to Defend Generally. — A corporation is not powerless in all cases and in all circumstances to resist a derivative action. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

Individual and Derivative Action Available to Minority Shareholders in Closely Held Corporation. — Minority shareholders in a closely held corporation who allege wrongful conduct and corruption against the majority shareholders in the corporation may bring an individual action against those shareholders, in addition to maintaining a derivative action on behalf of the corporation. Norman v. Nash Johnson & Sons' Farms, Inc., 140 N.C. App. 390, 537 S.E.2d 248, 2000 N.C. App. LEXIS 1207 (2000).

Burden of Proving Reasonableness of Transactions. — When a stockholder in a derivative action seeks to establish self-dealing on the part of a majority of the board, the burden should be upon those directors to establish that the transactions complained of were just and reasonable to the corporation when entered into or approved. Alford v. Shaw, 320 N.C. 465, 358 S.E.2d 323 (1987).

Defenses Not on Merits Available to Corporation. — Certain defenses, such as matters of personal jurisdiction, venue and subject matter jurisdiction (which question may arise in the context of alleged existence of prior pending actions involving matters identical to those complained of in the derivative suit) could be asserted by both the corporation and individual defendants where appropriate, as they are not defenses on the merits of the derivative claim. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

Additionally, certain defenses which are properly asserted before trial on the merits of the derivative action are peculiar to the corporation alone, and may be properly raised only by the corporate nominal defendant who, for purposes of those matters, ceases to be a nominal defendant and becomes an actual party defendant. These defenses would include the lack of standing of the plaintiffs to sue derivatively for reasons of insufficient representation of shareholders and a failure on plaintiffs' part to make a demand upon the board of directors. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

Limits on Corporation's Right to Defend. — In an action brought by a minority shareholder derivatively in the name and right of a corporation, to enforce rights or to seek redress accruing to the corporation, that corporation will be deemed for purposes of the litigation to be aligned as a party plaintiff (except to the extent that the corporation is an actual defendant as to an issue in the action) although for purposes of form it is designated as a nominal defendant. Accordingly, the corporation may not defend itself against the derivative action on the merits and must limit its defenses, if any, to the pre-trial matters proper to it. Where a corporation seeks to extend its defenses beyond those areas in which it may properly conduct them, dismissal will lie against it. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

When Order Not Void for Lack of Notice to Shareholders. — In an action challenging the appointment of operating receivers for a corporation, there was no merit to defendants' contention that the initial order of the trial court appointing the receivers was void because certain shareholders were not given notice of the proceedings and were thereby denied their due process rights to notice prior to a court proceeding, the outcome of which would affect their property interests, since there was no requirement in the statutes, either in the provisions governing the appointment of receivers or in the provisions governing derivative shareholder suits, that notice be given to persons who are not parties to the action. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

The statute sets forth two distinct standards for awarding attorneys' fees to successful litigants and taxing unsuccessful litigants with their opponents' attorney's fees. The court may award attorney's fees to a successful litigant who obtains a compromise and settlement or judgment, and may also assess attorney's fees against an unsuccessful litigant in certain cases. Lowder ex rel. Doby v. Doby, 79 N.C. App. 501, 340 S.E.2d 487, cert. denied, 316 N.C. 732, 345 S.E.2d 388 (1986).

When Fees May Be Awarded. — The statute does not impose a requirement to quantify the financial success of the derivative claim before fees may be awarded. The plaintiff need only succeed, in whole or in part, on behalf of the corporation. Lowder v. All Star Mills, Inc., 82 N.C. App. 470, 346 S.E.2d 695 (1986).

Amount of Award. — The statute does not provide, directly or indirectly, that the award of fees and expenses cannot exceed the specific monetary recovery. Lowder v. All Star Mills, Inc., 82 N.C. App. 470, 346 S.E.2d 695 (1986).

Award Upheld. — The removal of a self-dealing, controlling director from office and the appointment of a permanent receiver to protect the corporation in question conferred a substantial benefit on the corporation, so as to justify an award of attorneys' fees against the corporation. Lowder v. All Star Mills, Inc., 82 N.C. App. 470, 346 S.E.2d 695 (1986).

Merit Bonus Improperly Added to Award. — An award of a merit bonus added by the court to the attorneys' fees awarded, based on factors that were properly considered in the initial determination of the hourly rates and the number of hours reasonably expended, was an abuse of discretion. Lowder v. All Star Mills, Inc., 82 N.C. App. 470, 346 S.E.2d 695 (1986).

The trial court, in its discretion, may charge plaintiffs with defendants' reasonable expenses, including attorneys' fees, incurred in defense of the action. Lowder ex rel. Doby v. Doby, 79 N.C. App. 501, 340 S.E.2d 487, cert. denied, 316 N.C. 732, 345 S.E.2d 388 (1986).

Plaintiffs' actions were brought without reasonable cause where both the federal bankruptcy court and state receivership court had previously, either in Chapter X reorganization proceeding or receivership proceeding, dealt with the merits of the allegations made by plaintiffs in their five complaints, and the record was devoid of evidence to support any reasonable belief that there was a sound chance that plaintiffs' claims in the litigation might be sustained. Lowder ex rel. Doby v. Doby, 79 N.C. App. 501, 340 S.E.2d 487, cert. denied, 316 N.C. 732, 345 S.E.2d 388 (1986).

Calculation of Fees and Expenses. — Where plaintiff filed five lawsuits involving substantially overlapping contentions of law and fact, four of which were virtually identical and were linked together for purposes of appeal, plaintiffs, who created the situation, could not complain that the fees and expenses apportioned by the trial court to each of these nominally separate proceedings were not calculated with precision. Lowder ex rel. Doby v. Doby, 79 N.C. App. 501, 340 S.E.2d 487, cert. denied, 316 N.C. 732, 345 S.E.2d 388 (1986).

Judicial Review. — The plain language of the statute requires thorough judicial review of suits initiated by shareholders on behalf of a corporation. The court is directed to determine whether the interest of any shareholder will be substantially affected by the discontinuance, dismissal, compromise, or settlement of a derivative suit. Alford v. Shaw, 320 N.C. 465, 358 S.E.2d 323 (1987).

Although the statute does not specify what test the court must apply in making its determination, it would be difficult for the court to determine whether the interests of shareholders or creditors would be substantially affected by such discontinuance, dismissal, compromise, or settlement without looking at the proposed action substantively; the court must of necessity evaluate the adequacy of materials prepared by the corporation which support the corporation's decision to settle or dismiss a derivative suit, along with the plaintiff's forecast of evidence. Alford v. Shaw, 320 N.C. 465, 358 S.E.2d 323 (1987).

Court approval is required for disposition of all derivative suits, even where the directors are not charged with fraud or self-dealing, or where the plaintiff and the board agree to discontinue, dismiss, compromise, or settle the lawsuit. Alford v. Shaw, 320 N.C. 465, 358 S.E.2d 323 (1987).

Disposition Where Amount of Recovery Would Not Outweigh Detriment to Corporation. — If it appears likely that plaintiff could prevail on the merits, but that the amount of the recovery would not be sufficient to outweigh the detriment to the corporation, the court may allow discontinuance, dismissal, compromise, or settlement. Alford v. Shaw, 320 N.C. 465, 358 S.E.2d 323 (1987).

In exercising its own independent business judgment, the court must consider "such ethical, commercial, promotional, public relations and fiscal factors as may be involved in a given situation." Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

The corporation as the party seeking final disposition of the case under former G.S. 55-55(c) (see now this section) has the burden of going forward with evidence, on such items, and to show that continuing the action is more likely than not to be against the interests of the corporation. Of course, the shareholders initiating the suit are also entitled to present evidence and arguments as to their contentions. Ultimately, however, while "the review contemplated does not lend itself to any formula-like approach," it is for the court to decide whether the case begun in the superior court will continue. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Trial judge may allow discovery to enable him to assess the committee of decision-makers, the investigation made by the committee, the findings of the committee, and the recommendation of the committee. After hearing evidence on these matters, the trial court is to determine the independence, disinterestedness, and good faith of the committee in making its investigation, in addition to the reasonableness of the bases relied upon by the committee in concluding and recommending that the cause of action on behalf of the corporation be disposed of as recommended. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Plaintiffs were not required to pursue statutory dissenters' rights under former G.S. 55-113 (see now Art. 13 of ch. 55) to oppose merger during litigation in order to maintain standing. Subdivision (c) of former G.S. 55-113 would have deprived them of all interest in defendant corporation. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Responsibility of Court When Party Challenges Recommendation of Corporation. — Since proceedings under former G.S. 55-55(c) (see now this section) are held before a trial judge sitting without a jury, when a party challenges the recommendation of the corporation in whose name a lawsuit was initiated derivatively, it is the court's responsibility first, to require the party taking issue with the recommendation to outline his contentions so he may receive an appropriate response from the other parties to the suit, and then secondly, to hear evidence on these contentions, in order to be able to determine whether the lawsuit is to be discontinued, dismissed, settled, or turned over to the plaintiff-shareholders or the corporation for litigation. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

There was no requirement of continuing share ownership in former § 55-55 in order for an individual, who was a shareholder at the time of the transaction about which he was complaining and at the time the action was filed, to proceed with a derivative action. Had the legislature intended to include such a requirement in the corporate statutes, it would have done so. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Section Does Not Contain Continuing Share Ownership Requirement. — This section, the new statute, while elaborating some of the procedures set forth in former G.S. 55-55, does not contain a continuing share ownership requirement. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

No State Constitutional Right Exists to Trial by Jury of Factual Issues. — Although a litigant's right to have a jury try issues of fact concerning the merits of the action initiated by the filing of a derivative suit complaint is guaranteed by the Constitution of North Carolina, the procedure required by former G.S. 55-55(c) (see now this section) did not exist before the adoption of the Constitution of 1868, and therefore no State constitutional right exists to a trial by jury of factual issues that might arise during the course of the proceedings required under this statute. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

A litigant has no right to the determination of factual issues by a jury during proceedings occurring pursuant to former G.S. 55-55(c) (see now this section). In this section of the statute, it is clear that the word "court" referred to the trial judge and not to a jury. The remaining sentences of former G.S. 55-55(c) referred to discretionary decisions exercisable properly only by the trial judge; clearly the legislature did not intend that a jury be involved in the procedures required under former G.S. 55-55(c). Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Jury Properly Not Involved in Deciding Future of Case. — The trial judge proceeded properly insofar as he did not involve a jury in the decision whether to allow the case to be discontinued, dismissed, compromised or settled. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Judge May Need to Resolve Fact Issues to Determine Future of Case. — As the judicial official charged under former G.S. 55-55(c) (see now this section) with this authority, the trial judge may well have to resolve issues of fact to decide whether to permit the suit to go forward, be settled, or be dismissed. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Judge, Not Jury, Decides Whether Case Will Be Settled, Dismissed, etc. — The hearing on motions filed under former G.S. 55-55(c) (see now this section) was appropriately held by the trial judge sitting without a jury. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Trial Court's Review of Motions to Settle, Dismiss, Compromise or Discontinue. — The trial court is to undertake a two-step review of motions brought under former G.S. 55-55(c) (see now this section). First, it is to decide whether the proposal for disposition of the case which is submitted to the court was reached by qualified independent disinterested decision-makers who in good faith proceeded to thoroughly investigate and evaluate the claims set forth in the complaint. The second step requires the trial court to exercise its own independent business judgment as to whether the case is to be discontinued, dismissed, compromised or settled. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Procedure and Discovery in Hearing Concerning Motion to Dismiss, Settle, etc. — For a case discussing interplay of rules and statutes governing procedure and discovery in shareholder's derivative action, particularly with respect to former G.S. 55-55(c) (see now this section) and G.S. 1A-1, Rules 12, 23 and 56. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Rule 23.1, Fed. R. Civ. P., is entirely consistent with this section, as this section allows for a device that the federal rule does not contemplate. The terms of Rule 23.1 and the appointment of a committee pursuant to this section both can be fully honored in a federal court sitting in diversity. Crown Crafts, Inc. v. Aldrich, 148 F.R.D. 547 (E.D.N.C. 1993).

Appointment of a committee under subsection (c) of former similar section is generally more appropriate in the context of a publicly held corporation, or at the very least within a close corporation with more than two owners. The appointment of a committee would likely only delay litigation in action brought by minority shareholders of close corporation alleging breach of fiduciary duties and deceptive and unfair trade practices. Crown Crafts, Inc. v. Aldrich, 148 F.R.D. 547 (E.D.N.C. 1993).

Issuance of Stay Pending Committee Report. — The language of subsection (c) of former similar section, while not expressly granting it, contemplates the issuance of a stay pending the committee's report. The appointment of a committee would be meaningless if the litigation were allowed to continue pending its investigation. Crown Crafts, Inc. v. Aldrich, 148 F.R.D. 547 (E.D.N.C. 1993).

Cited in Crown Crafts, Inc. v. Aldrich, 148 F.R.D. 151 (E.D.N.C. 1993); Guess v. Parrott, 160 N.C. App. 325, 585 S.E.2d 464, 2003 N.C. App. LEXIS 1798 (2003); Bridges v. Oates, 167 N.C. App. 459, 605 S.E.2d 685, 2004 N.C. App. LEXIS 2335 (2004).

§ 55-7-40.1. Definitions.

In this Part:

(1) "Derivative proceeding" means a civil suit in the right of a domestic corporation or, to the extent provided in G.S. 55-7-47, in the right of a foreign corporation.

(2) "Shareholder" has the same meaning as in G.S. 55-1-40 and includes a beneficial owner whose shares are held in a voting trust or held by a nominee on the beneficial owner's behalf. (1995, c. 149, s. 1.)

CASE NOTES

Standing. — As 50% shareholder failed to show that her damages differed from those sustained by her corporation, by reason of some special circumstances or special relationship to the defendants, she lacked standing to maintain a direct action against defendants on claims of fraud, constructive fraud, and unfair and deceptive practices. Aubin v. Susi, 149 N.C. App. 320, 560 S.E.2d 875, 2002 N.C. App. LEXIS 190 (2002), cert. dismissed, 356 N.C. 610, 574 S.E.2d 473 (2002), cert. denied, 356 N.C. 610, 574 S.E.2d 474 (2002).

Cited in Norman v. Nash Johnson & Sons' Farms, Inc., 140 N.C. App. 390, 537 S.E.2d 248, 2000 N.C. App. LEXIS 1207 (2000); Bridges v. Oates, 167 N.C. App. 459, 605 S.E.2d 685, 2004 N.C. App. LEXIS 2335 (2004).

§ 55-7-41. Standing.

A shareholder may not commence or maintain a derivative proceeding unless the shareholder:

(1) Was a shareholder of the corporation at the time of the act or omission complained of or became a shareholder through transfer by operation of law from one who was a shareholder at that time; and

(2) Fairly and adequately represents the interests of the corporation in enforcing the right of the corporation. (1995, c. 149, s. 1.)

Legal Periodicals. — For recent development, "In re Wachovia Shareholders Litigation: The Case for the Common Benefit Doctrine," see 84 N.C. L. Rev. 2066 (2006).

CASE NOTES

Cited in Norman v. Nash Johnson & Sons' Farms, Inc., 140 N.C. App. 390, 537 S.E.2d 248, 2000 N.C. App. LEXIS 1207 (2000); Bridges v. Oates, 167 N.C. App. 459, 605 S.E.2d 685, 2004 N.C. App. LEXIS 2335 (2004).

§ 55-7-42. Demand.

No shareholder may commence a derivative proceeding until:

(1) A written demand has been made upon the corporation to take suitable action; and

(2) 90 days have expired from the date the demand was made unless, prior to the expiration of the 90 days, the shareholder was notified

that the corporation rejected the demand, or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period. (1995, c. 149, s. 1.)

Legal Periodicals. — For recent development, "In re Wachovia Shareholders Litigation: The Case for the Common Benefit Doctrine," see 84 N.C. L. Rev. 2066 (2006).

CASE NOTES

The enactment of this section has eliminated the futility exception to the demand requirement; that is, all derivative actions based on conduct occurring on or after 1 October 1995 require demand. Norman v. Nash Johnson & Sons' Farms, Inc., 140 N.C. App. 390, 537 S.E.2d 248, 2000 N.C. App. LEXIS 1207 (2000).

This section does not require that the complaint in a derivative proceeding state how the demand requirement was met, although its predecessor statute (G.S. 55-7-40) required that a plaintiff allege his efforts "with particularity;" consequently, the trial court erred in dismissing the plaintiffs' complaint in the context of a G.S. 1A-1, Rule 12(b)(6) motion for failure to comply with the statutory requirements of a derivative action where the plaintiffs had complied with G.S. 1A-1, Rule 9(c). Norman v. Nash Johnson & Sons' Farms, Inc., 140 N.C. App. 390, 537 S.E.2d 248, 2000 N.C. App. LEXIS 1207 (2000).

Failure to Satisfy Requirements of This Section Results in Dismissal. — The trial court properly dismissed plaintiff's claims pursuant to G.S. 1A-1, Rule 12(b)(6) for failure to satisfy the shareholder derivative action demand requirement of this section where he was not excused from meeting the requirements because the enactment of it abolished the futility exception under North Carolina law. Allen v. Ferrera, 141 N.C. App. 284, 540 S.E.2d 761, 2000 N.C. App. LEXIS 1404 (2000).

Trial court properly dismissed a property owners association's suit against its developer, which asserted claims of constructive fraud and unfair and deceptive trade practices, for lack of standing on the part of the association, because the association failed to obtain a two-thirds vote of its membership authorizing the suit, as was required by its bylaws; as a result, the trial court lacked subject matter jurisdiction and properly granted the developer's motion to dismiss and motion for summary judgment. Peninsula Prop. Owners Ass'n v. Crescent Res., LLC, 171 N.C. App. 89, 614 S.E.2d 351, 2005 N.C. App. LEXIS 1165 (2005), cert. denied, — N.C. —, 626 S.E.2d 648 (2005).

The failure to make adequate pre-litigation demand did not bar plaintiffs minority shareholders' claims insofar as they were based on defendant's actions prior to October 1, 1995, the date that this section became effective. Norman v. Nash Johnson & Sons' Farms, Inc., 140 N.C. App. 390, 537 S.E.2d 248, 2000 N.C. App. LEXIS 1207 (2000).

Applied in Wright v. Krispy Kreme Doughnuts, Inc., 231 F.R.D. 475, 2005 U.S. Dist. LEXIS 25557 (M.D.N.C. 2005).

Cited in Bridges v. Oates, 167 N.C. App. 459, 605 S.E.2d 685, 2004 N.C. App. LEXIS 2335 (2004).

§ 55-7-43. Stay of proceedings.

If the corporation commences an inquiry into the allegations set forth in the demand or complaint, the court may stay a derivative proceeding for a period of time the court deems appropriate. (1995, c. 149, s. 1.)

CASE NOTES

Applied in Wright v. Krispy Kreme Doughnuts, Inc., 231 F.R.D. 475, 2005 U.S. Dist. LEXIS 25557 (M.D.N.C. 2005).

Cited in Norman v. Nash Johnson & Sons' Farms, Inc., 140 N.C. App. 390, 537 S.E.2d 248, 2000 N.C. App. LEXIS 1207 (2000); Bluebird Corp. v. Aubin, 188 N.C. App. 671, 657 S.E.2d 55, 2008 N.C. App. LEXIS 279 (2008).

§ 55-7-44. Dismissal.

(a) The court shall dismiss a derivative proceeding on motion of the corporation if one of the groups specified in subsection (b) or (f) of this section determines in good faith after conducting a reasonable inquiry upon which its conclusions are based that the maintenance of the derivative proceeding is not in the best interest of the corporation.

(b) Unless a panel is appointed pursuant to subsection (f) of this section, the inquiry and determination shall be made by:

(1) A majority vote of independent directors present at a meeting of the board of directors if the independent directors constitute a quorum; or

(2) A majority vote of a committee consisting of two or more independent directors appointed by majority vote of independent directors present at a meeting of the board of directors, whether or not the independent directors constituted a quorum.

(c) For purposes of this section, none of the following factors by itself shall cause a director to be considered not independent:

(1) The nomination or election of the director by persons who are defendants in the derivative proceeding or against whom action is demanded;

(2) The naming of the director as a defendant in the derivative proceeding or as a person against whom action is demanded; or

(3) The approval by the director of the act being challenged in the derivative proceeding or demand if the act resulted in no personal benefit to the director.

(d) If a derivative proceeding is commenced after a determination has been made rejecting a demand by a shareholder, the complaint shall allege with particularity facts establishing that the requirements of subsection (a) of this section have not been met. Defendants may make a motion to dismiss a complaint under subsection (a) of this section for failure to comply with this subsection. Prior to the court's ruling on such a motion to dismiss, the plaintiff shall be entitled to discovery only with respect to the issues presented by the motion and only if and to the extent that the plaintiff has alleged such facts with particularity. The preliminary discovery shall be limited solely to matters germane and necessary to support the facts alleged with particularity relating solely to the requirements of subsection (a) of this section.

(e) If a majority of the board of directors does not consist of independent directors at the time the determination is made, the corporation shall have the burden of proving that the requirements of subsection (a) of this section have been met. If a majority of the board of directors consists of independent directors at the time the determination is made, the plaintiff shall have the burden of proving that the requirements of subsection (a) of this section have not been met.

(f) The court may appoint a panel of one or more independent persons upon motion of the corporation to make a determination whether the maintenance of the derivative proceeding is in the best interest of the corporation. The plaintiff shall have the burden of proving that the requirements of subsection (a) of this section have not been met. (1995, c. 149, s. 1; c. 509, s. 135.2(t).)

Legal Periodicals. — For recent development, "In re Wachovia Shareholders Litigation: The Case for the Common Benefit Doctrine," see 84 N.C. L. Rev. 2066 (2006).

CASE NOTES

Special Committee Conducted Reasonable Inquiry. — Shareholder derivative action failed because a special committee, which was comprised of independent directors and a law firm, conducted a reasonable inquiry that actually exceeded the scope of the shareholder's allegations of corporate misconduct based on alleged accounting errors, and the committee made a good faith decision that the lawsuit was not in the best interests of the corporation since there was no evidence supporting the shareholder's claims, and damages were questionable while litigation would be costly and disruptive. Madvig v. Gaither, 461 F. Supp. 2d 398, 2006 U.S. Dist. LEXIS 85031 (W.D.N.C. 2006).

Cited in Norman v. Nash Johnson & Sons'

Farms, Inc., 140 N.C. App. 390, 537 S.E.2d 248, 2000 N.C. App. LEXIS 1207 (2000).

§ 55-7-45. Discontinuance or settlement.

(a) A derivative proceeding may not be discontinued or settled without the court's approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interests of the corporation's shareholders or a class of shareholders, the court shall direct that notice be given to the shareholders affected.

(b) The court shall determine the manner and form of the notice and the manner in which costs of the notice shall be borne. (1995, c. 149, s. 1.)

CASE NOTES

Cited in Norman v. Nash Johnson & Sons' Farms, Inc., 140 N.C. App. 390, 537 S.E.2d 248, 2000 N.C. App. LEXIS 1207 (2000); Bluebird Corp. v. Aubin, 188 N.C. App. 671, 657 S.E.2d 55, 2008 N.C. App. LEXIS 279 (2008).

§ 55-7-46. Payment of expenses.

On termination of the derivative proceeding, the court may:

(1) Order the corporation to pay the plaintiff's reasonable expenses, including attorneys' fees, incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the corporation;

(2) Order the plaintiff to pay any defendant's reasonable expenses, including attorneys' fees, incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose; or

(3) Order a party to pay an opposing party's reasonable expenses, including attorneys' fees, incurred as a result of the filing of a pleading, motion, or other paper, if the court, after reasonable inquiry, finds that the pleading, motion, or other paper was not well grounded in fact or was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it was interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. (1995, c. 149, s. 1.)

Legal Periodicals. — For recent development, "In re Wachovia Shareholders Litigation: The Case for the Common Benefit Doctrine," see 84 N.C. L. Rev. 2066 (2006).

CASE NOTES

Award of Fees to Non-Prevailing Party. — Under G.S. 55-7-46(1), the party seeking attorney's fees need not necessarily be the prevailing party, nor must the derivative claim have proceeded to a final judgment or order; upon a plaintiff's motion, the trial court is at least required to consider whether the proceeding resulted in a substantial benefit to the corporation, and whether such benefit warranted any award of fees. Aubin v. Susi, 149 N.C. App. 320, 560 S.E.2d 875, 2002 N.C. App. LEXIS 190 (2002), cert. dismissed, 356 N.C. 610, 574 S.E.2d 473 (2002), cert. denied, 356 N.C. 610, 574 S.E.2d 474 (2002).

Cited in Norman v. Nash Johnson & Sons' Farms, Inc., 140 N.C. App. 390, 537 S.E.2d 248, 2000 N.C. App. LEXIS 1207 (2000); BellSouth Telecomms., Inc. v. City of Laurinburg, 168 N.C. App. 75, 606 S.E.2d 721, 2005 N.C. App. LEXIS 164; In re Wachovia S'holders Litig., 168 N.C. App. 135, 607 S.E.2d 48, 2005 N.C. App. LEXIS 168 (2005); Bluebird Corp. v. Aubin, 188 N.C. App. 671, 657 S.E.2d 55, 2008 N.C. App. LEXIS 279 (2008).

§ 55-7-47. Applicability to foreign corporations.

In any derivative proceeding in the right of a foreign corporation, the matters covered by this Part shall be governed by the laws of the jurisdiction of incorporation of the foreign corporation except for the matters governed by G.S. 55-7-43, 55-7-45, and 55-7-46. (1995, c. 149, s. 1.)

CASE NOTES

Internal Affairs Doctrine. — In a suit between a lender and a broker, a prior New York decision was not overturned when the North Carolina court found that the lender breached fiduciary duties because: (1) collateral estoppel, res judicata, and full faith and credit did not apply since the New York court did not dispose of or address the broker's counterclaims; and (2) the internal affairs doctrine was a conflict of laws principle, not a jurisdictional principal. Bluebird Corp. v. Aubin, 188 N.C. App. 671, 657 S.E.2d 55, 2008 N.C. App. LEXIS 279 (2008).

§ 55-7-48. Suits against directors of public corporations.

In addition to the requirements of this Part, the plaintiff in an action brought on behalf of a corporation that is a public corporation at the time of the action against one or more of its directors for monetary damages shall:

(1) Allege, and it must appear, that each plaintiff has been a shareholder or holder of a beneficial interest in shares of the corporation for at least one year;

(2) Bring the action within two years of the date of the transaction of which the plaintiff complains; and

(3) If the court orders, execute and deposit with the clerk of court a written undertaking with sufficient surety, approved by the court, to indemnify the corporation against any and all expenses reasonably expected to be incurred by the corporation in connection with the proceeding, including expenses arising by way of indemnity. (1995, c. 149, s. 1.)

§ 55-7-49. Privileged communications.

In any derivative proceeding, no shareholder shall be entitled to obtain or have access to any communication within the scope of the corporation's attorney-client privilege that could not be obtained by or would not be accessible to a party in an action other than on behalf of the corporation. (1995, c. 149, s. 1.)

ARTICLE 8.

Directors and Officers.

Part 1. Board of Directors.

§ 55-8-01. Requirement for and duties of board of directors.

(a) Except as provided in subsection (c), each corporation must have a board of directors.

(b) All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed by or under the direction of, its board of directors, except as otherwise provided in the articles of incorporation or in an agreement valid under G.S. 55-7-31(b).

(c) A corporation may dispense with or limit the authority of a board of directors by describing in its articles of incorporation or in an agreement valid under G.S. 55-7-31(b) who will perform some or all of the duties of a board of directors; but no such limitation upon the authority which the board of directors would otherwise have shall be effective against other persons without actual knowledge of such limitation.

(d) To the extent the articles of incorporation or an agreement valid under G.S. 55-7-31(b) vests authority of the board of directors in an individual or group other than the board of directors, such individual or group in the exercise of such authority shall be deemed to be acting as the board of directors for all purposes of this Chapter. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 2005-268, s. 6.)

OFFICIAL COMMENT

Section 8.01 requires that every corporation have a board of directors except that a corporation with 50 or fewer shareholders may dispense with or limit the authority of the board of directors by describing in the articles "who will perform some or all of the duties of a board of directors." Section 8.01(c). This election is independent of the various close corporation elections permitted by the Model Statutory Close Corporation Supplement, though the basic standard of 50 shareholders is the same in both section 8.01 and that Supplement.

Obviously, some form of governance is necessary for every corporation. The board of directors is the traditional form of corporate governance but it need not be the exclusive form. Patterns of management may be tailored to specific needs in connection with family controlled enterprises, wholly or partially owned subsidiaries, or corporate joint ventures without the requirement of electing close corporation status under the Model Statutory Close Corporation Supplement. The persons who perform some or all of the duties of the board of directors may be designated "trustees," "agents," or "managers," and they may be selected in ways other than the traditional election by the shareholders. It is necessary, however, that some person or group perform these duties, and the designated persons, while performing them, are subject to the same duties as directors.

An example of the restructuring of the traditional board of directors permitted by section 8.01 is presented by the facts of *Lehrman v. Cohen,* 43 Del. Ch. 222, 222 A.2d 800 (Del. 1966), where two shareholders (or allied family interests) had equal voting power and wished to permit the corporation's attorney to cast a tie-breaking vote on the board of directors without giving him a participating equity interest in the corporation. While the desired result was successfully achieved in that case by creating a class of voting shares without a significant economic interest in the corporation, the same result may be reached under section 8.01 directly by provision in the articles of incorporation without creating a special class of shares.

Any arrangement under section 8.01(c) may also be established by a close corporation election under the Model Statutory Close Corporation Supplement.

When a corporation has more than 50 shareholders, it must adopt the traditional board of directors as its sole form of governance. Because questions may at least theoretically arise how joint share ownership and other arrangements should be counted in applying a numerical limitation, section 1.42 prescribes rules for calculating the number of shareholders for the purpose of this and other numerical limitations in the Model Act.

Section 8.01(b) states that if a corporation has a board of directors "all corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of," the board of directors. The quoted language is chosen to reflect the role and functions of boards of directors in all varieties of corporations. In a small corporation and in some larger corporations where the board of directors is composed entirely of persons actively involved in the management of the corporate business, it may be reasonable to describe management as being "by" the board of directors. But a different model is appropriate for the boards of directors of publicly held corporations, which usually include individuals not actively involved in management. In these corporations it is not feasible to impose a requirement that the business and affairs of the corporation be managed "by" the board of directors. In these corporations the appropriate model is that the business and affairs be managed "under the direction of" the board of directors, since the role of the board of directors consist principally of the formulation of major management policy with little or no direct involvement in day-to-day management.

As a correlative in large and complex publicly held corporations it is generally recognized that the board of directors may delegate to appropriate officers those powers not required by law to be exercised by the board of directors itself. Although delegation does not relieve the board of directors from its responsibilities of oversight, directors should not be held personally responsible for actions or omissions of officers, employees, or agents of the corporation so long as the directors have relied reasonably upon these officers, employees, or agents. See section 8.30 and its Official Comment. The board of directors has the power to probe to any depth its chooses in day-to-day management, but it has the responsibility to do so only to the extent that section 8.30 requires.

Section 8.01(b) also recognizes that the powers of the board of directors may be limited by express provisions in the articles of incorporation.

NORTH CAROLINA COMMENTARY

This section contains several variations from former G.S. 55-24 and former G.S. 55-73. First, it requires that the board *direct* the management of the business and affairs of the corporation whereas former G.S. 55-24 required that the board *manage* the corporation's business and affairs. As pointed out in the Official Comment, the new language clarifies the role of directors as policy makers rather than managers. Also, this section clarifies that all shareholders must assent to an agreement (not contained in the articles of incorporation) which limits or dispenses with the board; and it explicitly provides that those in whom the board's authority is vested under such an arrangement are deemed to be acting as the board for all purposes of this Act (including the duties defined in G.S. 55-8-30 et seq.). Such substitutes for the board would be subject to liability to the same extent as directors.

This section differs from the Model Act in permitting limitation of the board's authority in a shareholders' agreement as well as in the articles of incorporation, and it permits dispensing with or limiting the board of a corporation regardless of the number of shareholders. Any such arrangement accomplished through a shareholders' agreement must comply with G.S. 55-7-31(b). The second clause of subsection (c) relating to rights of third parties without knowledge does not appear in the Model Act; it brings forward former G.S. 55-24(b). Finally, paragraph (d) does not appear in the Model Act, although it is likely that the same result would be reached under the Model Act. *See* Official Comment, *supra,* para. 2.

Former G.S. 55-33, which provided for jurisdiction over nonresident directors, was not brought forward because G.S. 1-75.4, the general jurisdiction statute, specifically provides such jurisdiction. It was therefore deemed unnecessary to continue to include a special provision in Chapter 55.

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

Effective October 1, 2005, subsection (b) is amended to recognize that a corporation's business and affairs may be managed by the board of directors.

Legal Periodicals. — For note on the liability of directors and officers for negligent management, see 45 N.C.L. Rev. 748 (1967).

For note on the fiduciary duty of interested directors and the business judgment rule, see 45 N.C.L. Rev. 755 (1967).

For comment on promoters of corporations dealing in condominiums, see 12 Wake Forest L. Rev. 979 (1976).

For note on close corporations and personal liability from execution of shareholder agreements, see 16 Wake Forest L. Rev. 975 (1980).

For article on corporate directors' accountability, see 66 N.C.L. Rev. 171 (1987).

For article discussing derivative suit litigation, see 66 N.C.L. Rev. 565 (1988).

For comment, "Fiduciary Duties of Directors, How Far Do They Go?," see 23 Wake Forest L. Rev. 163 (1988).

For comment, "North Carolina's Statutory Limitation on Directors' Liability," see 24 Wake Forest L. Rev. 117 (1989).

For article, "The Corporate Persona, Contract (and Market) Failure, and Moral Values," see 69 N.C.L. Rev. 273 (1991).

For article, "Discrimination, Managerial Discretion and the Corporate Contract," see 26 Wake Forest L. Rev. 541 (1991).

For note, "Ignorance is not Bliss: Responsible Corporate Officers Convicted of Environmental Crimes and the Federal Sentencing Guidelines," see 1992 Duke L.J. 145.

For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

CASE NOTES

Editor's Note. *— The cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Director occupies a fiduciary relation to the company which, by virtue of his office, he represents in the management of its principal functions. Hill v. Pioneer Lumber Co., 113 N.C. 173, 18 S.E. 107 (1893).

Directors are to be considered and dealt with as trustees or quasi trustees. Besseliew v. Brown, 177 N.C. 65, 97 S.E. 743 (1919).

Liability for Gross Mismanagement and Neglect. — Good faith alone will not relieve the directors of a corporation from liability to its creditors for damages caused them by their gross mismanagement and neglect of its affairs. Anthony v. Jeffress, 172 N.C. 378, 90 S.E. 414 (1916).

Duty of Care. — Directors are not, as a rule, responsible for mere errors of judgment, nor for slight omissions from which the loss complained of could not have been reasonably expected; but where they accept these positions of trust they are expected and required to give them the care and attention that a prudent man should exercise in like circumstances, and are charged with a like duty, usually the care that a prudent man shows in the conduct of his own affairs of a similar kind. Besseliew v. Brown, 177 N.C. 65, 97 S.E. 743 (1919).

Same Good Faith Required of Promoters as Directors. — The promoters of a corporation occupy a relation of trust and confidence towards the corporation which they are calling into existence as well as to each other, and the law requires of them the same good faith it exacts from directors and other fiduciaries. Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964).

Right of Corporation to Sue Negligent Directors. — Where the directors or managing officers of a corporation are liable in damages for their willful or negligent failure to exercise the care and attention to corporate affairs entrusted to them and which they have assumed, an action will lie against them in favor of the corporation, and in case of its insolvency and receivership, in favor of its receiver. Besseliew v. Brown, 177 N.C. 65, 97 S.E. 743 (1919).

Directors Establish Policies. — In general, the directors establish corporate policies and supervise the carrying out of those policies through their duly elected and authorized officers. Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974).

Powers to Borrow Money and Encumber Property. — The directors of a corporation, unless they are specially restrained by the charter or bylaws, have the power to borrow money with which to conduct its business and to secure payment by mortgage on corporate property. Wall v. Rothrock, 171 N.C. 388, 88 S.E. 633 (1916).

Director of a company may lend it money when needed for its benefit, and take a lien upon the corporate property as security for its repayment, provided the transaction is open and entirely fair and capable of strict proof as to its bona fides. Hill v. Pioneer Lumber Co., 113 N.C. 173, 18 S.E. 107 (1893).

Director who is also a creditor of a corporation cannot prefer himself to the other creditors in the application of the corporation's assets to the security or payment of its debts. Hill v. Pioneer Lumber Co., 113 N.C. 173, 18 S.E. 107 (1893); Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894); McIver v. Young Hdwe. Co., 144 N.C. 478, 57 S.E. 169 (1907).

Right of Directors to Security. — By taking a mortgage on corporate property when the corporation is in failing circumstances, directors, occupying a fiduciary relation, are not permitted to secure themselves against preexisting liabilities of the corporation upon which they are already bound. Wall v. Rothrock, 171 N.C. 388, 88 S.E. 633 (1916); Caldwell v. Robinson, 179 N.C. 518, 103 S.E. 75 (1920).

Judgment Liens of Directors. — Where the directors of a corporation made a bona fide sale of property to it, for value and free from fraud, judgments against the corporation for the purchase price, duly docketed, constitute liens in favor of the directors against the corporate property. Caldwell v. Robinson, 179 N.C. 518, 103 S.E. 75 (1920).

Use of Inside Information by Director to Gain Advantage Against Other Creditors. — Where a corporation is insolvent, a director who is a creditor cannot, upon a debt theretofore existing, take advantage of his superior means of information to secure his debt as against other creditors. Hill v. Pioneer Lumber Co., 113 N.C. 173, 18 S.E. 107 (1893).

Stockholder's Agreements on Election of Directors Are Valid Absent Fraud or Prejudice. — North Carolina is aligned with the majority of jurisdictions which hold that a contract entered into between corporate stockholders by which they agree to vote their stock in a specified manner — including agreements for the election of directors and corporate officers — is not invalid unless it is inspired by fraud or will prejudice the other stockholders. Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964).

Agreements for Future Management Must Be "Otherwise Lawful". — Former G.S. 55-24 and 55-73 required that contemplated agreements providing for the future management and control of a corporation be "otherwise lawful." Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964).

When Such Agreements Will Be Declared Invalid. — Agreements providing for the future management and control of a corporation which violate express charter or statutory provisions, contemplate an illegal object, involve any fraud, oppression or wrong against other stockholders, or are made in consideration of a private benefit to the promisor will be declared invalid. Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964).

§ 55-8-02. Qualifications of directors.

The articles of incorporation or bylaws may prescribe qualifications for directors. A director need not be a resident of this State or a shareholder of the corporation unless the articles of incorporation or bylaws so prescribe. (1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

The elimination of mandatory special qualifications for directors is now nearly universal. The articles of incorporation or bylaws, however, may prescribe special qualifications, an option that is most likely to be utilized in closely held corporations where qualifications for directors may be used as a device for ensuring representation and voting power on the board of directors.

§ 55-8-03. Number and election of directors.

(a) A board of directors must consist of one or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws.

(b) The number of directors may be increased or decreased from time to time by amendment to, or in the manner provided in, the articles of incorporation or the bylaws, but for a corporation to which G.S. 55-7-28(e) applies in which shares are entitled to be voted cumulatively, the number of directors shall not be decreased unless one of the following applies:

(1) The decrease is approved by the shareholders in a vote in which the number of shares entitled to be voted cumulatively that vote against the proposal for decrease would not be sufficient to elect a director by cumulative voting.

(2) The decrease is made pursuant to a provision of the articles of incorporation or bylaws fixing a minimum and maximum number of directors and authorizing the number of directors to be fixed or changed from time to time, within the maximum and the minimum, by the shareholders or, unless the articles of incorporation or an agreement valid under G.S. 55-7-31 provides otherwise, the board of directors.

(c) Repealed by Session Laws 2005-268, s. 7.

(d) Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless their terms are staggered under G.S. 55-8-06. (1901, c. 2, ss. 14, 39; Rev., ss. 1147, 1182; C.S., ss. 1144, 1175; 1927, c. 138; G.S., ss. 55-48, 55-112; 1955, c. 1371, s. 1; 1959, c. 1316, s. 33; 1969, c. 751, ss. 10, 11; 1989, c. 265, s. 1; 1993, c. 552, s. 13; 2005-268, s. 7; 2006-264, s. 44(a).)

OFFICIAL COMMENT

Section 8.03 prescribes rules for the determination of the size of the board of directors of corporations that have not dispensed with a board of directors under section 8.01(c), and for changes in the size of the board of directors once it is established.

1. Minimum number of directors

Section 8.03(a) provides that the size of the initial board of directors may be "specified in or fixed in accordance with" the articles of incorporation or bylaws. The size of the board of directors may thus be fixed initially in the fundamental corporate documents, or the decision as to the size of the initial board of directors may be made thereafter by those authorized in those documents. After shares have been issued, however, the power to increase or decrease the size of the board of directors by more than 30 percent, whether by amendment of the bylaws or otherwise, is reserved to the shareholders.

Before 1969 the Model Act required a board of directors to consist of at least three directors. Since then, however, the Model Act, and the corporation statutes of an increasing number of states, have provided that the board of directors may consist of one or more members. A board of directors consisting of one or more individuals may be appropriate for corporations with one or two shareholders, or for corporations with more than two shareholders where in fact the full power of management is vested in only one or two persons. The requirement that every corporation have a board of directors of at least three directors may require the introduction into these closely held corporations of persons with no financial interest in the corporation.

2. Changes in the size of the board of directors

Section 8.03(b) and (c) prescribe rules for corporations in which the board of directors has authority to establish or change the size of the board of directors. It has no application to corporations in which the size of the board of directors is fixed by the bylaws and the shareholders reserve to themselves the power to amend bylaws. See section 10.20. The basic premise is that the determination of the size of the board of directors should rest with the shareholders. These subsections also prevent the board of directors from manipulating its own size without the approval of the shareholders. But experience has shown, particularly in larger corporations, that it is desirable to grant the board of directors some authority to change its size without incurring the expense of obtaining shareholder approval.

Subsection (b) therefore permits the board of directors to increase or decrease its own size by up to 30 percent without shareholder approval. The 30 percent is calculated from the size last approved by the shareholders, thereby preventing directors from tacking a series of 30 percent increases or decreases to alter the basic composition of a board of directors without shareholder approval. For example, in a board of directors fixed or approved by the shareholders at 15 members, the board may, without shareholder approval, change the size of the board to as few as 11 or as many as 19; a board of 5 may be changed by the board to as few as 4 or as many as 6. The 30-percent limit was established to give the board of directors reasonable leeway in adjusting its own size. Thus, when a director resigns, the board of directors should normally be able to reduce its own size and elect not to fill the vacancy without shareholder action; similarly, if an exceptionally qualified person becomes available (or is invited to serve on the board of directors because of a felt need), he may normally be added to the board of directors without shareholder approval.

Alternatively, subsection (c) authorizes the articles of incorporation or bylaws to establish a variable-range size for the board of directors. If a variable range size is established, either the shareholders or the board of directors may prescribe or change the size of the board of directors within that range. However, only the shareholders may amend the bylaws to change the limits established for the size of the board of directors, or to change from a variable-range size board to a fixed board or vice versa. A variable-range size board is intended to provide essentially the same benefits as the authority granted a board of directors by subsection (b) to change its own size by 30 percent. Many publicly held corporations have established variable-range size boards of directors pursuant to general authority in state statutes. Specific recognition and regulation of this widespread practice seems desirable.

Section 8.03(c) also applies to a variable-range size board of directors whose initial size is established by the articles of incorporation if the articles authorize changing the limits of the size of the board without having to amend the articles.

The limitations on the authority of the board of directors set forth in this section are substantive restrictions that may not be changed by provisions in articles of incorporation or bylaws. For example, a general provision in bylaws granting the board of directors authority to amend bylaws does not authorize a board of directors, after shares are issued, to change the limits of a variable-range board established by the bylaws.

Sections 8.03(b) and (c) are primarily designed for publicly held corporations. In closely held corporations, typically, a change in the size of the board of directors may be accomplished readily by the shareholders if that is desired. In many closely held corporations, on the other hand, a board of directors of a fixed size may be an essential part of a control arrangement. In these situations, an increase or decrease in the size of the board of directors by even a single member may significantly affect control. In order to effectuate control arrangements dependent on a board of directors of a fixed size, the power of the board of directors to change its own size must be negated. This may be accomplished by fixing the size of the board of directors in the articles of incorporation or by expressly negating all powers of the board of directors to change the size of the board, whether by amendment of the bylaws or otherwise. See section 10.22.

3. ANNUAL ELECTIONS OF DIRECTORS

Section 8.03(d) makes it clear that all directors are elected annually unless the board is staggered. See section 8.05 and its Official Comment.

NORTH CAROLINA COMMENTARY

This section permits any corporation to have fewer than three directors, whereas former G.S. 55-25(a) permitted it only where there were fewer than three shareholders. In addition, unless there is cumulative voting, this section permits the board to change the number of directors by up to 30% in a 12-month period, whereas former G.S. 55-25(b) required shareholder action or a provision in the articles of incorporation to change the number of directors except within a variable range. Finally, this section eliminates the provision in former G.S. 55-25(e) which allowed a shareholder to demand election by ballot unless the articles of incorporation or bylaws provided otherwise.

Subsection (b) of this section modifies the Model Act's subsection 8.03(b) to retain the former G.S. 55-25(b) protection of the right of cumulative voting if it exists. The Model Act leaves cumulative voting unprotected in this situation unless such protection is written into the articles of incorporation.

Subsection (c) modifies the Model Act by the addition of the parenthetical clause in the second sentence of this subsection.

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

Effective October 1, 2005, this section's limitations on the authority of the board of directors to set the size of the board are removed, subject to retaining certain limitations if shareholders are entitled to vote cumulatively in the election of directors.

Legal Periodicals. — For recent development, "In re Wachovia Shareholders Litigation: The Case for the Common Benefit Doctrine," see 84 N.C. L. Rev. 2066 (2006).

§ 55-8-04. Election of directors by certain classes of shareholders.

If the articles of incorporation authorize dividing the shares into classes, the articles may also authorize the election of all or a specified number of directors by the holders of one or more authorized classes of shares. A class (or classes) of shares entitled to elect one or more directors is a separate voting group for purposes of the election of directors. (1901, c. 2, ss. 14, 39; Rev., ss. 1147, 1182; C.S., ss. 1144, 1175; 1927, c. 138; G.S., ss. 55-48, 55-112; 1955, c. 1371, s. 1; 1959, c. 1316, s. 33; 1969, c. 751, ss. 10, 11; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 8.04 makes explicit that the articles of incorporation may provide that a specified number (or all) of the directors may be elected by the holders of one or more classes of shares. This approach is widely used in closely held corporations to effect an agreed upon allocation of control, for example, to ensure minority representation on the board of directors by issuing to that minority a class of shares entitled to elect one or more directors. A class (or classes) of shares entitled to elect separately one or more directors constitutes a separate voting group for purposes of the election of directors; within each voting group directors are elected by a plurality of votes and quorum and voting requirements must be separately met by each voting group. See sections 7.25, 7.26, and 7.28.

NORTH CAROLINA COMMENTARY

This section is substantially the same as former G.S. 55-25(b) and former G.S. 55-26.

§ 55-8-05. Terms of directors generally.

(a) The terms of the initial directors of a corporation expire at the first shareholders' meeting at which directors are elected.

(b) The terms of all other directors expire at the next annual shareholders' meeting following their election unless their terms are staggered under G.S. 55-8-06.

(c) A decrease in the number of directors does not shorten an incumbent director's term.

(d) The term of a director elected to fill a vacancy expires at the next shareholders' meeting at which directors are elected.

(e) Despite the expiration of a director's term, he continues to serve until his successor is elected and qualifies or until there is a decrease in the number of directors. (1901, c. 2, ss. 14, 39; Rev., ss. 1147, 1182; C.S., ss. 1144, 1175; 1927, c. 138; G.S., ss. 55-48, 55-112; 1955, c. 1371, s. 1; 1959, c. 1316, s. 33; 1969, c. 751, ss. 10, 11; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 8.05 provides for the annual election of directors at the annual shareholders' meeting with a single exception that terms may be staggered as permitted in section 8.06.

Section 8.05(c) provides that a decrease in the number of directors does not shorten the term of an incumbent director or divest any director of his office. Rather, the incumbent director's term expires at the annual meeting at which his successor would otherwise be elected.

Section 8.05(d) provides that the terms of all directors elected to fill vacancies expire at the next meeting of shareholders at which directors are elected. Thus, if terms are staggered under section 8.06, the term of a director elected to fill a vacant term with more than a year to run is shorter than the term of his predecessor. The board of directors may take appropriate steps, by designation of short terms or otherwise, to return the rotation of election of directors to the original terms established or fixed by the articles or bylaws.

Section 8.05(e) provides for "holdover" directors so that directorships do not automatically become vacant at the expiration of their terms but the same persons continue in office until successors qualify for office. Thus the power of the board of directors to act continues uninterrupted even though an annual shareholders' meeting is not held or the shareholders are deadlocked and unable to elect directors at the meeting.

NORTH CAROLINA COMMENTARY

This section is substantially the same as former G.S. 55-25(c) and (d).

§ 55-8-06. Staggered terms for directors.

The articles of incorporation or bylaws adopted by the shareholders may provide for staggering the terms of directors by dividing the total number of directors into two, three, or four groups, with each group containing one-half, one-third, or one-fourth of the total, as near as may be. In that event, the terms of directors in the first group expire at the first annual shareholders' meeting after their election, the terms of the second group expire at the second annual shareholders' meeting after their election, the terms of the third group, if any, expire at the third annual shareholders' meeting after their election, and the terms of the fourth group, if any, expire at the fourth annual shareholders' meeting after their election. At each annual shareholders' meeting held thereafter, directors shall be chosen for a term of two, three, or four years, as the case may be, to succeed those whose terms expire. (1901, c. 2, ss. 14, 44; Rev., ss. 1147, 1148; C.S., s. 1144; 1937, c. 179; 1945, c. 200; 1949, c. 917; G.S., s. 55-48; 1955, c. 914, s. 1; c. 1371, s. 1; 1959, c. 1316, s. 7; 1989, c. 265, s. 1; 1993, c. 552, s. 10; 2005-268, s. 8.)

OFFICIAL COMMENT

Section 8.06 recognizes the practice of "classifying" the board or "staggering" the terms of directors so that only one-half or one-third of them are elected at each annual shareholders' meeting and directors are elected for two- or three-year terms rather than one-year terms.

Under section 8.06 at least three directors must be elected at each annual meeting. These directors may be elected by one or more voting groups, as provided in the articles of incorporation.

The principal justification for staggering the board today is that it protects against sudden change in the management of the corporation despite a change in shareholdings. It also reduces the impact of cumulative voting since a greater number of votes is required to elect a director if the board is staggered than is required if the entire board were elected at each annual meeting.

The staggered board of directors is sometimes used by incumbent management to make unwanted takeover attempts more difficult to effectuate. It is unlikely to be effective alone, however, since the shareholders may in any event remove directors under section 8.08 whether or not their terms are staggered. As a result, a staggered board is likely to be used for this purpose only in conjunction with a provision that directors may be removed only for cause.

NORTH CAROLINA COMMENTARY

This section is substantially the same as former G.S. 55-26. The corresponding provision in the Model Act was modified to permit staggered terms for directors to be fixed in a bylaw adopted by the shareholders, thus continuing the former North Carolina practice.

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

Effective October 1, 2005, the requirement that a board of directors consist of at least nine directors before directors' terms may be staggered is eliminated.

§ 55-8-07. Resignation of directors.

(a) A director may resign at any time by communicating his resignation to the board of directors, its chair, or the corporation.

(b) A resignation is effective when it is communicated unless it specifies in writing a later effective date or subsequent event upon which it will become effective. (1955, c. 1371, s. 1; 1959, c. 1316, s. 34; 1973, c. 469, s. 7; 1989, c. 265, s. 1; 2001-358, s. 6(c); 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

OFFICIAL COMMENT

The resignation of a director is effective when the written notice is delivered unless the notice specifies a later effective date, in which case the director continues to serve until that later date. Since the person giving the notice is still a member of the board, he may participate in all decisions until the specified date, including the choice of his successor under section 8.10. The participation of the retiring director in the decision on his successor may be of importance in closely held corporations where control of the board may be affected by the resignation.

Vacancies created by a resignation effective at a later date may be filled before that date under section 8.10.

NORTH CAROLINA COMMENTARY

This section is more explicit than former G.S. 55-27(a)(1) in specifying the effective time of a director's resignation.

The section is also more explicit than the Model Act in clarifying that notice is effective when communicated unless a later date is specified in writing. The Model Act merely uses the term "delivered." Since "delivered" is defined to include "mail," a more precise term was deemed desirable.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§ 55-8-08. Removal of directors by shareholders.

(a) The shareholders may remove one or more directors with or without cause unless the articles of incorporation provide that directors may be removed only for cause.

(b) If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove him.

(c) If cumulative voting is authorized, unless the entire board of directors is to be removed, a director may not be removed if the number of votes sufficient to elect him under cumulative voting is voted against his removal. If cumulative voting is not authorized, a director may be removed only if the number of votes cast to remove him exceeds the number of votes cast not to remove him.

(d) A director may not be removed by the shareholders at a meeting unless the notice of the meeting states that the purpose, or one of the purposes, of the meeting is removal of the director.

(e) Unless otherwise provided in the articles of incorporation or a bylaw adopted by the shareholders, the entire board of directors may be removed from office with or without cause by the affirmative vote of a majority of the votes entitled to be cast at any election of directors. (1955, c. 1371, s. 1; 1959, c. 1316, s. 34; 1973, c. 469, s. 7; 1989, c. 265, s. 1; 1991, c. 645, s. 6.)

OFFICIAL COMMENT

Section 8.08(a) accepts the view that since the shareholders are the owners of the corporation, they should normally have the power to change the directors at will. This section reverses the common law position that directors have a statutory entitlement to their office and can be removed only for cause—fraud, criminal conduct, gross abuse of office amounting to a breach of trust, or similar conduct. The power to remove directors is subject to several restrictions set forth in section 8.08:

(1) The power to remove a director without cause may be eliminated by a provision in the articles of incorporation. Such a provision in effect guarantees the directors the same entitlement to office that directors enjoyed at common law. It is likely to be used in closely held corporations as an element of an agreed-upon allocation of power and control which ensures directors immunity from removal except for cause. It may also be used in publicly held corporations that fear changes in ownership of the majority of the shares and desire to provide security to the directors.

(2) If the articles of incorporation provide that one or more classes of shares constitute a separate voting group entitled to elect a director (see section 8.04), only the shareholders of that voting group may participate in the vote whether or not to remove that director. But that director may be removed by court proceeding under section 8.09 despite this section.

(3) If cumulative voting is not authorized, a director is removed (with or without cause) only if the votes cast to remove him exceed the votes cast to retain him at a meeting of the voting group electing him at which a quorum of shares entitled to vote on his election is present.

(4) If cumulative voting is authorized, a different standard for removal is involved. Under cumulative voting, a director may be removed (with or without cause) only if the votes cast in favor of retaining him would not have been sufficient to elect him pursuant to cumulative voting at that meeting. This provision guarantees that a minority faction with sufficient votes to guarantee the election of a director under cumulative voting will be able to protect that director from removal by the remaining shareholders. The director, however, may be removed by court proceeding under section 8.09 despite this section. In computing whether or not a director elected by cumulative voting is protected from removal from office by section 8.08(c), the votes should be counted as though (1) the vote to remove the director occurred in an election to elect the number of directors normally elected by the voting group along with the director whose removal is sought, (2) the number of votes cast cumulatively against removal of the director had been cast for his election, and (3) all votes cast for removal of the director had been cast cumulatively in an efficient pattern for the election of a sufficient number of candidates so as to deprive the director whose removal is being sought of his office.

Removal of directors under section 8.08(d) requires the meeting notice to state that removal of specific directors will be proposed.

AMENDED NORTH CAROLINA COMMENTARY

This section is consistent with prior law as contained in former G.S. 55-27(f) with two notable differences. This section does not contain a specific provision allowing removal of the entire board by a majority vote, and the notice requirement of subsection (d) is new. Subsection (d) does not prohibit removal of a director by unanimous consent (*see* G.S. 55-7-04) but requires notice if the removal is to be considered at a meeting. The language of the Model Act was modified in this subsection for clarity.

§ 55-8-09. Removal of directors by judicial proceeding.

(a) The superior court of the county where a corporation's principal office (or, if none in this State, its registered office) is located may remove a director of the corporation from office in a proceeding commenced either by the corporation or by its shareholders holding at least ten percent (10%) of the outstanding shares of any class if the court finds that:

(1) The director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation; and

(2) Removal is in the best interest of the corporation.

(b) The court that removes a director may bar the director from reelection for a period prescribed by the court.

(c) If shareholders commence a proceeding under subsection (a), they shall make the corporation a party defendant. (1955, c. 1371, s. 1; 1959, c. 1316, s. 34; 1973, c. 469, s. 7; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 8.09 authorizes the removal of a director who is found in a judicial proceeding to have engaged in fraudulent or dishonest conduct or gross abuse of office. For example, a judicial proceeding (as contrasted with removal under section 8.08) may be necessary or appropriate in the following situations:

(1) In a closely held corporation, the director charged with misconduct is elected by voting group or cumulative voting, and the shareholders with power to prevent his removal exercise that power despite the existence of fraudulent or dishonest conduct. The classic example is where the director charged with misconduct himself possesses sufficient votes to prevent his own removal and exercises his voting power to that end.

(2) In a publicly held corporation, the director charged with misconduct declines to resign, though urged to do so, and because of the large number of widely scattered shareholders, a special shareholders' meeting can be held only after a period of delay and at considerable expense.

A shareholder who owns less than 10 percent of the outstanding shares of the corporation may bring suit derivatively in the name of the corporation under this section upon compliance with the requirements of section 7.40. A shareholder who owns at least 10 percent of the outstanding shares of the corporation may maintain suit in his own name and in his own right without compliance with section 7.40. The corporation, however, must be made a party to the proceeding. See section 8.09(c).

The purpose of section 8.09 is to permit the prompt and efficient elimination of dishonest directors. It is not intended to permit judicial resolution of internal corporate struggles for control except in those cases in which a court finds that the director has been guilty of wrongful conduct of the type described.

NORTH CAROLINA COMMENTARY

This section increases from 5% (as in former G.S. 55-27(g)) to 10% the number of shares needed to petition for removal of a director. Otherwise, this section is consistent with the prior law.

§ 55-8-10. Vacancy on board.

(a) Unless the articles of incorporation provide otherwise, if a vacancy occurs on a board of directors, including, without limitation, a vacancy resulting from an increase in the number of directors or from the failure by the shareholders to elect the full authorized number of directors:

(1) The shareholders may fill the vacancy;

(2) The board of directors may fill the vacancy; or

(3) If the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors, or by the sole director, remaining in office.

(b) If the vacant office was held by a director elected by a voting group of shareholders, only the remaining director or directors elected by that voting group or the holders of shares of that voting group are entitled to fill the vacancy.

(c) A vacancy that will occur upon a specific later date or subsequent event (by reason of a resignation effective upon a later date or subsequent event under G.S. 55-8-07(b) or otherwise) may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs. (1955, c. 1371, s. 1; 1959, c. 1316, s. 34; 1973, c. 469, s. 7; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.12.)

OFFICIAL COMMENT

Vacancies on the board of directors may be filled either by the shareholders or by the board of directors. In large corporations the cost of calling a special meeting of shareholders may be prohibitive so that in those corporations filling vacancies by the board of directors is the norm. On the other hand, in a closely held corporation the shareholders may fill vacancies as readily as the board.

Section 8.10(a)(3) allows the directors remaining in office to fill vacancies even though they are fewer than a quorum. The test for the exercise of this power is whether the directors remaining in office are fewer than a quorum, not whether the directors seeking to act are fewer than a quorum. For example, on a board of six directors where a quorum is four, if there are two vacancies, they may not be filled under section 8.10(a)(3) at a "meeting" attended by only three directors. Even though the three directors are fewer than a quorum, section 8.10(a)(3) is not applicable because the number of directors remaining in office—four—is not fewer than a quorum.

Section 8.10(b) provides that if a voting group of shares is entitled to elect a director, only that voting group is entitled to fill a vacant office which was held by a director elected by that voting group. This section is part of the consistent treatment of directors elected by a voting group of shareholders. See sections 1.40, 7.25, 7.26, 7.28, 8.04 and 8.08(b).

Section 8.10(c) permits vacancies that will arise on a specific later date to be filled in advance of that date so long as the designee does not actually take office until the vacancy occurs. The director in the office that will become vacant may participate in the selection of his successor. A vacancy arising at a later date is most likely to arise because of a resignation effective at a later date; it may also arise in connection with retirements or with prospective amendments to bylaws. In a closely held corporation with a balance of power on the board of directors that was reached by agreement, a prospective resignation followed by the appointment of a successor under this section permits the board to act on the replacement before the change in balance caused by the resignation.

AMENDED NORTH CAROLINA COMMENTARY

This section is generally consistent with prior law. However, unlike the present section, former G.S. 55-27(c) permitted the bylaws as well as the articles of incorporation to withhold from directors the power to fill board vacancies and did not permit the directors to fill vacancies created by an increase in the authorized number of directors, except within a minimum-maximum range fixed by the shareholders.

This section expands the comparable Model Act section in subsection (a) by explicitly recognizing a vacancy occurring from failure by the shareholders to elect a full board and in subsection (b) by permitting the remaining directors elected by a voting group to fill a vacancy in that class of directors, both of which are consistent with former G.S. 55-27(c). The Model Act was modified in subsection (c) to conform to the changes made in G.S. 55-8-07(b) regarding the effective date of a resignation.

§ 55-8-11. Compensation of directors.

Unless the articles of incorporation or bylaws provide otherwise, the board of directors may fix the compensation of directors. (1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

This section puts at rest the question whether the board of directors can fix the compensation of its members for serving as directors. The practice of compensating directors is now of long standing, and the establishment of a policy with respect to director compensation is an appropriate function of the board of directors.

In publicly held corporations, compensation is customarily provided to nonmanagement directors. As stated in *The Corporate Director's Guidebook*, ". . . it is expected that a nonmanagement director will devote substantial attention to the affairs of the corporation and will be compensated accordingly." 33 BUS. LAW. 1591, 1622 (1978).

§§ 55-8-12 through 55-8-19: Reserved for future codification purposes.

Part 2. Meetings and Action of the Board.

§ 55-8-20. Meetings.

(a) The board of directors may hold regular or special meetings in or out of this State.

(b) Unless otherwise provided by the articles of incorporation, the bylaws, or the board of directors, any or all directors may participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

(c) Unless the bylaws provide otherwise, special meetings of the board of directors may be called by the president or any two directors. (1955, c. 1371, s. 1; 1959, c. 1316, s. 8; 1969, c. 751, s. 12; 1973, c. 469, ss. 8-10; 1989, c. 265, s. 1; 1991, c. 645, s. 7.)

OFFICIAL COMMENT

This section authorizes meetings of directors anywhere. No distinction is made between meetings in-state and out-of-state. It also authorizes the board of directors to permit any or all directors to participate in a meeting by the use of any means of communication by which all directors participating may simultaneously hear each other. This decision is discretionary with the board of directors, and a person participating in this fashion is deemed to be present in person at the meeting for purposes of quorum and voting requirements.

With the development of modern electronic technology, it is possible that the advantages of the traditional meeting, at which all members are present at a single place, may be obtained even though the members are physically dispersed and no two directors are present at the same place. The advantage of the traditional meeting is the opportunity for interchange that is permitted by a meeting in a single room at which members are physically present. If this opportunity for interchange is thought to be available by the board of directors, a meeting may be conducted by electronic means although no two directors are physically present at the same place and no specific place for the meeting is designated.

NORTH CAROLINA COMMENTARY

By providing that, in the absence of contrary provisions in the articles of incorporation or bylaws, "the board of directors may permit" telephonic participation in its meetings, this section resolves the ambiguity of former G.S. 55-29(c), which provided that a director "may participate" telephonically in such meetings. It is now clear that an individual director may not assert telephonic participation as a right.

§ 55-8-21. Action without meeting.

(a) Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by this Chapter to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one or more unrevoked written consents signed by each director before or after such action, describing the action taken, and included in the minutes or filed with the corporate records. To the extent the corporation has agreed pursuant to G.S. 55-1-50, a director's consent to action taken without meeting or revocation thereof may be in electronic form and delivered by electronic means.

(b) Action taken under this section is effective when one or more unrevoked consents signed by all of the directors are delivered to the corporation, unless the consents specify a different effective date. A director's consent to action may be revoked in a writing signed by the director and delivered to the corporation prior to the action becoming effective.

(c) A consent signed under this section has the effect of a meeting vote and may be described as such in any document. (1955, c. 1371, s. 1; 1959, c. 1316, s. 8; 1969, c. 751, s. 12; 1973, c. 469, ss. 8-10; 1989, c. 265, s. 1; 2001-387, s. 15; 2005-268, s. 9.)

OFFICIAL COMMENT

The power of the board of directors to act unanimously without a meeting is based on the pragmatic consideration that in many situations a formal meeting is a waste of time. For example, in a closely held corporation there will often be informal discussion by the manager-owners of the venture before a decision is made. And, of course, if there is only a single director (as is permitted by section 8.03), a written consent is the natural method of signifying director action. Consent may be signified on one or more documents if desirable.

In publicly held corporations, formal meetings of the board of directors may be appropriate for many actions. But there will always be situations where prompt action is necessary and the decision noncontroversial, so that approval without a formal meeting may be appropriate.

Under section 8.21 the requirement of unanimous consent precludes the possibility of stifling or ignoring opposing argument. A director opposed to an action that is proposed to be taken by unanimous consent, or uncertain about the desirability of that action, may compel the holding of a directors' meeting to discuss the matter simply by withholding his consent.

NORTH CAROLINA COMMENTARY

This section is generally consistent with former G.S. 55-29, except that it does not contain the provisions for estoppel of a director who does not object promptly after obtaining knowledge of the action. The drafters believed that little, if any, use was made of the estoppel provisions of former G.S. 55-29(a)(3).

The Model Act was modified in subsection (a) to conform to a corresponding change made in G.S. 55-7-04(a), providing that written consent to action without a meeting can be given before or after the action is taken.

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 55-8-22. Notice of meeting.

(a) Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting.

(b) Special meetings of the board of directors shall be held upon such notice as is provided in the articles of incorporation or bylaws, or in the absence of any such provision, upon notice sent by any usual means of communication not less than five days before the meeting. The notice need not describe the purpose of the special meeting unless required by this chapter, the articles of incorporation or bylaws. (1955, c. 1371, s. 1; 1969, c. 751, s. 12; 1973, c. 469, s. 8; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Regular meetings of the board of directors may be held without notice and special meetings require only two days' notice unless other requirements are imposed by the articles of incorporation or bylaws. The notice may be written or oral. Also, no statement of the purpose of either a regular or special meeting is necessary unless required by the articles of incorporation or bylaws. These requirements differ from the requirements applicable to meetings of shareholders because of fundamental differences in their roles: directors are expected to be more closely involved in corporate affairs than shareholders, and meetings of directors are held more systematically and regularly than meetings of shareholders.

NORTH CAROLINA COMMENTARY

This section is consistent with former G.S. 55-28(c).

The section differs in subsection (b) from the Model Act by requiring five instead of two days' notice of meetings in the absence of a notice provision in the articles of incorporation or bylaws, and by adding "this act" to the last sentence of the subsection.

§ 55-8-23. Waiver of notice.

(a) A director may waive any notice required by this Chapter, the articles of incorporation, or bylaws before or after the date and time stated in the notice. Except as provided by subsection (b), the waiver must be in writing, signed by the director entitled to the notice, and filed with the minutes or corporate records.

(b) A director's attendance at or participation in a meeting waives any required notice to him of the meeting unless the director at the beginning of the meeting (or promptly upon his arrival) objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting. (1955, c. 1371, s. 1; 1969, c. 751, s. 12; 1973, c. 469, s. 8; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 8.23(a) reverses the common law rule that invalidates waivers of notice by directors after the date and time of the meeting. In modern practice notice is often a technical requirement and waivers should be freely permitted.

Section 8.23(b) recognizes that the function of notice is to inform directors of a meeting. If a director actually appears at the meeting he has probably had notice of it and generally should not be able to raise a technical objection that he was not given notice.

In cases where actual prejudice occurs because of the lack of notice, as may be indicated by the absence of one or more other directors, the director must call attention to the defect at the outset of the meeting or promptly upon his arrival. That director, or a director who did not receive notice and was not present at the meeting, may then attack the validity of the action taken for want of notice. If a director properly objects to the meeting being held, he is not presumed to have assented to actions taken thereafter, but he waives his objection if he there after votes for or assents to action taken at the meeting. See section 8.24(d).

NORTH CAROLINA COMMENTARY

This section is substantially the same as former G.S. 55-28(c) and 55-172.

§ 55-8-24. Quorum and voting.

(a) Unless the articles of incorporation or bylaws require a greater number, a quorum of a board of directors consists of:

(1) A majority of the fixed number of directors if the corporation has a fixed board size; or

(2) A majority of the number of directors prescribed, or if no number is prescribed the number in office immediately before the meeting begins, if the corporation has a variable-range size board.

(b) The articles of incorporation or a bylaw adopted by the shareholders may authorize a quorum of a board of directors to consist of no fewer than one-third of the fixed or prescribed number of directors determined under subsection (a).

(c) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors.

(d) A director who is present at a meeting of the board of directors or a committee of the board of directors when corporate action is taken is deemed to have assented to the action taken unless:

(1) He objects at the beginning of the meeting (or promptly upon his arrival) to holding it or transacting business at the meeting;

(2) His dissent or abstention from the action taken is entered in the minutes of the meeting; or

(3) He files written notice of his dissent or abstention with the presiding officer of the meeting before its adjournment or with the corporation immediately after adjournment of the meeting. The right of dissent or abstention is not available to a director who votes in favor of the action taken. (Code, s. 681; 1901, c. 2, ss. 33, 52; Rev., s. 1192; C.S., s. 1179;

1927, c. 121; 1933, c. 354, s. 1; G.S., s. 55-116; 1955, c. 1371, s. 1; 1959, c. 1316, s. 35; 1969, c. 751, s. 12; 1973, c. 469, s. 8; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

In the absence of a provision in the articles of incorporation or bylaws, a quorum is determined as follows:

(1) If the board of directors consists of a fixed number—whether fixed by the board or shareholders under section 8.03(b)—a quorum is a majority of that number. Thus, if a board of directors has a fixed membership of 15, a quorum is 8. If the board of directors has exercised its power under section 8.03(b) to increase its size to 19, a quorum is 10; if it reduced its size to 12, a quorum is 7.

(2) If the board of directors is a variable size board, a quorum consists of a majority of the number of directors prescribed at that time by the board of directors or shareholders. If no number is prescribed, then a quorum consists of a majority of the directors in office immediately before the meeting begins.

Section 8.24(b) provides that the articles of incorporation or bylaws may decrease the size of the quorum to one-third of the number of directors determined under section 8.24(a).

Section 8.24(a) allows the articles of incorporation or bylaws to increase the quorum up to and including unanimity while section 8.24(c) allows these documents similarly to increase the vote necessary to take action. The articles of incorporation or bylaws may also establish quorum or voting requirements with respect to directors elected by voting groups of shareholders pursuant to section 8.04. The option to increase either or both the vote and quorum requirements most commonly is exercised in closely held corporations where a greater degree of participation is thought appropriate or where a minority participant in the venture seeks to obtain a veto power over corporate action.

The phrase "when the vote is taken" in section 8.24(c) is designed to make clear that the board of directors may act only when a quorum is present. If directors leave during the course of a meeting, the board of directors may not act after the number of directors present is reduced to less than a quorum.

Under section 8.24(d) directors, if they object or abstain with respect to action taken by the board of directors or a committee of the board of directors, must make their position clear in one of the ways described in this subsection. If objection is made in the form of a written consent, it may be transmitted by wire, telecopier, or other medium of data transmission. This written objection serves the important purpose of forcefully bringing the position of the dissenting member to the attention of the balance of the board of directors. The requirement of a written objection also prevents a director from later seeking to avoid responsibility because of secret doubts about the wisdom of the action taken. The right of dissent or abstention is not available to a director who voted in favor of the action taken.

Section 8.24(d) applies only to directors who are present at the meeting. Directors who are not present are not deemed to have assented to any action taken at the meeting in their absence.

NORTH CAROLINA COMMENTARY

This section is generally consistent with prior law but clarifies an ambiguity in former G.S. 55-28(d) by expressly requiring in subsection (c) that a quorum be present when the vote is taken, thus explicitly permitting directors to prevent further action by withdrawing from the meeting to eliminate a quorum.

This section varies from the Model Act in requiring in subsection (b) that a bylaw fixing a low quorum be "adopted by the shareholders." For clarification, the word "files" was substituted in subdivision (d) (3) for the Model Act's ambiguous "delivers."

Legal Periodicals. — For note on unanimous approval of corporate bylaws and creation of shareholder agreements, see 1 Campbell L. Rev. 153 (1979).

CASE NOTES

No Cause of Action Stated. — Claim against director of dissolved corporation did not state a cause of action where plaintiff only alleged that director was officer when corporation dissolved and where there was no allegation that corporation's assets were distributed by officers without providing for known or reasonably ascertainable liabilities. Heather Hills Home Owners Ass'n v. Carolina Custom Dev. Co., 100 N.C. App. 263, 395 S.E.2d 154 (1990), decided under former § 55-32.

§ 55-8-25. Committees.

(a) Unless this Chapter, the articles of incorporation, or the bylaws provide otherwise, a board of directors may create one or more committees and appoint one or more members of the board of directors to serve on any such committee.

(b) Unless this Chapter provides otherwise, the creation of a committee and appointment of members to it must be approved by the greater of:

(1) A majority of all the directors in office when the action is taken; or

(2) The number of directors required by the articles of incorporation or bylaws to take action under G.S. 55-8-24.

(b1) The creation and appointment of a committee pursuant to G.S. 55-7-44(b)(2) may be approved in the manner set forth in G.S. 55-7-44(b)(2).

(c) G.S. 55-8-20 through G.S. 55-8-24 apply both to committees of the board of directors and to their members.

(d) To the extent specified by the board of directors or in the articles of incorporation or bylaws, each committee may exercise the authority of the board of directors under G.S. 55-8-01.

(e) A committee shall not, however, do any of the following:

(1) Authorize or approve distributions, except according to a formula or method, or within limits, prescribed by the board of directors.

(2) Approve or propose to shareholders action that this act requires be approved by shareholders.

(3) Fill vacancies on the board of directors or on any of its committees.

(4) Amend articles of incorporation pursuant to G.S. 55-10-02.

(5) Adopt, amend, or repeal bylaws.

(6) Approve a plan of merger not requiring shareholder approval.

(f) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in G.S. 55-8-30. (1955, c. 1371, s. 1; 1969, c. 751, s. 13; 1973, c. 1087, ss. 1, 2; 1989, c. 265, s. 1; 2005-268, s. 10; 2007-385, s. 1.)

OFFICIAL COMMENT

Section 8.25 makes explicit the common law power of a board of directors to act through committees of directors and specifies the powers of the board of directors that are nondelegable, that is, powers that only the full board of directors may exercise. Section 8.25 deals only with committees of the board of directors exercising the functions of the board of directors; the board of directors or management, independently of section 8.25, may establish nonboard committees composed of directors, employees, or others to deal with corporate powers not required to be exercised by the board of directors.

Section 8.25(b) provides that a committee of the board of directors may be created only by the affirmative vote of a majority of the board of directors then in office, or, if greater, by the number of directors required to take action by the articles of incorporation or the bylaws. This supermajority requirement reflects the importance of the decision to invest board committees with power to act under section 8.25.

Committees of the board of directors are assuming increasingly important roles in the governance of publicly held corporations. See "The Corporate Director's Guidebook," 33 BUS. LAW. 1591 (1978); "The Overview Committees of the Board of Directors," 35 BUS. LAW. 1335 (1980). Executive committees have long provided guidance to management between meetings of the full board of directors. Audit committees also have a long history of performing essential review and control functions on behalf of the board of directors. In recent years nominating and compensation committees, composed primarily or entirely of nonmanagement directors, have also become more widely used by publicly held corporations.

Section 8.25 establishes the desirable and appropriate role of director committees in light of competing considerations: on the one hand, it seems clear that appropriate board committee action is not only desirable but also is likely to improve the functioning of larger and more diffuse boards of directors; on the other hand, wholesale delegation of authority to a board committee, to the point of abdication of director responsibility as a board of directors, is manifestly inappropriate and undesirable. Overbroad delegation also increase the potential, where the board of directors is divided, for usurpation of basic board functions by means of delegation to a committee dominated by one faction.

The statement of nondelegable functions set out in section 8.25(e) is based on the principle that prohibitions against delegation should be limited generally to actions substantially affecting the rights of shareholders among themselves as shareholders and specifically to (1) those matters that have immediate and irrevocable effect (such as the declaration of a dividend), (2) those matters that may well become irrevocable without swift action, and (3) those matters that will cause changes of position by others that cannot be rectified. As a result, delegation of authority to committees under section 8.25(e) may be broader than mere authority to act with respect to matters arising within the ordinary course of business. The ordinary course of business standard for delegation was rejected as being too narrow and inappropriate for many modern corporations. For example, although section 8.25(e)(8) makes nondelegable the decision whether to issue and sell shares or create a class or series of shares with designated rights and preferences, it permits the board of directors to delegate to a committee (within limits specifically prescribed by the board of directors) the important but more limited functions of fixing the specific terms—including without limitation, the price, the dividend rate, provisions for redemption, sinking fund, conversion, voting or preferential rights, and provisions for other features of a class or series of shares. The committee may also be empowered to adopt any final resolution setting forth the terms and to authorize the appropriate filing with the Secretary of State required by this Act. Thus, terms of the sale of shares may be set quickly and upon the most accurate information without necessarily involving a meeting of the board of directors. The phrase "(or senior executive officer of the corporation)" also permits these functions to be delegated to the chief financial officer or other appropriate officer of the corporation. The subsection also permits delegation to a committee of authority to determine the terms of a contract or option for the sale of shares if the board prescribes specific limits in a stock option plan or otherwise. This delegation avoids requiring involvement of the full board in the details of the administration of stock option or other compensation plans.

Section 8.25(e) prohibits delegation of authority with respect to most mergers, sales of substantially all the assets, amendments to articles of incorporation and voluntary dissolution under section 8.25(e)(2) since these require shareholder action. In addition, section 8.25(e) prohibits delegation to a board committee of authority to declare dividends or distributions, designate director candidates for purposes of proxy solicitation, fill board vacancies, approve a so-called "short-form merger" (where the interests of the minority shareholders warrant special attention), authorize the disposition or reacquisition of shares, or amend the bylaws or the articles of incorporation (without shareholder approval under section 10.02). On the other hand, under section 8.25(e) many actions of a material nature, such as the authorization of long-term debt and capital investment or the pricing of shares, may properly be made the subject of committee delegation.

The statutes of several states make nondelegable certain powers not listed in section 8.25(e)—for example, the power to change the principal corporate office, to appoint or remove officers, to fix director compensation, or to remove agents. These are not prohibited by section 8.25(e) since the whole board of directors may reverse or rescind the committee action taken, if it should wish to do so, without undue risk that implementation of the committee action might be irrevocable or irreversible.

Section 8.25(f) makes clear that although the board of directors may delegate to a committee the authority to take action, the designation of the committee, the delegation of authority to it, and action by the committee will not alone constitute compliance by a noncommittee board member with his responsibility under section 8.30. On the other hand, a noncommittee director also will not automatically incur liability should the action of the particular committee fail to meet the standard of care set out in section 8.30. The noncommittee member's liability in these cases will depend upon whether he failed to comply with section 8.30(b)(3). Factors to be considered in this regard will include the care used in the delegation to and supervision over the committee, and the amount of knowledge regarding the particular matter which the noncommittee director has available to him. Care in delegation and supervision include appraisal of the capabilities and diligence of the committee directors in light of the subject and its relative importance and may be facilitated, in the usual case, by review of minutes and receipt of other reports concerning committee activities. The enumeration of these factors is intended to emphasize that directors may not abdicate their responsibilities and secure exoneration from liability simply by delegating authority to board committees. Rather, a director against whom liability is asserted based upon acts of a committee of which he is not a member avoids liability if the standards contained in section 8.30 are met.

Section 8.25(f) has no application to a member of the committee itself. The standard applicable to a committee member is set forth in section 8.30(a).

AMENDED NORTH CAROLINA COMMENTARY

The powers which may not be delegated to committees, specified in subsection (e) of this section, are different and more extensive than those specified in former G.S. 55-31(a). Also, this section contains no counterpart of former G.S. 55-31(c), which expressly held the board responsible for action of its committees. This difference is moderated by subsection (f) of the present section.

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

Effective October 1, 2005, this section is amended (i) to permit a committee of the board of directors to consist of a single director, (ii) to permit a committee to approve the corporation's purchase of its own shares, to approve the issuance of shares, and to determine the designation and relative rights, preferences, and limitations of a class or series of shares, and (iii) to recognize the special procedures provided in G.S. 55-7-44(b)(2) for appointment of a committee to make certain determinations in a derivative proceeding.

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2007)

The amendment to subsection (e)(1) affected by Session Law 2007-385 permits a board of directors to delegate to a committee the authority to authorize or approve distributions, but only according to a formula or method, or within limits, prescribed by the board of directors. This applies to distributions as defined in G.S. 55-1-40, including but not limited to share reacquisitions and dividends.

Editor's Note. — Session Laws 2007-385, s. 7, provides: "The Revisor of Statutes may cause to be printed all explanatory comments of the drafters of the act as the Revisor deems appropriate."

The comment under the heading Supplemental North Carolina Commentary (2007) above was printed under authority of Session Laws 2007-385, s. 7. It was provided by the original drafters of Session Laws 2007-385 and was printed as received.

Legal Periodicals. — For note, "Alford v. Shaw: North Carolina Adopts a Prophylactic Rule to Prevent Termination of Shareholders' Derivative Suits Through Special Litigation Committees," see 64 N.C.L. Rev. 1228 (1986).

CASE NOTES

Editor's Note. — *The case below was decided under the Business Corporation Act adopted in 1955.*

Special Litigation Committee. — The fact that the appointing members of a board of directors are acting under the "disability" of potential liability as a result of shareholder allegations does not per se extend to disable them from delegating managerial authority over the litigation to a special litigation committee. Alford v. Shaw, 318 N.C. 289, 349 S.E.2d 41 (1986), modified and aff'd on rehearing, 320 N.C. 465, 358 S.E.2d 323 (1987).

§§ 55-8-26 through 55-8-29: Reserved for future codification purposes.

Part 3. Standards of Conduct.

§ 55-8-30. General standards for directors.

(a) A director shall discharge his duties as a director, including his duties as a member of a committee:

(1) In good faith;
(2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
(3) In a manner he reasonably believes to be in the best interests of the corporation.

(b) In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
(2) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within their professional or expert competence; or
(3) A committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

(c) A director is not entitled to the benefit of subsection (b) if he has actual knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section. The duties of a director weighing a change of control situation shall not be any different, nor the standard of care any higher, than otherwise provided in this section.

(e) A director's personal liability for monetary damages for breach of a duty as a director may be limited or eliminated only to the extent permitted in G.S. 55-2-02(b)(3), and a director may be entitled to indemnification against liability and expenses pursuant to Part 5 of Article 8 of this Chapter. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1993, c. 552, s. 11.)

OFFICIAL COMMENT

Section 8.30 defines the general standard of conduct for directors. It sets forth the standard by focusing on the manner in which the director performs his duties, not the correctness of his decisions. Section 8.30(a) thus requires a director to perform his duties in good faith, with the care of an ordinarily prudent person in a like position and in a manner he believes to be in the best interests of the corporation. This standard is based on former section 35 of the 1969 Model Act, a number of state statutes and on judicial formulations of the duty of care applicable to directors. Section 8.30 also parallels, to the extent possible, the indemnification provisions of sections 8.50 through 8.58.

In determining whether to impose liability, the courts recognize that boards of directors and corporate managers continuously make decisions that involve the balancing of risks and benefits for the enterprise. Although some decisions turn out to be unwise or the result of a mistake of judgment, it is unreasonable to reexamine these decisions with the benefit of hindsight. Therefore, a director is not liable for injury or damage caused by his decision, no matter how unwise or mistaken it may turn out to be, if in performing his duties he met the requirements of section 8.30.

Even before statutory formulations of directors' duty of care, courts sometimes invoked the business judgment rule in determining whether to impose liability in a particular case. In doing so, courts have sometimes used language similar to the standards set forth in section 8.30(a). The elements of the business judgment rule and the circumstances for its application are continuing to be developed by the courts. In view of that continuing judicial development, section 8.30 does not try to codify the business judgment rule or to delineate the differences, if any, between that rule and the standards of director conduct set forth in this section. That is a task left to the courts and possibly to later revisions of this Model Act.

Section 8.30 should be read in light of the basic duty of directors set forth in section 8.01(b) that the "business and affairs of a corporation [shall be] managed under the direction of" the board. Since the board may delegate or assign to appropriate officers of the corporation the authority or duty to exercise powers that section 8.01 does not require the board to retain, directors are not personally responsible under section 8.30 for actions or omissions of officers, employees, or agents of the corporation so long as the directors, complying with the standard of care set forth in section 8.30, have acted reasonably in delegating responsibility.

1. Section 8.30(a)

Section 8.30(a) establishes a general standard of care for all directors. It requires a director to exercise "the care an ordinarily prudent person in a like position would exercise." Some state statutes use the words "diligence," "care," and "skill" to define this duty. E.G., N.C. GEN. STAT. ANN. § 55-35 (1975). There is very little authority as to what "skill" and "diligence," as distinguished from "care," can be required or properly expected of corporate directors in the performance of their duties. "Skill," in the sense of technical competence in a particular field, should not be a qualification for the office of director. The concept of "diligence" is sufficiently subsumed within the concept of "care." Accordingly, the words "diligence" and "skill" were omitted from the standard adopted.

Likewise, section 8.30 does not use the term "fiduciary" in the standard for directors' conduct, because that term could be confused with the unique attributes and obligations of a fiduciary imposed by the law of trusts, some of which are not appropriate for directors of a corporation.

Several of the phrases chosen to define the general standard of care in section 8.30(a) deserve specific mention.

(1) The reference to "ordinarily prudent person" embodies long traditions of the common law, in contrast to suggested standards that might call for some undefined degree of expertise, like "ordinarily prudent businessman." The phrase recognizes the need for innovation, essential to profit orientation, and focuses on the basic director attributes of common sense, practical wisdom, and informed judgment.

(2) The phrase "in a like position" recognizes that the "care" under consideration is that which would be used by the "ordinarily prudent person" if he were a director of the particular corporation.

(3) The combined phrase "in a like position … under similar circumstances" is intended to recognize that (a) the nature and extent of responsibilities will vary, depending upon such factors as the size, complexity, urgency, and location of activities carried on by the particular corporation, (b) decisions must be made on the basis of the information known to the directors without the benefit of hindsight, and (c) the special background, qualifications, and management responsibilities of a particular director may be relevant in evaluating his compliance with the standard of care. Even though the quoted phrase takes into account the special background, qualifications and management responsibilities of a particular director, it does not excuse a director lacking business experience or particular expertise from exercising the common sense, practical wisdom, and informed judgment of an "ordinarily prudent person."

The process by which a director informs himself will vary but the duty of care requires every director to take steps to become informed about the background facts and circumstances before taking action on the matter at hand. In relying upon the performance by management of delegated or assigned duties pursuant to section 8.01 (including, for example, matters of law and legal compliance), the director may depend upon the presumption of regularity, absent knowledge or notice to the contrary. A director may also rely on information, opinions, reports, and statements prepared or presented by others as set forth in section 8.30(b). Furthermore, a director should not be expected to anticipate the problems which the corporation may face except in those circumstances where something has occurred to make it obvious to the director that the corporation should be addressing a particular problem.

2. Section 8.30(b)

A director complying with the standards expressed in section 8.30(a) is entitled to rely upon information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by the persons or committees described in section 8.30(b). The right to rely under this section applies to the entire range of matters for which the board of directors is responsible. Under section 8.30(c), however, a director so relying must be without knowledge concerning the matter in question that would cause his reliance to be unwarranted. Also inherent in the concept of good faith is the requirement that, in order to be entitled to rely on a report, statement, opinion, or other matter, the director must have read the report or statement in question, or have been present at a meeting at which it was orally presented, or have taken other steps to become generally familiar with its contents. In short, the director must comply with the general standard of care of section 8.30(a) in making a judgment as to the reliability and competence of the source of information upon which he proposes to rely.

Section 8.30(b) permits reliance upon outside advisers, including not only those in the professional disciplines customarily supervised by state authorities, such as lawyers, accountants, and engineers, but also those in other fields involving special experience and skills, such as investment bankers, geologists, management consultants, actuaries, and real estate appraisers. The concept of "expert competence" in section 8.30(b)(2) embraces a wide variety of qualifications and is not limited to the more precise and narrower recognition of experts under the Securities Act of 1933. In this respect section 8.30(b) goes beyond any existing state business corporation act, although several state statutes permit reliance on reports of appraisers selected with reasonable care by the board of directors and deal with the scope and nature of corporate reports and records generally.

Section 8.30(b) permits reliance upon a committee of the board of directors when performing a supervisory or other functions in instances where neither the full board of directors nor the committee takes dispositive action. For example, there may be reliance upon an investigation undertaken by a board committee and reported to the full board of directors, which forms the basis for action by the board of directors itself. Another example is reliance upon a committee of the board of directors, such as a corporate audit committee, with respect to the ongoing role of oversight of the accounting and auditing functions of the corporation. In addition, where reliance upon information or materials prepared or presented by a board committee is not involved, a director may properly rely on dispositive action by a board committee (of which he is not a member) empowered to act pursuant to authority delegated under section 8.25 or acting with the acquiescence of the board of directors. In this connection, see the Official Comment to section 8.25. A director may similarly rely on committees not created under section 8.25 which have nondirector members.

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In conditioning reliance upon reasonable belief that the board committee merits the director's "confidence," section 8.30(b)(3) recognizes a difference between a board committee and an expert. In sections 8.30(b)(1) and (2) the reference is to "competence of an expert," which recognizes the expectation of experience and in most instances technical skills on the part of those upon whom the director may rely. In section 8.30(b)(3), the concept of "confidence" is substituted for "competence" in order to avoid any inference that technical skills are a prerequisite.

By identifying those upon whom a director may rely in discharging his duties, section 8.30(b) does not limit the ability of directors to delegate their powers under section 8.01(a) to committees of the board of directors or officers of the corporation, except where this delegation is expressly prohibited by the Act. Delegation should be carried out in accordance with the standards set forth in section 8.30(a). See also section 8.25 and its Official Comment with respect to delegation to committees.

3. Section 8.30(c)

Section 8.30(c) expressly prevents a director from "hiding his head in the sand" and relying on information, opinions, reports, or statements when he has actual knowledge which makes reliance unwarranted.

4. Section 8.30(d)

Section 8.30(d) follows former section 35 of the Model Act, which provided that "An individual who performs the duties of his office in accordance with this section is not liable for serving or having served as a director." Thus, both former section 35 and current section 8.30(d) are self-executing, and the individual director's exoneration from liability is automatic. If compliance with the standard of conduct set forth in former section 35 or section 8.30 is established, there is no need to consider possible application of the business judgment rule. The possible application of the business judgment rule need only be considered if compliance with the standard of conduct set forth in former section 35 or section 8.30 is not established.

Section 8.30(d) makes clear that the section will apply whether or not affirmative action was in fact taken. If the board of directors or a committee considers an issue (such as a recommendation of independent auditors concerning the corporation's internal accounting controls) and determines not to take action, the determination not to act is protected by section 8.30. Similarly, if the board of directors or committee delegates responsibility for handling a matter to subordinates, the delegation constitutes "action" under section 8.30. Section 8.30(d) applies (assuming its requirements are satisfied) to any conscious consideration of matters involving the affairs of the corporation. It also applies to the determination by the board of directors of which matters to address and which not to address. Section 8.30(d) does not apply only when the director has failed to consider taking action which under the circumstances he is obliged to consider taking.

5. Application to officers

Section 8.30 generally deals only with directors. Section 8.42 and its Official Comment explain the extent to which the provisions of section 8.30 apply to officers.

NORTH CAROLINA COMMENTARY

Although the word "fiduciary" is no longer used in describing the duty owed by a director to a corporation, there is no intent to change North Carolina law in this area. The decision not to bring forward the language stating that a director shall "be deemed to stand in a fiduciary relation to the corporation" in former G.S. 55-35 is not intended to modify in any way the duty of directors recognized under the former law. Removal of the word "fiduciary" was solely because of confusion in other jurisdictions between the corporate and the trust standards of fiduciary duty. This Act does not attempt to define the full range of a director's duty, since the language chosen might be used to limit the standards under which directors should act.

Former G.S. 55-35 provided that officers and directors stand in a fiduciary relation "to the corporation and to its shareholders." The drafters decided not to bring forward the words "and to its shareholders" in order to avoid an interpretation that there is a duty running directly from directors to the shareholders that would give shareholders a direct right of action on claims that should be asserted derivatively.

The drafters noted the dictum in *Snyder v. Freeman*, 300 N.C. 204, 266 S.E.2d 593 (1980), suggesting that directors owe a fiduciary duty to creditors. The drafters considered adding a new section 55-8-34 expressly stating that the directors do not have any such duty to creditors; but, because of the complexities and novelty of such a provision, they finally decided not to add the new section but instead to express in this Comment their opinion that in general no such duty exists.

Subsection (c) of this section is different from the Model Act in two respects. First, it requires "actual" knowledge for a director to be denied the right of reliance under subsection (b); and, second, it says more specifically that a director who has such knowledge is not "entitled to the benefit of subsection (b)" instead of saying that such director is not "acting in good faith."

Subsection (e) of the section was added to the Model Act's provisions to clarify the two points covered. It should be noted that a provision in the articles of incorporation that limits a director's monetary liability for a breach of the duty of due care does not affect the duty of due care itself.

Legal Periodicals. — For note on the fiduciary duty of interested directors and the business judgment rule, see 45 N.C.L. Rev. 755 (1967).

For comment on promoters of corporations dealing in condominiums, see 12 Wake Forest L. Rev. 979 (1976).

For note on close corporations and personal liability from execution of shareholder agreements, see 16 Wake Forest L. Rev. 975 (1980).

For article on corporate directors' accountability, see 66 N.C.L. Rev. 171 (1987).

For article discussing derivative suit litigation, see 66 N.C.L. Rev. 565 (1988).

For comment, "Fiduciary Duties of Directors, How Far Do They Go?," see 23 Wake Forest L. Rev. 163 (1988).

For article, "Reliance and Liability Standards for Outside Directors," see 24 Wake Forest L. Rev. 5 (1989).

For article, "The Effect of Statutes Limiting Directors' Due Care Liability on Hostile Takeover Defenses," see 24 Wake Forest L. Rev. 31 (1989).

For article, "Should Corporate Statutes Providing Special Protection for Directors Be Limited to Publicly Traded Corporations?," see 24 Wake Forest L. Rev. 79 (1989).

For article, "Intracorporate Process and the Avoidance of Director Liability," see 24 Wake Forest L. Rev. 97 (1989).

For comment, "North Carolina's Statutory Limitation on Directors' Liability," see 24 Wake Forest L. Rev. 117 (1989).

For comment on corporate law and director liability, see 24 Wake Forest L. Rev. 141 (1989).

For article, "The Duty of Directors to Non-Shareholder Constituencies in Control Transactions — A Comparison of U.S. and U.K. Law," see 25 Wake Forest L. Rev. 61 (1990).

For article on the evolution of corporate combination law, see 76 N.C.L. Rev. 687 (1998).

For note, "First Union v. Suntrust and The Delaware Experience: An Analysis of Deal Protection Measures," see 80 N.C.L. Rev. 2109 (2002).

For recent development, "In re Wachovia

Shareholders Litigation: The Case for the Common Benefit Doctrine," see 84 N.C. L. Rev. 2066 (2006).

CASE NOTES

Editor's Note. — *Most of the cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Common Law of Business Judgment Rule Not Abrogated. — This section does not abrogate the common law of the business judgment rule. State ex rel. Long v. ILA Corp., 132 N.C. App. 587, 513 S.E.2d 812 (1999).

Directors Are Trustees of Property of Corporation. — Directors of a corporation are trustees of the property of the corporation for the benefit of the corporate creditors, as well as shareholders. It is their duty to administer the trust assumed by them, not for their own profit, but for the mutual benefit of all interested parties; and, when such directors receive an advantage to themselves not common to all, they are guilty of a plain breach of trust. Meiselman v. Meiselman, 58 N.C. App. 758, 295 S.E.2d 249 (1982), modified and aff'd, 309 N.C. 279, 307 S.E.2d 551 (1983).

Directors owe the corporation fidelity and the duty to use due care in the management of its business. Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964).

Director in Fiduciary Relationship to Shareholder. — Under special circumstances, a director of a corporation stands in a fiduciary relationship to a shareholder or director in the acquisition of the shareholder's stock. Lazenby v. Godwin, 40 N.C. App. 487, 253 S.E.2d 489 (1979).

Director's Fiduciary Duty to Creditors. — As a general rule, directors of a corporation do not owe a fiduciary duty to creditors of the corporation under G.S. 55-8-30, but a corporate director can breach a fiduciary duty to a creditor if the transaction at issue occurs under circumstances amounting to a winding-up or dissolution of the corporation. Oberlin Capital, L.P. v. Slavin, 147 N.C. App. 52, 554 S.E.2d 840, 2001 N.C. App. LEXIS 1047 (2001).

Officer Not Protected. — The director and chief executive officer of an insolvent insurer and its parent corporation was not protected by the business judgment rule from liability for breach of his fiduciary duties, where the director was a leading participant in a plan to benefit himself and his interests at the expense of the insurer. State ex rel. Long v. ILA Corp., 132 N.C. App. 587, 513 S.E.2d 812 (1999).

Where the former president of a Chapter 11 debtor claimed that his actions were sheltered by the business judgment rule and G.S. 55-8-30(d), the debtor was entitled to summary judgment on its claim against the president for breach of fiduciary duty because the debtor rebutted any presumption that the president acted in good faith and with the care of an ordinarily prudent person by showing that certain transfers of property from the debtor to the president were transactions in which the president had a direct financial interest. Anderson v. Brokers Inc. (In re Brokers, Inc.), 363 B.R. 458, 2007 Bankr. LEXIS 792 (Bankr. M.D.N.C. 2007).

Duty Owed to Minority Shareholders. — Directors, officers, and majority shareholders owe a fiduciary duty and obligation of good faith to minority shareholders as well as to the corporation. Meiselman v. Meiselman, 58 N.C. App. 758, 295 S.E.2d 249 (1982), modified and aff'd, 309 N.C. 279, 307 S.E.2d 551 (1983); Umstead v. Durham Hosiery Mills, Inc., 578 F. Supp. 342 (M.D.N.C. 1984).

Fiduciary Duty. — Directors of a corporation generally owed a fiduciary duty to their corporation and the complaint adequately stated a cause of action for breach of the fiduciary duty against a corporation's directors. Governor's Club, Inc. v. Governors Club Ltd. P'ship., 152 N.C. App. 240, 567 S.E.2d 781, 2002 N.C. App. LEXIS 926 (2002), aff'd sub nom., 357 N.C. 46, 577 S.E.2d 620 (2003).

Evidence was sufficient to establish a breach of defendant's fiduciary duty to plaintiff as a minority shareholder. Freese v. Smith, 110 N.C. App. 28, 428 S.E.2d 841 (1993).

This Section Applies to Limited Partnerships. — In a limited partnership the duty of the general partner to the limited partners is a duty to discharge his responsibilities according to the business judgment rule outlined in G.S. 55-8-30. Jackson v. Marshall, 140 N.C. App. 504, 537 S.E.2d 232, 2000 N.C. App. LEXIS 1211 (2000).

Fiduciary Duty as Question Where Revolving Fund Certificate Was Issued. — Revolving fund certificate held by plaintiff issued in exchange for stock sold to defendant had some characteristics of a corporation/shareholder relationship; therefore, issue of whether defendants owed plaintiff a fiduciary duty was properly submitted to the jury. HAJMM Co. v. House of Raeford Farms, Inc., 94 N.C. App. 1, 379 S.E.2d 868, reversed on other grounds, HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 403 S.E.2d 483 (1991), appeal of right allowed pursuant to Rule 16(b) and petition allowed as to additional issues, 325 N.C. 271, 382 S.E.2d 439 (1989), decided under the former Business Corporation Act.

Balance Sheet Insolvency. — For a corporate director to breach a fiduciary duty to a creditor, the transaction at issue must occur under circumstances amounting to a "winding up" or dissolution of the corporation; balance sheet insolvency, absent such circumstances, is insufficient to give rise to a breach of fiduciary duty to creditors of a corporation. Whitley v. Carolina Clinic, Inc., 118 N.C. App. 523, 455 S.E.2d 896 (1995).

Suit for Breach of Duty Is Derivative. — A suit against corporation's officers and directors for breach of their fiduciary duty on account of mismanagement is clearly derivative. Gilbert v. Bagley, 492 F. Supp. 714 (M.D.N.C. 1980).

When Action by Shareholders Is Individual. — Where several officers and directors were alleged to have breached the fiduciary duty owed to shareholders by maintaining the market price of the corporation's shares at artificial levels and in issuing false or misleading financial statements, the shareholder plaintiffs would be entitled to receive any recovery under these allegations and the action was thus individual. Gilbert v. Bagley, 492 F. Supp. 714 (M.D.N.C. 1980).

Shareholder plaintiffs need not demonstrate that all defendants are amenable to suit. Rather, nonofficers and nondirectors may, by North Carolina common-law principles, be held to answer for substantially assisting or encouraging another's breach of fiduciary duty. Gilbert v. Bagley, 492 F. Supp. 714 (M.D.N.C. 1980).

Genuine Issue of Material Fact Shown. — Where defendants submitted a number of affidavits tending to substantiate their version of the facts and where plaintiff responded with evidence which, if believed, would enable a jury to find in the corporation's favor, the parties' submissions created a genuine issue of material fact as to whether defendants breached their duty of loyalty by diverting a deal from the corporation for which they were directors to another corporation so as to warrant denial of defendants' summary judgment motion. Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993).

Issues regarding knowledge, intent and motive, in determining whether directors' actions were taken in good faith in order to further the interests of the corporations, depend upon credibility of witnesses and are therefore not amenable to resolution on summary judgment. Clark v. B.H. Holland Co., 852 F. Supp. 1268 (E.D.N.C. 1994).

Where a Chapter 11 debtor claimed that a former director breached his fiduciary duty in approving or executing transfers of property to the debtor's former president, the debtor was not entitled to summary judgment because there was an issue of material fact as to whether the director acted in good faith because there was evidence that the director honestly believed that a partnership existed between the debtor and the president, and that it was in the best interests of the debtor to pay its indebtedness to the president. Anderson v. Brokers Inc. (In re Brokers, Inc.), 363 B.R. 458, 2007 Bankr. LEXIS 792 (Bankr. M.D.N.C. 2007).

Where directors of a bankruptcy debtor formed a management company to manage the debtor, genuine issues of material fact remained concerning whether the directors breached fiduciary duties since it was unclear whether the directors caused unnecessary transfer of the debtor's funds and whether the company's contract with the debtor served a legitimate business purpose. Ivey v. McDaniel (In re EBW Laser, Inc.), — Bankr. —, 2009 Bankr. LEXIS 70 (Bankr. M.D.N.C. Jan. 15, 2009).

Failure to Rely on the Advice of Professionals. — The director of an insolvent insurer did not rely on the advice of accounting and legal professionals, and thus, his statutory right to rely on their advice did not protect him from liability for breach of fiduciary duty in connection with loans made by the insurer, where actual advice received made the director aware that the loans were undercollateralized. State ex rel. Long v. ILA Corp., 132 N.C. App. 587, 513 S.E.2d 812 (1999).

Officer Not Personally Liable for Debt. — Where the evidence showed the defendant was an officer of a lawful corporation but had no knowledge, at the time debt was incurred on behalf of the corporation, that the corporate charter was suspended, the defendant had no personal liability for the corporation's debt to the plaintiff. Charles A. Torrence Co. v. Clary, 121 N.C. App. 211, 464 S.E.2d 502 (1995).

Action Untimely. — Summary judgment was granted in favor of a director of a corporation in an action alleging violations of G.S. 55-8-30 and N.Y. Gen. Bus. Law § 717 relating to the sale of certain illegal agreements because the causes of action were time barred. Rich Food Servs., Inc. v. Rich Plan Corp., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 27799 (E.D.N.C. Nov. 11, 2002).

Cited in IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992); Howell v. Sykes, 136 N.C. App. 407, 526 S.E.2d 183, 2000 N.C. App. LEXIS 6 (2000); In re Wachovia S'holders Litig., 168 N.C. App. 135, 607 S.E.2d 48, 2005 N.C. App. LEXIS 168 (2005); Geitner v. Mullins, — N.C. App. —, 643 S.E.2d 435, 2007 N.C. App. LEXIS 808 (2007).

§ 55-8-31. Director conflict of interest.

(a) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true:

(1) The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved, or ratified the transaction;

(2) The material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction; or

(3) The transaction was fair to the corporation.

(b) For purposes of this section, a director of the corporation has an indirect interest in a transaction if:

(1) Another entity in which he has a material financial interest or in which he is a general partner is a party to the transaction; or

(2) Another entity of which he is a director, officer, or trustee is a party to the transaction and the transaction is or should be considered by the board of directors of the corporation.

(c) For purposes of subsection (a)(1) of this section, a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors (or on the committee) who have no direct or indirect interest in the transaction. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken under subsection (a)(1) of this section if the transaction is otherwise authorized, approved, or ratified as provided in that subsection.

(d) For purposes of subsection (a)(2), a conflict of interest transaction is authorized, approved, or ratified if it receives the vote of a majority of the shares entitled to be counted under this subsection. Shares owned by or voted under the control of a director who has a direct or indirect interest in the transaction, and shares owned by or voted under the control of an entity described in subsection (b)(1), may not be counted in a vote of shareholders to determine whether to authorize, approve, or ratify a conflict of interest transaction under subsection (a)(2). The vote of those shares, however, shall be counted in determining whether the transaction is approved under other sections of this Chapter. A majority of the shares that would if present be entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 2005-268, s. 11.)

OFFICIAL COMMENT

Historically, the scope of a director's duty of loyalty to a corporation has been defined by judicial decision rather than by statute. The courts have developed and refined this duty based on increasing sophistication and experience with the corporate form, and the need to encourage honest decisions by directors and to discourage direct or indirect devices by which directors may benefit personally at the expense of creditors or shareholders. Over the years, courts have been vigilant to subject novel transactions and devices to scrutiny.

Sections 8.31 and 8.32 deal with various facets of the duty of loyalty. The Model Act, however, does not attempt to define the full range of this duty. Indeed, any such attempt would probably be self-defeating since the language chosen might be used to limit prematurely the standards under which directors should act.

1. Conflict of interest transactions in general

Section 8.31 deals only with "conflict of interest" transactions by a director with the corporation, that its, transactions in which the director has an interest either (1) directly or (2) indirectly through an entity in which the director has a financial or managerial interest covered by section 8.31(b). A conflict of interest transaction does not include transactions in which the director participates in the transaction only as a shareholder and receives only a proportionate share of the advantage or benefit of the transaction. Section 8.31 deals only with conflict of interest transactions involving directors; it does not address analogous transactions entered into by officers, employees, or substantial or dominating shareholders unless they are also directors.

Section 8.31 rejects the common law view that all conflict of interest transactions entered into by directors are automatically voidable at the option of the corporation without regard to the fairness of the transaction or the manner in which the transaction was approved by the corporation. Section 8.31(a) makes any automatic rule of voidability inapplicable to transactions that are fair or that have been approved by directors or shareholders in the manner provided by the balance of section 8.31. The approval mechanisms set forth in section 8.31(c) and (d) relate only to the elimination of this automatic rule of voidability and do not address the manner in which the transactions must be approved under other sections of this Act. This is made clear by the express limitations in sections 8.31(c) and (d) that they are applicable only "for the purposes of this section" as well as the language of the second and third sentences of section 8.31(d).

The elimination of the automatic rule of voidability does not mean that all transactions that meet one or more of the tests set forth in section 8.31(a) are automatically valid. These transactions may be subject to attack on a variety of grounds independent of section 8.31—for example, that the transaction constituted waste, that it was not authorized by the appropriate corporate body, that it violated other sections of the Model Business Corporation Act, or that it was unenforceable under other common law principles. The sole purpose of section 8.31 is to sharply limit the common law principle of automatic voidability and in this respect section 8.31 follows earlier versions of the Model Act and the statutes of many states dealing with conflict of interest transactions.

2. Requirements for approval of conflict of interest transactions

Sections 8.31(c) and (d) provide special rules for determining whether the board of directors (or a committee thereof) or the shareholders have authorized, approved, or ratified a conflict of interest transaction so as to bring subsections (a)(1) or (a)(2) into play. Basically, these subsections require the transaction in question to be approved by an absolute majority of the directors (on the board of directors, or on the committee, as the case may be) or shares whose votes may be counted in determining whether the transaction should be authorized, approved, or ratified. If these votes are not obtained the transaction is tested under the fairness test of subsection (a)(3). The vote required for authorization, approval, or ratification of a conflict of interest transaction is more onerous than the standard applicable to normal voting requirements for approval of corporate actions—i.e., that a quorum be present and only the votes of directors or shares present or represented at that meeting be considered—because of the importance of assuring that conflict of interest transactions receive as broad consideration within the corporation as possible if independent review on the basis of fairness is to be avoided.

a. Consideration by the directors

Section 8.31(c) provides that if a conflict of interest transaction is to be considered by the board of directors or a committee of the board, only the votes of directors "who have no direct or indirect interest in the transaction" may be counted in determining whether to authorize, approve, or ratify the transaction. A vote mistakenly cast by an interested director, however, does not affect the validity of the authorization, approval, or ratification by a committee or by the board of directors under section 8.31 if it otherwise meets the requirement of this subsection. The presence of the interested director at the meeting similarly does not affect the validity of the action by the disinterested directors. Because of the voting disqualification of interested directors, section 8.31(c) provides that a majority of the disinterested directors on the committee or on the board of directors, as the case may be, constitute a quorum for purposes of authorizing, approving, or ratifying the conflict of interest transaction under section 8.31, subject always, however, to the requirement that more than one director must approve the transaction. This two director minimum is applicable to a committee of the board of directors as well as the board of directors itself.

b. Consideration by the shareholders

When a director's conflict of interest transaction is considered by the shareholders, section 8.31(d) applies a similar but somewhat more complex prohibition: votes by shares "owned by or voted under the control of a director who has a direct or indirect interest in the transaction" and votes by shares "owned by or voted under the control of an entity described in subsection (b)(1)"—that is, an entity in which the director has a material financial interest or is a general partner—may not be counted. This prohibition is based on the belief that the same considerations that prevent votes cast be interested directors from being counted in favor of a conflict of interest transaction also compel the conclusion that votes cast by shares owned or controlled by them, or by entities involved in the transaction in which they have a material financial interest, should also not be counted when the issue is the authorization, approval, or ratification of a conflict of interest transaction under section 8.31. A similar prohibition does not appear in section 41 of the 1969 Model Act.

In some situations, the prohibition of section 8.31(d) will result in the conflict of interest issue being resolved by a majority of a minority of the shares. This will occur, for example, whenever a director who is the majority shareholder of the corporation is interested in a transaction. The vote on the conflict of interest issue under section 8.31, however, must be distinguished from the vote on the approval of the transaction itself under other sections of the Model Act, in which there is no prohibition against the voting of shares owned or controlled by an interested director. For example, if a parent corporation wishes to merge its 60-percent-owned subsidiary into itself, and the majority shareholder of the parent is a director of the subsidiary, the votes of the shares owned by the parent corporation may not be counted under section 8.31(d) (since the shares are owned by an entity which is a party to the transaction and which the director controls). The shares nevertheless may be voted on the merger proposal itself under chapter 11 of the Model Act, and the merger will, of course, normally be approved solely by the vote of the shares owned by the parent corporation. On the other hand, the test of section 8.31(a)(2) is not met unless the transaction is approved by at least a majority of the votes cast by the holders of the 40 percent of the shares not owned by the parent corporation. If this requirement is not met, the transaction may be evaluated under the fairness test of section 8.31(a)(3).

3. Indirect Conflicts of Interest

Section 8.31 is applicable to "indirect" as well as direct conflicts; "indirect" is defined in section 8.31(b) to cover transactions between the corporation and an entity in which the director has a material financial interest or is a general partner. Further, section 8.31(b) covers indirect conflicts where the director is an officer or director of another entity (but does not have a material financial interest in the transaction) if the transaction is of sufficient importance that it is or should be considered by the board of directors of the corporation. The purpose of this last clause is to permit normal business transactions between large business entities that may have a common director to go forward without concern about the technical rules relating to conflict of interest unless the transaction is of such importance that it is or should be considered by the board of directors or the director may be deemed to have a material financial interest in the transaction. Thus, section 8.31 covers transactions between corporations with interlocking or common directors as well as the direct "interested director" transaction.

4. "Fairness" of a transaction

The fairness of a transaction for purposes of section 8.31 should be evaluated on the basis of the facts and circumstances as they were known or should have been known at the time the transaction was entered into. For example, the terms of a transaction subject to section 8.31 should normally be deemed "fair" if they are within the range that might have been entered into at arm's-length by disinterested persons.

5. An "interested" director

The Model Act does not attempt to define precisely when a director should be viewed as "interested" for purposes of participating in the decision to adopt, approve, or ratify a conflict of interest transaction. Secton 8.31(b) does, however, define one aspect of this concept—the "indirect" interest. For purposes of section 8.31 a director should normally be viewed as interested in a transaction if he or the immediate members of his family have a financial interest in the transaction or a relationship with the other parties to the transaction such that the relationship might reasonably be expected to affect his judgment in the particular matter in a manner adverse to the corporation.

NORTH CAROLINA COMMENTARY

This section replaces former G.S. 55-30(b); subsection (a) of the prior law is covered by G.S. 55-8-11. The section is more precise than former G.S. 55-30(b) in several respects. First, it says that a conflict of interest transaction "is not voidable by the corporation solely because of the director's interest" if it passes one of the three prescribed tests, thus recognizing that it might be voidable for some other reason. Second, subsection (b) of this section defines "indirect interest." Finally, subsections (c) and (d) define the manner in which the transaction may be approved by the disinterested directors or shareholders, respectively. The specific requirement of "good faith" by the directors in former G.S. 55-30(b)(1) is unnecessary because it is generally imposed by G.S. 55-8-30.

The only change in this section from the Model Act is a minor clarification of the last sentence in subsection (d).

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

Effective October 1, 2005, subsection (c) is amended to remove the limitation that a conflict of interest transaction may not be approved by a single disinterested director.

Legal Periodicals. — For comment on promoters of corporations dealing in condominiums, see 12 Wake Forest L. Rev. 979 (1976).

For article on corporate directors' accountability, see 66 N.C.L. Rev. 171 (1987).

For article, "Should Corporate Statutes Providing Special Protection for Directors Be Limited to Publicly Traded Corporations?," see 24 Wake Forest L. Rev. 79 (1989).

For comment, "North Carolina's Statutory Limitation on Directors' Liability," see 24 Wake Forest L. Rev. 117 (1989).

For article, "Fairness and Trust in Corporate Law," see 1993 Duke L.J. 425.

CASE NOTES

Editor's Note. *— Most of the cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

"Corporate Transaction" Construed. — The words "corporate transaction" in former G.S. 55-30 were intended to apply to a situation where the corporate director was dealing directly with the corporation. Smith v. Robinson, 343 F.2d 793 (4th Cir. 1965).

Corporate officer acts in a fiduciary capacity and cannot profit at the expense of the corporation. Smith v. Robinson, 343 F.2d 793 (4th Cir. 1965).

Contracts Fixing Compensation Not Void or Voidable Per Se. — Notwithstanding the fiduciary relationship existing between officers and the corporation which they serve, contracts fixing the amount and method of paying compensation for services to be rendered are not void or voidable per se. Fulton v. Talbert, 255 N.C. 183, 120 S.E.2d 410 (1961).

Derivative Action Against Director Does Not Necessarily Make Him "Adversely Interested." — In a derivative action brought by shareholders against directors of a corporation alleging malfeasance in office, former G.S. 55-30 did not operate to prevent former G.S. 55-19(d) from being effective in allowing the corporation to advance any legal fees to the directors, since the advancement of legal fees under former G.S. 55-19(d) was not necessarily a transaction in which a director was adversely interested, and since, even if it were, the disinterested directors of the corporation had approved the advancement. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

Adversely Interested Party Must Prove Transaction Was Fair. — While North Carolina law and general law do not prohibit corporate officers from dealing with the corporation, the adversely interested party must prove that the transaction was fair, just and reasonable when entered into. Smith v. Robinson, 343 F.2d 793 (4th Cir. 1965).

When a stockholder in a derivative action seeks to establish self-dealing on the part of a majority of the board, the burden should be upon those directors to establish that the transactions complained of were just and reasonable to the corporation when entered into or approved. Alford v. Shaw, 320 N.C. 465, 358 S.E.2d 323 (1987).

Where officer of corporation engaged in transactions which were not approved by the corporate defendants or shareholders, the burden was on him to prove that the transactions were just and reasonable. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

Where the former director and president of a Chapter 11 debtor claimed that he complied with G.S. 55-8-31(a)(1) by having two disinterested directors approve or ratify the transfer of certain property to him, although the president sufficiently established that the two directors were disinterested, the director failed to disclose the material facts of the transactions to the disinterested directors, and could not show that the transactions were fair to the debtor.

Anderson v. Brokers Inc. (In re Brokers, Inc.), 363 B.R. 458, 2007 Bankr. LEXIS 792 (Bankr. M.D.N.C. 2007).

For discussion of the "doctrine of corporate opportunity," see Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983).

Determination of what is "just and reasonable" and thus, whether a corporate opportunity has been usurped, is one in which no hard and fast rule can be formulated. Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983).

Decision of Special Committee Not Binding on Trial Court. — The fact that a special litigation committee appointed by directors charged with self-dealing recommends that derivative action should not proceed, while carrying weight, is not binding upon the trial court. Rather, the court must make a fair assessment of the report of the special committee, along with all the other facts and circumstances in the case, in order to determine whether the defendants will be able to show that the transaction complained of was just and reasonable to the corporation. Alford v. Shaw, 320 N.C. 465, 358 S.E.2d 323 (1987).

Corporate director and majority shareholder of closely held corporation did not breach a fiduciary duty to minority shareholder and director when the corporate director purchased the corporation's sole property at a foreclosure on a mortgage the corporate director had personally guaranteed without telling the minority shareholder he intended to do so in advance. Boyd v. Howard, 147 N.C. App. 491, 556 S.E.2d 337, 2001 N.C. App. LEXIS 1187 (2001).

Approval of Employment Contract by Disinterested Officers. — Execution of employment contract with the former director and president of a Chapter 11 debtor complied with G.S. 55-8-31(a)(1) because the contract was approved by two disinterested directors. Anderson v. Brokers Inc. (In re Brokers, Inc.), 363 B.R. 458, 2007 Bankr. LEXIS 792 (Bankr. M.D.N.C. 2007).

No Conflict of Interest Based Solely on Familial Relationship. — Shareholders did not establish that corporate directors had a conflict of interest, based solely on a familial relationship, in their actions in electing the officers and managers of the corporation and setting their compensation because G.S. 55-8-31 did not provide for a conflict of interest solely based on a family relationship; also, none of the actions at issue by the board of directors was a "transaction with the corporation." Geitner v. Mullins, — N.C. App. —, 643 S.E.2d 435, 2007 N.C. App. LEXIS 808 (2007), cert. denied, 361 N.C. 692, 652 S.E.2d 263 (2007), Geitner v. Mullins, — N.C. App. —, 643 S.E.2d 435, 2007 N.C. App. LEXIS 808 (2007).

Cited in Benchmark Carolina Aggregates, Inc. v. Martin Marietta Materials, Inc., 125 N.C. App. 666, 482 S.E.2d 27 (1997).

§ 55-8-32. Loans to directors.

(a) Except as provided by subsection (c), a corporation may not directly or indirectly lend money to or guarantee the obligation of a director of the corporation unless:

(1) The particular loan or guarantee is approved by a majority of the votes represented by the outstanding voting shares of all classes, voting as a single voting group, except the votes of shares owned by or voted under the control of the benefited director; or

(2) The corporation's board of directors determines that the loan or guarantee benefits the corporation and either approves the specific loan or guarantee or a general plan authorizing loans and guarantees.

(b) The fact that a loan or guarantee is made in violation of this section does not affect the borrower's liability on the loan.

(c) This section does not apply to loans and guarantees authorized by statute regulating any special class of corporations.

(d) For purposes of this section, a loan or guarantee is made indirectly to or for a director if such director has an indirect interest in the loan or guarantee as defined in G.S. 55-8-31(b). (1955, c. 1371, s. 1; 1959, c. 1316, s. 6; 1961, c. 198; 1969, c. 751, s. 9; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 8.32 treats specially a second type of conflict of interest transaction: loans by the corporation to directors (including loans obtained by directors from third persons on the basis of the corporation's credit). Early statutes in many states made all these loans unlawful because they were believed to be inherently subject to abuse; the modern view epitomized by section 8.32 recognizes that these loans may be proper and desirable in some situations.

The basic test for validity under section 8.32(a) is that either (1) the particular loan is approved by a majority of the shares or by the board of directors after a specific finding that the loan benefits the corporation, or (2) the loan is pursuant to a general plan approved by the board of directors as being of benefit to the corporation. This type of plan will normally cover at least directors, officers, and high-level employees, and possibly lower level employees as well. Examples of these plans are employee benefit plans, plans authorizing loans of petty cash, and advances for expenses reasonably anticipated to be incurred in the performance of the duties of the director, officer, or employee.

Section 8.32(b) makes clear that an irregular or improper loan is nevertheless legally enforceable by the corporation by the corporation against the borrower.

Section 8.32(c) provides for an exception for loans by banks, savings and loans, and other lending institutions that are authorized by law to make loans to directors in the ordinary course of business. The protections provided by the statutes applicable to these entities render unnecessary the protections provided by section 8.32.

NORTH CAROLINA COMMENTARY

Former G.S. 55-22 required shareholder approval of loans to directors, officers, and dominant shareholders. This section permits the board of directors to authorize loans to directors without shareholder approval if the board determines that the loan benefits the corporation. There are no special limits on loans to officers who are not directors or to dominant shareholders.

This section differs from the Model Act by the addition of the words "directly or indirectly" to the loan prohibition in subsection (a) of this section. These words are then defined in a new subsection (d).

CASE NOTES

Editor's Note. — The cases below were decided under the Business Corporation Act adopted in 1955.

Grant of Security Interest. — Former G.S. 55-22 was not drafted or designed to prevent a corporation from granting a security interest in its own property to secure its own obligation to another party. Landscaping Servs., Inc. v. Poole, 38 Bankr. 21 (Bankr. E.D.N.C. 1983).

Restriction Imposed. — The language contained in former G.S. 55-22 was very broad and severely restricted the right of a corporation to lend money or property to, or guarantee or otherwise secure the obligation of a dominant shareholder, directors or officers of any corporation of which the officers and directors of the lending or securing corporation owned more than 50% of the outstanding stock of any class; such a restriction was consistent with the fiduciary relationship created by former G.S. 55-35 between the corporation and directors of the corporation. Landscaping Servs., Inc. v. Poole, 38 Bankr. 21 (Bankr. E.D.N.C. 1983).

§ 55-8-33. Liability for unlawful distributions.

(a) A director who votes for or assents to a distribution made in violation of G.S. 55-6-40 or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating G.S. 55-6-40 or the articles of incorporation if it is established that he did not perform his duties in compliance with G.S. 55-8-30. In any proceeding commenced under this section, a director has all of the defenses ordinarily available to a director.

(b) A director held liable under subsection (a) for an unlawful distribution is entitled to:

(1) Contribution from every other director who could be held liable under subsection (a) for the unlawful distribution; and

(2) Reimbursement from each shareholder for the amount the shareholder accepted knowing the distribution was made in violation of G.S. 55-6-40 or the articles of incorporation.

(c) A proceeding under subsection (a) is barred unless it is commenced within three years after the date on which the effect of the distribution was

measured under G.S. 55-6-40(e) or (g). (Code, s. 681; 1901, c. 2, ss. 33, 52; Rev., s. 1192; C.S., s. 1179; 1927, c. 121; 1933, c. 354, s. 1; G.S., s. 55-116; 1955, c. 1371, s. 1; 1959, c. 1316, s. 35; 1989, c. 265, s. 1.)

NORTH CAROLINA COMMENTARY

This section is substantially the same as the revised version of the comparable section in the Model Act as published in the November 1986 issue of *The Business Lawyer*. Subsection (b) was modified for greater precision in terminology. The limitation period in subsection (c) was increased to three rather than two years, and the subsection was clarified to ensure that the rights of individual directors to contribution and reimbursement under subsection (b) cannot be cut off before their own liability or lack thereof is determined.

CASE NOTES

Editor's Note. *— Some of the cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Primary Right to Enforce Liabilities Lies in Corporation. — The primary right of enforcement of liabilities to the corporation lies in the corporation, and as such the corporation is the real party in interest and a necessary party to such action. Underwood v. Stafford, 270 N.C. 700, 155 S.E.2d 211 (1967).

Creditor or Stockholder Cannot Maintain Action Without First Demanding Suit by Corporation. — Where alleged breach or injuries are based on duties owed to the corporation and not to any particular creditor or stockholder, the creditor or stockholder cannot maintain an action without a demand on the corporation, or its receiver if insolvent, to bring suit and a refusal to do so, and a joinder of the corporation as a party. Underwood v. Stafford, 270 N.C. 700, 155 S.E.2d 211 (1967).

Liability of Director for Improper Dividend. — A director of a corporation who has not brought himself within the exemptions to liability for the payment of dividends to the stockholders when the profits of the business did not justify it, or its debts exceeded two thirds of its assets, etc., is liable, in the action of the trustee in bankruptcy of such corporation, for the amount of such debts, and the proper court costs and charges, not exceeding the amount of the dividends unlawfully declared. Claypoole v. McIntosh, 182 N.C. 109, 108 S.E. 433 (1921).

Effect of Charter Provision Exempting Stockholders from Liability. — A charter provision that "no stockholder of the corporation shall be individually liable for debt, liability, contract, tort, omission, or engagement of the corporation or any other stockholder therein" did not interfere with the just and equitable principle embodied in former statute holding stockholders who were directors liable for a joint tort or misfeasance committed by them to the prejudice of creditors. McIver v. Young Hdwe. Co., 144 N.C. 478, 57 S.E. 169 (1907).

Trial court was justified in disregarding the corporate entity and holding defendant personally liable to the extent of plaintiff's damages under the contract where defendant, who was president and sole shareholder of company, received substantial compensation from the sale of the corporation's assets without informing plaintiff of the sale or making provision for contractual debt to plaintiff. Hudson v. Jim Simmons Pontiac-Buick, Inc., 94 N.C. App. 563, 380 S.E.2d 612 (1989), decided under the former Business Corporation Act.

No Cause of Action Stated. — Claim against director of dissolved corporation did not state a cause of action where plaintiff only alleged that director was officer when corporation dissolved and where there was no allegation that corporation's assets were distributed by officers without providing for known or reasonably ascertainable liabilities. Heather Hills Home Owners Ass'n v. Carolina Custom Dev. Co., 100 N.C. App. 263, 395 S.E.2d 154 (1990), decided under former § 55-32.

Creditors Lacked Standing. — Plaintiffs lacked standing to assert claims (1) that the joinder agreements executed by two defendants were fraudulent transfers in violation of G.S. 39-23.1 and unlawful distributions in violation of G.S. 55-8-33 and G.S. 55-6-40, for which all defendants were liable, or alternatively, (2) for unauthorized execution, because such claims could have been brought by any of the corporation's creditors who, like plaintiffs, were denied timely payment of the corporation's debts when execution of the joinder agreements led to its insolvency. Angell v. Kelly, 336 F. Supp. 2d 540, 2004 U.S. Dist. LEXIS 19003 (M.D.N.C. 2004).

§§ 55-8-34 through 55-8-39: Reserved for future codification purposes.

Part 4. Officers.

§ 55-8-40. Officers.

(a) A corporation has the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws.

(b) A duly appointed officer may appoint one or more officers or assistant officers if authorized by the bylaws or the board of directors.

(c) The secretary or any assistant secretary or any one or more other officers designated by the bylaws or the board of directors shall have the responsibility and authority to maintain and authenticate the records of the corporation.

(d) The same individual may simultaneously hold more than one office in a corporation, but no individual may act in more than one capacity where action of two or more officers is required.

(e) Whenever a specific office is referred to in this Chapter, it shall be deemed to include any individual who, alone or collectively with one or more other individuals, holds or occupies such office. (1901, c. 2, ss. 15, 16, 17; Rev., ss. 1149, 1150, 1151; C.S., s. 1145; G.S., s. 55-49; 1955, c. 1371, s. 1; 1959, c. 1316, s. 9; 1973, c. 1217; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.13.)

OFFICIAL COMMENT

Section 8.40 permits every corporation to designate the officers it wants. The designation may be made in the bylaws or by the board of directors consistently with the bylaws. This is a departure from earlier versions of the Model Act and most state corporation acts, which require certain officers, usually the president, the secretary, and the treasurer, and generally authorize the corporation to designate additional or assistant officers. Experience has shown, however, that little purpose is served by a statutory requirement that there be certain officers, and statutory requirements may sometimes create problems of implied or apparent authority or confusion with nonstatutory offices the corporation desires to create.

The board of directors may appoint assistant officers pursuant to its general powers under section 8.40(a); duly appointed officers may also appoint assistant officers if authorized by the board under section 8.40(b).

Throughout the Model Act, the act of a board designating an officer is referred to as an "appointment" rather than an "election." The Act also consistently uses the word "elect" when referring to the selection of directors, thus emphasizing the difference in the selection process.

The board of directors, as well as duly appointed corporate officers or other agents, may also appoint agents for the corporation.

The bylaws or the board of directors must also delegate to an officer the responsibility to prepare minutes and authenticate records of the corporation; the person performing this function is referred to as the "secretary" of the corporation throughout the Model Act. See section 1.40. Under this Act a corporation may have this and all other corporate functions performed by a single individual.

The person who is designated by the bylaws or the board as responsible for maintaining minutes of meetings and authenticating records of the corporation thereby has authority to bind the corporation by his authentication under this section. This delegation of authority, traditionally vested in the corporate "secretary," allows third persons to rely on authenticated records without inquiring into their truth or accuracy.

AMENDED NORTH CAROLINA COMMENTARY

This section was adapted from the corresponding section of the Model Act with several changes. The word "required" was deleted from the catchline of the section because it covers officers that are optional as well as those that are required.

No changes were made in subsections (a) and (b). Subsection (b) permits the board of directors to authorize officers to appoint other officers or assistant officers, whereas former G.S. 55-34 was silent on this point. The drafters were in favor of this provision but noted that the appointment should be documented as a practical matter, e.g., in the minute books.

Subsection (c) was changed to designate the secretary or any assistant secretary as the officers who have responsibility and authority to maintain and authenticate corporate records, subject to any other provision in the bylaws, in accordance with existing practice, and subsection (d) was changed by adding the final clause relating to acting in a dual capacity when the action of more than one officer is required, thus conforming to former G.S. 55-34(a). Subsection (e) brings forward the last sentence of former G.S. 55-34(a) with updated terminology.

CASE NOTES

Whether Level of Control and Authority Rose to De Facto Director Status. — In a business dispute involving asserted allegations of breach of a covenant-not-to-compete and other claims, a trial court erred by granting defendants summary judgment on the issue of whether one of defendants' level of control and authority rose to the level of a de facto officer as, although none of plaintiff's corporate records indicated that the defendant was the president of plaintiff, testimony from plaintiff stated that the defendant was promoted to that position when the defendant signed the covenant-not-to-compete and other agreements and that the defendant's own business cards named him as president of plaintiff. Kinesis Adver., Inc. v. Hill, 187 N.C. App. 1, 652 S.E.2d 284, 2007 N.C. App. LEXIS 2251 (2007), review denied, appeal dismissed, 362 N.C. 177, 658 S.E.2d 485 (2008).

§ 55-8-41. Duties of officers.

Each officer has the authority and duties set forth in the bylaws or, to the extent consistent with the bylaws, the authority and duties prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the authority and duties of other officers. (1901, c. 2, ss. 15, 16, 17; Rev., ss. 1149, 1150, 1151; C.S., s. 1145; G.S., s. 55-49; 1955, c. 1371, s. 1; 1959, c. 1316, s. 9; 1973, c. 1217; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 8.41 recognizes that persons designated as officers have the formal authority set forth for that position (1) by its description in the bylaws, (2) by specific resolution of the board of directors, or (3) by direction of another officer authorized by the board of directors to prescribe the duties of other officers.

These methods of investing officers with formal authority do not exhaust the sources of an officer's actual or apparent authority. Many cases state that specific corporate officers, particularly the chief executive officer, may have implied authority merely by virtue of their positions. This authority, which may overlap the express authority granted by the bylaws, generally has been viewed as extending only to ordinary business transactions, though some cases have recognized unusually broad implied authority of the chief executive officer or have created a presumption that corporate officers have broad authority, thereby placing on the corporation the burden of showing lack of authority. Corporate officers may also be vested with apparent (or ostensible) authority by reason of corporate conduct on which third persons reasonably rely.

In addition to express, implied, or apparent authority, a corporation is normally bound by unauthorized acts of officers if they are ratified by the board of directors. Generally, ratification extends only to acts that could have been authorized as an original matter. Ratification may itself be express or implied and may in some cases serve as the basis of apparent (or ostensible) authority.

NORTH CAROLINA COMMENTARY

This section was modified by deleting the Model Act's words "shall perform the" before the word "duties" in the first use of that word and by adding the words "authority and" before the word "duties" in the other two uses of that word.

Former G.S. 55-34(c) expressly gave the president of a corporation authority to institute or defend legal proceedings when the directors are deadlocked. *See Thomas v. Baker,* 227 N.C. 226, 41 S.E.2d 842 (1947). That provision was not brought forward. The drafters concluded that situations involving a deadlocked board of directors should be determined by the courts on a case by case basis rather than having a definitive statutory statement that the president can act in such situations.

Legal Periodicals. — For note on the liability of directors and officers for negligent management, see 45 N.C.L. Rev. 748 (1967).

CASE NOTES

Editor's Note. — The cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.

Conduct of Day-to-Day Business. — The day-to-day business of a corporation is actually conducted by its officers, employees and other agents under the authority and control of its board of directors. The officers of a corporation have such authority and may perform such duties in the management of the corporation as provided either specifically or generally in the bylaws, or as may be determined by action of the board of directors not inconsistent with the bylaws. Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974).

President as Head and General Agent of Corporation. — The president of a corporation by the very nature of his position is the head and general agent of the corporation, and accordingly he may act for the corporation, in the business in which the corporation is engaged. Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974).

But the authority of the president to act for the corporation is limited to those matters that are incidental to the business in which the corporation is engaged, that is, to matters that are within the corporation's ordinary course of business. Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974).

Necessity for Contract for Compensation. — An officer of a corporation, for services in the course and scope of his official duties, can only recover when compensation therefor has been authoritatively agreed upon in advance. It is not always required that a definite sum be fixed upon, but there must be a previous agreement for compensation existent or in some way expressed so as to bind the company. There can be no recovery on a quantum meruit. Chiles v. United States Furn. Mfg. Co., 167 N.C. 574, 83 S.E. 812 (1914). See Caho v. Norfolk & S. Ry., 147 N.C. 20, 60 S.E. 640 (1908).

Individual Liability of Officers. — Where officers of a corporation knowingly participate in a wrong which is actionable, they are jointly and severally liable therefor. Cone v. United Fruit Growers' Ass'n, 171 N.C. 530, 88 S.E. 860 (1916).

Defense Based on Unwritten Limitation on Powers. — The president of a corporation is not bound by any secret limitation upon the authority usually vested in the chief officer of a corporation; hence a defense to a note, issued by the president of a corporation, that it was unauthorized because of an unwritten bylaw, is untenable. Phillips v. Interstate Land Co., 176 N.C. 514, 97 S.E. 417 (1918).

The president of a corporation under former G.S. 55-49 had implied power to sign a note, and secret limitations on his authority were not binding on the payee. White v. Johnson & Sons, 205 N.C. 773, 172 S.E. 370 (1934).

The secretary of an incorporated garage and automobile repair company had the implied authority to settle claims made for damages upon the corporation, and one so dealing with him therein would not be bound by a secret limitation of his authority; and upon his own testimony that he was the proper one to be dealt with in this respect, the question of the corporation's liability for his promise to pay the claim was properly presented. Beck v. Wilkins-Ricks Co., 186 N.C. 210, 119 S.E. 235 (1923).

The general manager of one of a chain of stores had implied authority to employ clerks by the year, and the corporation was bound by such contract though there existed an undisclosed limitation of the agent's authority to make contracts of employment for more than a month. Strickland v. S.H. Kress & Co., 183 N.C. 534, 112 S.E. 30 (1922).

§ 55-8-42. Standards of conduct for officers.

(a) An officer with discretionary authority shall discharge his duties under that authority:

(1) In good faith;

(2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) In a manner he reasonably believes to be in the best interests of the corporation.

(b) In discharging his duties an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) One or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented; or

(2) Legal counsel, public accountants, or other persons as to matters the officer reasonably believes are within their professional or expert competence.

(c) An officer is not entitled to the benefit of subsection (b) if he has actual knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) An officer is not liable for any action taken as an officer, or any failure to take any action, if he performed the duties of his office in compliance with this section.

(e) An officer may be entitled to indemnification against liability and expenses pursuant to Part 5 of Article 8 of this Chapter. (1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

This section provides that a nondirector officer with discretionary authority must meet the same standards of conduct required of directors under section 8.30. But his ability to rely on information, reports, or statements, may, depending upon the circumstances of the particular case, be more limited than in the case of a director in view of the greater obligation he may have to be familiar with the affairs of the corporation. See section 8.42(b). Nondirector officers with more limited discretionary authority may be judged by a narrower standard, though every corporate officer or agent owes duties of fidelity, honesty, good faith, and fair dealing to the corporation. The Official Comment to section 8.30 is generally applicable to nondirector officers as well as to directors.

NORTH CAROLINA COMMENTARY

Subsection (c) of this section is different from the Model Act, first, in requiring "actual" knowledge and, second, in providing that an officer with such knowledge is not "entitled to the benefit of subsection (b)" instead of not "acting in good faith." This change conforms to the change made in subsection 55-8-30(c). Subsection (e) was added for clarification.

CASE NOTES

Editor's Note. *— Most of the cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Duty Owed to Minority Shareholders. — Directors, officers, and majority shareholders owe a fiduciary duty and obligation of good faith to minority shareholders as well as to the corporation. Meiselman v. Meiselman, 58 N.C. App. 758, 295 S.E.2d 249 (1982), modified and aff'd, 309 N.C. 279, 307 S.E.2d 551 (1983); Umstead v. Durham Hosiery Mills, Inc., 578 F. Supp. 342 (M.D.N.C. 1984).

Fiduciary Duty as Question Where Revolving Fund Certificate Was Issued. — Revolving fund certificate held by plaintiff issued in exchange for stock sold to defendant had some characteristics of a corporation/shareholder relationship; therefore, issue of whether defendants owed plaintiff a fiduciary duty was properly submitted to the jury. HAJMM Co. v. House of Raeford Farms, Inc., 94 N.C. App. 1, 379 S.E.2d 868, rev'd on other grounds, HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 403 S.E.2d 483 (1991).

Officers Must Act in Good Faith. — The officers of a company have no right to take advantage of their knowledge of its financial condition to secure a preference for themselves on all its property as to a preexisting debt. Hill v. Pioneer Lumber Co., 113 N.C. 173, 18 S.E. 107 (1893); Thomson-Houston Elec. Light Co. v. Henderson Elec. Light Co., 116 N.C. 112, 21 S.E. 951 (1895); Graham v. Carr, 130 N.C. 271, 41 S.E. 379 (1902); Holshouser v. Copper Co., 138 N.C. 248, 50 S.E. 650 (1905); Edwards v. Hill Supply Co., 150 N.C. 171, 63 S.E. 742 (1909).

An officer may be held liable for the torts committed by agents of the corporation if the officer fails to act with due diligence in their supervision. Air Traffic Conference of Am. v. Marina Travel, Inc., 69 N.C. App. 179, 316 S.E.2d 642 (1984).

Corporate officer cannot take business for himself from the corporation. Brite v. Penny, 157 N.C. 110, 72 S.E. 964 (1911).

The law will not permit corporate officers to create obligations in the name of the corporation, knowing the acts are without authority and invalid, and then be permitted to use the corporate name as shield against creditors. Pierce Concrete, Inc. v. Cannon Realty & Constr. Co., 77 N.C. App. 411, 335 S.E.2d 30 (1985).

Officers Not to Incur Ordinary Business When Charter Suspended. — While corporate officers in North Carolina are not trustees, their fiduciary duty to the corporation is a high one; this includes a duty not to continue to incur ordinary business obligations on behalf of the corporation when they have knowledge that the corporation's charter has been suspended. Pierce Concrete, Inc. v. Cannon Realty & Constr. Co., 77 N.C. App. 411, 335 S.E.2d 30 (1985).

Whether Level of Control and Authority Rose to De Facto Director Status. — In a business dispute involving asserted allegations of breach of a covenant-not-to-compete and other claims, a trial court erred by granting defendants summary judgment on the issue of whether one of defendants' level of control and authority rose to the level of a de facto officer as, although none of plaintiff's corporate records indicated that the defendant was the president of plaintiff, testimony from plaintiff stated that the defendant was promoted to that position when the defendant signed the covenant-not-to-compete and other agreements and that the defendant's own business cards named him as president of plaintiff. Kinesis Adver., Inc. v. Hill, 187 N.C. App. 1, 652 S.E.2d 284, 2007 N.C. App. LEXIS 2251 (2007), review denied, appeal dismissed, 362 N.C. 177, 658 S.E.2d 485 (2008).

Contracts Fixing Compensation Not Void or Voidable Per Se. — Notwithstanding the fiduciary relationship existing between officers and the corporation which they serve, contracts fixing the amount and method of paying compensation for services to be rendered are not void or voidable per se. Fulton v. Talbert, 255 N.C. 183, 120 S.E.2d 410 (1961).

Suit for Breach of Duty Is Derivative. — A suit against corporation's officers and directors for breach of their fiduciary duty on account of mismanagement is clearly derivative. Gilbert v. Bagley, 492 F. Supp. 714 (M.D.N.C. 1980).

When Action by Shareholders Is Individual. — Where several officers and directors were alleged to have breached the fiduciary duty owed to shareholders by maintaining the market price of the corporation's shares at artificial levels and in issuing false or misleading financial statements, the shareholder plaintiffs would be entitled to receive any recovery under these allegations and the action was thus individual. Gilbert v. Bagley, 492 F. Supp. 714 (M.D.N.C. 1980).

Shareholder plaintiffs need not demonstrate that all defendants are amenable to suit. Rather, nonofficers and nondirectors may, by North Carolina common-law principles, be held to answer for substantially assisting or encouraging another's breach of fiduciary duty. Gilbert v. Bagley, 492 F. Supp. 714 (M.D.N.C. 1980).

Action Based on Fraud for Salaries Not Honestly Earned. — The right of action which accrues for the fixing and taking by one in authority of salaries, bonuses, or other moneys not honestly earned and fairly owing is based on fraud. When one seeks to recover for wrongs fraudulently inflicted, he must allege the facts which, if proven, will establish the fraud. It is not sufficient merely to allege as a conclusion that the payments were "exorbitant, unreasonable, and unjust." Fulton v. Talbert, 255 N.C. 183, 120 S.E.2d 410 (1961).

Conversion of Corporate Money Justifying Punitive Damages. — Defendant officers and directors' conversions to their own use of money belonging to corporation held to support an award of punitive damages. Stone v. Martin, 85 N.C. App. 410, 355 S.E.2d 255, appeal dismissed and cert. denied, 320 N.C. 638, 360 S.E.2d 105 (1987).

Cited in IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992); Charles A. Torrence Co. v. Clary, 121 N.C. App. 211, 464 S.E.2d 502 (1995).

§ 55-8-43. Resignation and removal of officers.

(a) An officer may resign at any time by communicating his resignation to the corporation. A resignation is effective when it is communicated unless it specifies in writing a later effective time. If a resignation is made effective at a later time and the corporation accepts the future effective time, its board of directors or the appointing officer may fill the pending vacancy before the effective time if the board of directors or the appointing officer provides that the successor does not take office until the effective time.

(b) An officer may be removed at any time with or without cause by (i) the board of directors, (ii) the appointing officer, unless the bylaws or the board of directors provide otherwise, or (iii) any other officer if authorized by the bylaws or the board of directors.

(c) In this section, "appointing officer" means the officer, including any successor to that officer, who appointed the officer resigning or being removed. (1901, c. 2, ss. 15, 16, 17; Rev., ss. 1149, 1150, 1151; C.S., s. 1145; G.S., s. 55-49; 1955, c. 1371, s. 1; 1959, c. 1316, s. 9; 1973, c. 1217; 1989, c. 265, s. 1; 2005-268, s. 12.)

OFFICIAL COMMENT

Section 8.43(a) is declaratory of current law. It recognizes that corporate officers may resign, that, with the consent of the board of directors, they may resign effective at a later date, and that the board of directors may fill a future vacancy to become effective as of the effective date of the resignation.

In part because of the unlimited power of removal, confirmed by section 8.43(b), a board of directors may grant an officer an employment contract that extends beyond the term of the board of directors. This type of contract is binding on the corporation even if the articles of incorporation or bylaws provide that officers are appointed for a term shorter than the period of the employment contract. If a later board of directors refuses to reappoint that person as an officer, he has the right to sue for damages but not for specific performance of his employment contract.

Section 8.43(b) is also declaratory of current law. The tenure of all corporate officers is subject to the will of the board of directors. If the board of directors loses confidence in a corporate officer, that officer may be removed irrespective of contract rights or the presence or absence of "cause" in a legal sense. Section 8.44 provides that removal of an officer who has contract rights is without prejudice to whatever rights the former officer may assert in a suit for damages for breach of contract.

NORTH CAROLINA COMMENTARY

The reference to an officer "communicating his resignation" is broader language than the reference in the Model Act to "delivering notice" of the resignation. This change parallels the change made in section 55-8-07.

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

Effective October 1, 2005, this section is amended to provide that an officer may be removed by another officer in certain circumstances.

CASE NOTES

***Editor's Note.** — The cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Removal. — The officers of a corporation created for private purposes have no franchise in their offices, and are removable during the term for which they are appointed, when found to be incompetent or faithless. Eliason v. Coleman, 86 N.C. 235 (1882).

Where plaintiff had no written contract, and his employment was indefinite, he was not wrongfully discharged even though his employment was not terminated by the board of directors. While the board of directors may remove an officer, there is no indication that it is mandatory that it do so. Buffaloe v. United Carolina Bank, 89 N.C. App. 693, 366 S.E.2d 918 (1988).

§ 55-8-44. Contract rights of officers.

(a) The appointment of an officer does not itself create contract rights.

(b) An officer's removal does not itself affect the officer's contract rights, if any, with the corporation. An officer's resignation does not affect the corporation's contract rights, if any, with the officer. (1901, c. 2, ss. 15, 16, 17; Rev., ss. 1149, 1150, 1151; C.S., s. 1145; G.S., s. 55-49; 1955, c. 1371, s. 1; 1959, c. 1316, s. 9; 1973, c. 1217; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 8.43 makes clear that the appointment of an officer does not itself create contract rights in the officer. The removal of an officer with contract rights is without prejudice to his later enforcement of contract rights in a suit for damages for breach of contract. See the Official Comment to section 8.43. Similarly, an officer with an employment contract who prematurely resigns may be in breach of his employment contract. The mere appointment of an officer for a term does not create a contractual obligation on his part to complete the term.

§§ 55-8-45 through 55-8-49: Reserved for future codification purposes.

Part 5. Indemnification.

§ 55-8-50. Policy statement and definitions.

(a) It is the public policy of this State to enable corporations organized under this Chapter to attract and maintain responsible, qualified directors, officers, employees and agents, and, to that end, to permit corporations organized under this Chapter to allocate the risk of personal liability of directors, officers, employees and agents through indemnification and insurance as authorized in this Part.

(b) Definitions in this Part:

(1) "Corporation" includes any domestic or foreign corporation absorbed in a merger which, if its separate existence had continued, would have had the obligation or power to indemnify its directors, officers, employees, or agents, so that a person who would have been entitled to receive or request indemnification from such corporation if its separate existence had continued shall stand in the same position under this Part with respect to the surviving corporation.

(2) "Director" means an individual who is or was a director of a corporation or an individual who, while a director of a corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise. A director is considered to be serving an employee benefit plan at the corporation's request if his duties to the corporation also impose duties on, or otherwise involve services by, him to the plan or to participants in or beneficiaries of the plan. "Director" includes, unless the context requires otherwise, the estate or personal representative of a director.

(3) "Expenses" means expenses of every kind incurred in defending a proceeding, including counsel fees.

(4) "Liability" means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or reasonable expenses incurred with respect to a proceeding.

(4a) "Officer", "employee", or "agent" includes, unless the context requires otherwise, the estate or personal representative of a person who acted in that capacity.

(5) "Official capacity" means: (i) when used with respect to a director, the office of director in a corporation; and (ii) when used with respect to an individual other than a director, as contemplated in G.S. 55-8-56, the office in a corporation held by the officer or the employment or agency relationship undertaken by the employee or agent on behalf of the corporation. "Official capacity" does not include service for any other foreign or domestic corporation or any partnership, joint venture, trust, employee benefit plan, or other enterprise.

(6) "Party" includes an individual who was, is, or is threatened to be made a named defendant or respondent in a proceeding.

(7) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal. (1955, c. 1371, s. 1; 1969, c. 797, s. 2; 1973, c. 469, s. 6; 1985 (Reg. Sess., 1986), c. 1027, s. 39; 1989, c. 265, s. 1; 1993, c. 552, s. 12.)

OFFICIAL COMMENT

The definitions set forth in section 8.50 apply only to subchapter E and have no application elsewhere in the Model Act.

1. CORPORATION

A special definition of "corporation" is included in subchapter E to make it clear that predecessor entities that have been absorbed in mergers or other transactions are included within the definition. It is probable that the same result would be reached for many transactions under section 11.06 (effect of merger or share exchange), which provides for the assumption of liabilities by operation of law upon a merger. The express responsibility of successor entities for the liabilities of their predecessors under this subchapter is broader than under section 11.06 and may impose liability on a successor although section 11.06 does not. Section 8.50(1) is thus an essential aspect of the protection provided by this subchapter for persons eligible for indemnification.

2. DIRECTOR

A special definition of "director" is included in subchapter E to make it clear that a person who is or was a director is covered by this subchapter while serving at the corporation's request in another enterprise. The purpose of this definition is to give directors the benefits of the protection of this subchapter while serving at the corporation's request in a responsible position in employee benefit plans, trade associations, nonprofit or charitable entities, foreign or domestic entities, and other kinds of profit or nonprofit ventures. A director serving at the corporation's request in such a venture is viewed as acting as a director of the corporation for purposes of this subchapter even though he is also acting in some other capacity in the other venture.

The second sentence of section 8.50(2) addresses the question of liabilities arising under the Employee Retirement Income Security Act (ERISA). It makes clear that a director who is serving as a fiduciary of an employee benefit plan is nevertheless viewed as acting as a director for purposes of this subchapter. Special treatment is felt to be necessary because of the broad definition of "fiduciary" in section 3(21) of ERISA, 29 U.S.C. § 1002(21) (1974), and the requirement of section 404 (§ 1104(a)) that a "fiduciary" must discharge his duties "solely in the interest" of the participants and beneficiaries of the employee benefit plan. Decisions by a director serving as a fiduciary under the plan on questions regarding eligibility for benefits, investment decisions, and interpretation of plan provisions regarding qualifying service, years of service, and retroactivity are all subject to the protections of this subchapter. See also sections 8.50(4) and 8.51(b) of this subchapter. Similar provisions appear in the business corporation acts of New York, N.Y. BUS. CORP. LAW ANN. § 723 (McKinney 1963), and Connecticut, CONN. GEN. STAT. ANN. § 33-320a (West Supp. 1981).

The estate or personal representative of a director is entitled to the rights of indemnification possessed by the director himself. See the last sentence of section 8.50(2). The phrase, "unless the context requires otherwise," was added to make clear that the estate or personal representative did not have the right to participate in directoral decisions whether to grant indemnification authorized in this subchapter.

3. EXPENSES

"Expenses" is defined to include counsel fees to avoid repeated references to such fees every time "expenses" appears throughout the subchapter.

4. LIABILITY

"Liability" is defined for convenience, to avoid repeated references to recoverable items throughout the subchapter. Even though the definition of "liability" includes both expenses and amounts paid to satisfy or to settle substantive claims, indemnification against substantive claims is not allowed in several provisions in subchapter E. For example, indemnification in suits brought by or in the name of the corporation is limited to expenses. See section 8.51(e).

The definition of "liability" permits the indemnification only of "reasonable expenses incurred." The intention is that any portion of expenses falling outside the perimeter of reasonableness should not be indemnified, and that, if necessary, an allocation of expenses should be made. By contrast, unlike earlier versions of the Model Act and statutes of many states, section 8.50(4) provides that amounts paid to settle or satisfy substantive claims are not subject to a reasonableness test. Since payment of these amounts is permissive — mandatory indemnification is available under section 8.52 only where the defendant is "wholly successful" — a special limitation of "reasonableness" for settlements is inappropriate. Further, it is undesirable to base the statutory test of power to indemnify on an affirmative finding that a settlement is reasonable. Indeed, the grant of authority to indemnify only those settlements that are "reasonable" would suggest an "all or nothing" approach inconsistent with the basic philosophy of indemnification of "reasonable" expenses.

"Penalties" and "fines" are expressly included within the definition of "liability" so that in appropriate cases these items may also be indemnified. See section 8.51. The purpose of this definition is to cover every type of monetary obligation that may be imposed upon a director, including civil penalties (which have been authorized in a number of recent statutes), restitution, and obligations to give notice (which are proposed as part of the revision of the federal criminal code). This definition also expressly includes the levy of excise taxes under the Internal Revenue Code pursuant to ERISA within the definition of "fines."

5. Official capacity

The definition of "official capacity" is necessary because the term determines which of the two alternative standards of conduct set forth in section 8.51 applies: if action is taken in an "official capacity," the person to be indemnified must have reasonably believed he was acting in the best interests of the corporation, while if the action in question was not taken in his "official capacity," he need only have reasonably believed that the conduct was not opposed to the best interests of the corporation.

6. Party

The definition of "party" establishes the basic coverage of the subchapter. The definition includes every individual "who was, is, or is threatened to be made a named defendant or respondent in a proceeding." A person who is only called as a witness is not a "party" within this definition, and as specifically provided in section 8.58(b), indemnification of this person is not limited by this subchapter.

7. Proceeding

The broad definition of "proceeding" ensures that the benefits of this subchapter will be available to directors in new and unexpected, as well as traditional, types of proceedings whether civil, criminal, administrative, or investigative. It also includes appeals in lawsuits and petitions to review administrative actions.

NORTH CAROLINA COMMENTARY

Subsection (a) of this section contains a policy statement that is not in the Model Act.

The definitions in subsection (b) are essentially the same as in the Model Act, and in the opinion of the drafters they all broaden the scope of prior law. For example, "corporation" includes predecessor entities (e.g., in a merger), whether or not incorporated; "director" broadens the coverage of persons who have responsibilities with respect to employee benefit plans and includes the successors of deceased directors; "party" includes persons who are threatened to be named as a party; and "proceeding" includes any kind of formal or informal proceeding, whether threatened or actual. The drafters do not believe there are any uncertainties or ambiguities in any of these definitions that permit a court to limit their scope, and any contrary restrictive decision by a court of another jurisdiction should be overridden by the broad public policy intent expressed in G.S. 55-8-50(a).

G.S. 55-8-51, 55-8-52, 55-8-54, 55-8-55 and 55-8-56 provide for indemnification of directors, officers, employees and agents. Indemnification in addition to and independent of that statutory indemnification is authorized in G.S. 55-8-57.

Legal Periodicals. — For comment, "North Carolina's Statutory Limitation on Directors' Liability," see 24 Wake Forest L. Rev. 117 (1989).

§ 55-8-51. Authority to indemnify.

(a) Except as provided in subsection (d), a corporation may indemnify an individual made a party to a proceeding because he is or was a director against liability incurred in the proceeding if:

(1) He conducted himself in good faith; and

(2) He reasonably believed (i) in the case of conduct in his official capacity with the corporation, that his conduct was in its best interests; and (ii) in all other cases, that his conduct was at least not opposed to its best interests; and

(3) In the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful.

(b) A director's conduct with respect to an employee benefit plan for a purpose he reasonably believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of subsection (a)(2)(ii).

(c) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of no contest or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.

(d) A corporation may not indemnify a director under this section:

(1) In connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

(2) In connection with any other proceeding charging improper personal benefit to him, whether or not involving action in his official capacity, in which he was adjudged liable on the basis that personal benefit was improperly received by him.

(e) Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation that is concluded without a final adjudication on the issue of liability is limited to reasonable expenses incurred in connection with the proceeding.

(f) The authorization, approval or favorable recommendation by the board of directors of a corporation of indemnification, as permitted by this section, shall not be deemed an act or corporate transaction in which a director has a conflict of interest, and no such indemnification shall be void or voidable on such ground. (1955, c. 1371, s. 1; 1969, c. 797, s. 2; 1973, c. 469, s. 6; 1985 (Reg. Sess., 1986), c. 1027, s. 39; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

1. Section 8.51(a)

The standards for indemnification of directors contained in this subsection define the outer limits for which voluntary indemnification is permitted under the Model Act. Conduct which does not meet these standards is not eligible for voluntary indemnification under the Model Act, although court-ordered indemnification may be available under section 8.54(2). Conduct that falls within these outer limits does not automatically entitle directors to indemnification, although many corporations have adopted bylaw provisions that obligate the corporation to indemnify directors to the maximum extent permitted by statute. Absent such a bylaw provision, section 8.52 defines a much narrower area in which the directors are entitled as a matter of right to indemnification.

Some state statutes provide separate, but usually similarly worded, standards for indemnification in third-party suits and indemnification in suits brought by or in the name of the corporation. The Model Act establishes a single uniform test to make clear that the outer limits of conduct for which indemnification is permitted should not be dependent on the type of proceeding in which the claim arises. To prevent circularity in recovery, however, section 8.51(e) limits indemnification in connection with suits brought by or in the name of the corporation to expenses incurred and excludes amounts paid to settle or satisfy substantive claims.

The standards of conduct described in sections 8.5(a)(1) and 8.5(a)(2)(i) — that a director's conduct in his official capacity was in "good faith" and in the corporation's "best interests" — is closely related to the basic standards of conduct imposed by section 8.30, but the two standards are not identical. No attempt is made to define "good faith," a term used in both section 8.30 and section 8.51. The concept of good faith involves a subjective test, which would include "a mistake of judgment," in the words of the Official Comment to section 8.30, even though made unwisely by objective standards. But the affirmative requirement of section 8.30 — that the "care of an ordinarily prudent person in a like position" be exercised — is not included in the standard of conduct for indemnification. On the other hand, section 8.51 requires that there be a "reasonable" belief on the part of the director in most instances, and in the case of criminal proceedings that there be no "reasonable" cause to believe the conduct was unlawful. Accordingly, it is possible that a director who has not acted "with the care an ordinarily prudent person in a like position would exercise under similar circumstances," as required by section 8.30, could nevertheless be indemnified if the standard of section 8.51 were met. As a corollary, it is clear that a director who has met the section 8.30 standards of conduct would be eligible in virtually every case to be indemnified under section 8.51.

Section 8.5(a)(2)(ii) requires, if a director is not acting in his official capacity, that his action be "at least not opposed to" the corporation's best interests. This standard is applicable to the director when serving another entity at the request of the corporation or when sued simply because he is or was a director. The words "at least" were added to qualify "not opposed to" in order to make it clear that this test is an outer limit for conduct other than in an official capacity.

2. SECTION 8.51(b)

This section makes clear that a director who is serving as a trustee or fiduciary for an employee benefit plan under ERISA meets the standard for indemnification under section 8.51(a) if he reasonably believes his conduct was in the best interests of the participants in and beneficiaries of the plan. This standard is a specific application of the more general test that conduct not in official corporate capacity is indemnifiable if it is "at least not opposed to" the best interests of the corporation and provides a standard for indemnification that is consistent with the statutory policies embodied in ERISA. See the Official Comment to section 8.50.

3. SECTION 8.51(c)

The purpose of section 8.51(c) is to reject the argument that indemnification is automatically improper whenever a proceeding has been terminated on a basis that does not exonerate the director claiming indemnification. Even though a final judgment or conviction is not automatically determinative of the issue whether the minimum standard of conduct was met, any judicial determination of substantive liability would in most instances be entitled to considerable weight. By the same token, it is clear that the termination of a proceeding by settlement or plea of nolo contendere should not of itself create a presumption either that conduct met or did not meet the standard of section 8.51. On the other hand, a final determination of nonliability or acquittal automatically entitles the director to indemnification of expenses under section 8.52.

Section 8.51(c) applies expressly to indemnification expenses in derivative actions as well as to indemnification in third party suits. The most likely application of this subsection to derivative actions will be to settlements since a judgment or order would normally result in liability to the corporation and thereby preclude all indemnification under section 8.51(d). In the rare event that a judgment or order entered against the director did not include a determination of liability to the corporation, the entry of the judgment or order would not be determinative that the director failed to meet the requisite standard of conduct.

4. SECTION 8.51(d)

This subsection makes clear that indemnification is not permissible under section 8.51 in the face of a finding of improper conduct either because liability is imposed in favor of the corporation in a suit brought by or in its name or because there is a finding that the director improperly received a personal benefit as a result of his conduct. Indemnification under this subsection is prohibited if a director is adjudged liable in a derivative suit because it is believed that there should be no indemnification in this situation unless a court first finds it proper. Section 8.54 permits a director found liable to the corporation to petition a court for a judicial determination of entitlement to indemnification. Voluntary indemnification is also prohibited if there has been an adjudication that a director improperly received a personal benefit, even if, for example, he acted in a manner not opposed to the best interests of the corporation. Improper use of inside information for personal benefit should not be an action for which the corporation may provide indemnification, even if the corporation was not thereby harmed. Although it is unlikely that a person found liable for receiving an improper personal benefit would be found to have met the statutory standard of conduct set forth in section 8.51(a)(2)(ii), this limitation is made explicit in section 8.51(d)(2). Recourse to a court under section 8.54 may also be appropriate in some improper benefit cases — for example, where it would be unfair for a small personal benefit to foreclose indemnification in an expensive and complicated matter.

5. Section 8.51(e)

This subsection limits indemnification in suits brought by or in the right of the corporation to expenses incurred in connection with the proceeding. Its purpose is to avoid circularity that would be involved if a corporation seeks to indemnify a director for payments made in settlement by the director to the corporation. This subsection applies only to settlements since all indemnification is prohibited by section 8.5(d)(1) — subject to the right to seek judicially approved indemnification under section 8.54 — in cases where a director is "adjudged" liable to the corporation.

NORTH CAROLINA COMMENTARY

This section differs in two respects from Section 8.51 of the Model Act. First, the qualifying clause "that is concluded without a final adjudication on the issue of liability" was added to subsection (e) to make it clear that the subsection applies only to settlements, as noted in the Official Comment on that subsection, and thus to remove any possible conflict with the prohibition in subdivision (d)(1) against indemnification under this section in a proceeding in which the director was adjudged liable to the corporation. Second, the entire subsection (f) was added.

This section does not limit any additional indemnification that may be payable under G.S. 55-8-57.

§ 55-8-52. Mandatory indemnification.

Unless limited by its articles of incorporation, a corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which he was a party because he is or was a director of the corporation against reasonable expenses incurred by him in connection with the proceeding. (1955, c. 1371, s. 1; 1969, c. 797, ss. 2, 3; 1973, c. 469, s. 6; 1986 (Reg. Sess., 1986), c. 1027, ss. 39, 40; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 8.51 determines whether indemnification may be made voluntarily by a corporation if it elects to do so. Section 8.52 determines whether a corporation must indemnify a director for his expenses; in other words, section 8.52 creates a statutory right of indemnification in favor of the director who meets the requirements of that section. Enforcement of this right by judicial proceeding is specifically contemplated by section 8.54(1), which also gives the director a statutory right to recover expenses incurred by him in enforcing his statutory right to indemnification under section 8.52.

The basic standard for mandatory indemnification is that the director has been "wholly successful, on the merits or otherwise," in the defense of the proceeding. The word "wholly" is added to avoid the argument accepted in *Merritt-Chapman & Scott Corp. v. Wolfson,* 321 A.2d 138 (Del. 1974), that a defendant may be entitled to partial mandatory indemnification if he succeeded by plea bargaining or otherwise to obtain the dismissal of some but not all counts of an indictment. A defendant is "wholly successful" only if the entire proceeding is disposed of on a basis which involves a finding of nonliability. However, the language in earlier versions of the Model Act and in many other state statutes that the basis of success may be "on the merits or otherwise" is retained. While this standard may result in an occasional defendant becoming entitled to indemnification because of procedural defenses not related to the merits — e.g., the statute of limitations or disqualification of the plaintiff, it is unreasonable to require a defendant with a valid procedural defense to undergo a possibly prolonged and expensive trial on the merits in order to establish eligibility for mandatory indemnification.

Legal Periodicals. — For article, "Corporate Director and Officer Indemnification: Alternative Methods for Funding," see 24 Wake Forest L. Rev. 53 (1989).

For article, "Should Corporate Statutes Providing Special Protection for Directors Be Limited to Publicly Traded Corporations?," see 24 Wake Forest L. Rev. 79 (1989).

For comment, "North Carolina's Statutory Limitation on Directors' Liability," see 24 Wake Forest L. Rev. 117 (1989).

§ 55-8-53. Advance for expenses.

Expenses incurred by a director in defending a proceeding may be paid by the corporation in advance of the final disposition of such proceeding as authorized by the board of directors in the specific case or as authorized or required under any provision in the articles of incorporation or bylaws or by any applicable resolution or contract upon receipt of an undertaking by or on behalf of the director to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the corporation against such expenses. (1955, c. 1371, s. 1; 1969, c. 797, s. 1; 1973, c. 469, s. 5; 1985 (Reg. Sess., 1986), c. 1027, ss. 35-38; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

It is often critically important to a director who is made a party to a complex proceeding that the corporation he served have power to make advances for expenses at the beginning of and during the proceeding. Adequate legal representation and adequate preparation of a defense may require substantial payments of expenses before a final determination, and unless the corporation may make advances for expenses, a defendant may be unable to finance his own defense. This problem is complicated by reason of the fact that during the early stages of a proceeding (when advances are often needed) the facts underlying the claim cannot be fully evaluated and the board of directors therefore cannot accurately ascertain the ultimate propriety of indemnification.

Section 8.53 establishes a workable standard: indemnification is permitted if the facts then known to those making the determination do not establish that indemnification would be precluded under section 8.51. The directors (or special legal counsel) making the determination under section 8.53(c) would normally communicate with counsel and the person or persons monitoring the matter for the corporation in order to gain familiarity with the status of the proceeding and the relevant facts that have emerged, but it is not required (or expected) that any form of independent investigation be undertaken for purposes of the determination. Thus, an advance may be made under section 8.53 unless it becomes clear, from the facts at hand, that indemnification under section 8.51 cannot be provided. As additional facts become known, a different determination may be required.

This section is a compromise between the view of some that advances should be made automatically at the claimant's request and at any time before the litigation is terminated and the view of others that a special investigation should be made before each advance.

In addition to the requirement that the facts then known to those acting on the request for an advance do not preclude indemnification, section 8.53(a) requires a written affirmation by the director of his good faith belief that he has met the standard of conduct necessary for indemnification by the corporation and a written undertaking by or on behalf of the director to repay the advance if it is ultimately determined that he has not met the standard of conduct. Under section 8.53(b), the undertaking need not be secured and financial ability to repay is not a prerequisite. The theory underlying this subsection is that, in advancing expenses, wealthy directors should not be favored over directors whose financial resources are modest.

The limitations of section 8.53 apply only to persons who are directors at the time the advance is made. Thus the corporation may advance the expenses of former directors without obtaining the undertaking otherwise required by section 8.53(a)(1) or (2).

NORTH CAROLINA COMMENTARY

The Model Act counterpart of this section was replaced by the less restrictive provisions of former G.S. 55-19(d). *See* North Carolina Comment to G.S. 55-8-57, *supra.*

CASE NOTES

Editor's Note. — *The case below was decided under the Business Corporation Act adopted in 1955.*

"Undertaking" Defined. — The "undertaking" required by former G.S. 55-19(d) for the repayment of fees advanced if the director is unsuccessful is just that: a written promise, not made under seal, given as security for the performance of some act as required in a legal proceeding. Swenson v. Thibaut, 39 N.C. App.

77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

Legal Fees May Be Advanced for Defense of Derivative Action. — In a derivative action brought by shareholders against directors of a corporation alleging malfeasance in office, former G.S. 55-30 did not operate to prevent former G.S. 55-19(d) from being effective in allowing the corporation to advance any legal fees to the directors, since the advancement of legal fees under that section was not necessarily a transaction in which a director was adversely interested, and since, even if it were, the disinterested directors of the corporation had approved the advancement. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

§ 55-8-54. Court-ordered indemnification.

Unless a corporation's articles of incorporation provide otherwise, a director of the corporation who is a party to a proceeding may apply for indemnification to the court conducting the proceeding or to another court of competent jurisdiction. On receipt of an application, the court after giving any notice the court considers necessary may order indemnification if it determines:

(1) The director is entitled to mandatory indemnification under G.S. 55-8-52, in which case the court shall also order the corporation to pay the director's reasonable expenses incurred to obtain court-ordered indemnification; or

(2) The director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not he met the standard of conduct set forth in G.S. 55-8-51 or was adjudged liable as described in G.S. 55-8-51(d), but if he was adjudged so liable his indemnification is limited to reasonable expenses incurred. (1955, c. 1371, s. 1; 1969, c. 797, ss. 2, 3; 1973, c. 469, s. 6; 1985 (Reg. Sess., 1986), c. 1027, ss. 39, 40; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 8.54 permits court-ordered indemnification in two situations: (1) a director entitled to mandatory indemnification may enforce that entitlement by judicial proceeding (in which case the court may also order the corporation to pay the reasonable expenses incurred in connection with the proceeding); and (2) indemnification at the court's discretion is permitted in all cases whether or not the director met the requisite standard of conduct in section 8.51 or is otherwise ineligible for indemnification. But indemnification with respect to derivative suits or improper benefit is always limited to expenses by the last clause of section 8.54(2).

Application for indemnification under section 8.54 may be made either to the court in which the proceeding was heard or to another court of appropriate jurisdiction. For example, a defendant in a criminal action who has been convicted but believes that indemnification would be proper could apply either to the court which heard the criminal action or bring an action against the corporation in another court. A decision by the board of directors not to oppose the request for indemnification is governed by the general standards of conduct found in section 8.30. Even if the corporation decided not to oppose the request, the court must satisfy itself that the person seeking indemnification is properly entitled to it.

A corporation may limit the right of a director under section 8.54 by a provision in its articles of incorporation. In the absence of such a provision, however, the court has general power to grant indemnification under this section.

§ 55-8-55. Determination and authorization of indemnification.

(a) A corporation may not indemnify a director under G.S. 55-8-51 unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because he has met the standard of conduct set forth in G.S. 55-8-51.

(b) The determination shall be made:

(1) By the board of directors by majority vote of a quorum consisting of directors not at the time parties to the proceeding;

(2) If a quorum cannot be obtained under subdivision (1), by majority vote of a committee duly designated by the board of directors (in which designation directors who are parties may participate), consisting solely of two or more directors not at the time parties to the proceeding;

(3) By special legal counsel (i) selected by the board of directors or its committee in the manner prescribed in subdivision (1) or (2); or (ii) if a quorum of the board of directors cannot be obtained under subdivision (1) and a committee cannot be designated under subdivision (2), selected by majority vote of the full board of directors (in which selection directors who are parties may participate); or

(4) By the shareholders, but shares owned by or voted under the control of directors who are at the time parties to the proceeding may not be voted on the determination.

(c) Authorization of indemnification and evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if the determination is made by special legal counsel, authorization of indemnification and evaluation as to reasonableness of expenses shall be made by those entitled under subsection (b)(3) to select counsel. (1955, c. 1371, s. 1; 1969, c. 797, s. 2; 1973, c. 469, s. 6; 1985 (Reg. Sess., 1986), c. 1027, s. 39; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 8.55 provides the method for determining whether a corporation should voluntarily indemnify directors under section 8.51. In this section a distinction is made between a "determination" and an "authorization." A "determination" involves a decision whether under the circumstances the person seeking indemnification has met the requisite standard of conduct under section 8.51 and is therefore eligible for indemnification. This decision may be made by the persons or groups described in section 8.55(b). In addition, after a favorable "determination" is made, the corporation must "authorize" indemnification; this includes a review of the reasonableness of the expenses, the financial ability of the corporation to make the payment, and the judgment whether limited financial resources should be devoted to this or some other use by the corporation. Section 8.55(c) provides that "authorization" of indemnification may be made only by the board of directors, by a committee of the board, or by the shareholders. While special legal counsel may make the "determination" of eligibility for indemnification, he may not "authorize" the indemnification.

Section 8.55(b) establishes a procedure for selecting the person or persons who will make the determination of eligibility for indemnification. Even though directors who are parties to the proceeding may not participate in the decision determining eligibility for indemnification, they may, if necessary to permit valid action by the board of directors, participate in the decision establishing a committee of independent directors or selecting special legal counsel. Directors who are parties may also participate in the decision to "authorize" indemnification on the basis of a favorable "determination" if necessary to permit action by the board of directors. This limited participation of interested directors in the decision is justified by a principle of necessity.

Legal counsel authorized to make the required determination is referred to as "special legal counsel." In earlier versions of the Model Act, and in the statutes of many states, he is referred to as "independent" legal counsel. The word "special" is felt to be more descriptive of the role to be performed and is not intended to indicate that the counsel selected should not be independent in accordance with governing legal precepts. "Special legal counsel" should normally be counsel having no prior professional relationship with those seeking indemnification, should be retained for the specific occasion, and should not be either inside counsel or regular outside counsel. It is important that the selection process be sufficiently flexible to permit selection of counsel in light of the particular circumstances and so that unnecessary expense may be avoided. Hence the phrase "special legal counsel" is not defined in the statute.

Determinations by shareholders rather than by directors or special counsel are permitted by section 8.55(b)(4), but shares owned by or voted under the control of directors seeking indemnification may not be voted on the determination of eligibility for indemnification. This does not affect rules governing the determination of a quorum at the meeting.

§ 55-8-56. Indemnification of officers, employees, and agents.

Unless a corporation's articles of incorporation provide otherwise:

(1) An officer of the corporation is entitled to mandatory indemnification under G.S. 55-8-52, and is entitled to apply for court-ordered indemnification under G.S. 55-8-54, in each case to the same extent as a director;

(2) The corporation may indemnify and advance expenses under this Part to an officer, employee, or agent of the corporation to the same extent as to a director; and

(3) A corporation may also indemnify and advance expenses to an officer, employee, or agent who is not a director to the extent, consistent with public policy, that may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract. (1955, c. 1371, s. 1; 1969, c. 797, s. 2; 1973, c. 469, s. 6; 1985 (Reg. Sess., 1986), c. 1027, s. 39; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 8.56 correlates the general legal principles relating to the indemnification of officers, employees, and agents of the corporation with the limitations on indemnification in subchapter E. This correlation may be summarized in general terms as follows:

(1) Subchapter E (except for section 8.56) applies only to, and limits the indemnification of, *directors*.

(2) An officer, agent or employee of a corporation who is *not* a director may be indemnified by the corporation on a discretionary basis to the same extent as though he were a director, and, in addition, may have additional indemnification rights apart from subchapter E. (Section 8.56(2) and (3).)

(3) A director who is *also* an officer, employee, or agent of the corporation is limited to his indemnification rights under subchapter E and is therefore treated the same way as other directors. (Section 8.56(3) by negative inference.) Such an officer/director is limited to his rights under subchapter E even though he is sued solely in his capacity as an officer.

(4) An *officer* of the corporation (but not employees or agents generally) who is not a director has the mandatory right of indemnification granted to directors under section 8.52 and the right to apply for court-ordered indemnification under section 8.54. (Section 8.56(1).)

1. Officers, employees, or agents who are not directors

Section 8.56(3) authorizes indemnification for officers, employees, and agents who are not directors, but neither requires nor prescribes standards for their indemnification and expressly states that their indemnification may be broader than the right of indemnification granted to directors by this subchapter. The rights of employees or agents may derive from principles of agency, the doctrine of respondeat superior, or collective bargaining or other contractual agreement, rather than from the statute. Indemnification of employees or agents may appropriately protect the person indemnified from liabilities incurred while serving at the corporation's request as a director, officer, partner, trustee, or agent of another commercial, charitable, or nonprofit enterprise. See the definition of "director" in section 8.50(2). But indemnification under section 8.56(3) must ultimately be "consistent with law." In effect, this leaves public policy determinations as to what are permissible limits, in a particular case, to the courts. For example, in *Koster v. Warren,* 297 F.2d 418, 423 (9th Cir. 1961), the court allowed indemnification of an officer and an employee, both of whom pleaded nolo contendere to an antitrust indictment at the corporation's request, the court reasoning that they had foregone their personal right to defend for the corporation's benefit. On the other hand, the court indicated in dictum that an agreement in advance by the corporation to indemnify anyone convicted of antitrust violations would be against public policy.

The broad grant of indemnification in section 8.56(3) may be limited by appropriate provisions in the articles of incorporation.

2. Directors who are also officers, employees, or agents

Section 8.56 provides that officers, employees, or agents who are also directors are subject to the same standards of indemnification as other directors. Consideration was given to whether these officer-directors, if acting in their capacity as an officer but not as a director, should have the benefit of the additional flexibility afforded by section 8.56(3) for officers who are not directors. It was concluded, however, that all directors should be treated alike; complications may be created if directors who are not officers have potentially less protection under the statute than directors who are officers. It would also be difficult in many instances to distinguish in what capacity an officer-director is acting. Finally, this subchapter offers sufficient flexibility in indemnifying directors so that, as a practical matter, foreseeable problems for officer-directors can be handled within the statutory framework.

3. Officers who are not directors

Section 8.56(1) grants nondirector officers the same mandatory rights to indemnification under section 8.52 (or to petition a court for indemnification under section 8.54) as are granted directors. Thus, the net effect of section 8.56 is to provide officers with no less protection than is provided directors (including protection for service to third parties at the request of the corporation) and, additionally, to permit the corporation to provide broader indemnification for officers who are not directors.

NORTH CAROLINA COMMENTARY

The words "who is not a director" appear after the words "of the corporation" in subdivisions 8.56(1) and (2) of the Model Act. The drafters omitted that language from the North Carolina version, without intending to change the meaning of the section, because they believe the words were unnecessary and confusing. If an officer, employee or agent is also a director, his rights of indemnification in his capacity as director will be defined by the other sections and his indemnification rights in his capacity as officer, employee or agent will be defined by this section. The addition of the unnecessary language in the Model Act might possibly be read as limiting a director's indemnification rights if he is also an officer, which was not intended.

§ 55-8-57. Additional indemnification and insurance.

(a) In addition to and separate and apart from the indemnification provided for in G.S. 55-8-51, 55-8-52, 55-8-54, 55-8-55 and 55-8-56, a corporation may in its articles of incorporation or bylaws or by contract or resolution indemnify or agree to indemnify any one or more of its directors, officers, employees, or agents against liability and expenses in any proceeding (including without limitation a proceeding brought by or on behalf of the corporation itself) arising out of their status as such or their activities in any of the foregoing capacities; provided, however, that a corporation may not indemnify or agree to indemnify a person against liability or expenses he may incur on account of his activities which were at the time taken known or believed by him to be clearly in conflict with the best interests of the corporation. A corporation may likewise and to the same extent indemnify or agree to indemnify any person who, at the request of the corporation, is or was serving as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust or other enterprise or as a trustee or administrator under an employee benefit plan. Any provision in any articles of incorporation, bylaw, contract, or resolution permitted under this section may include provisions for recovery from the corporation of reasonable costs, expenses, and attorneys' fees in connection with the enforcement of rights to indemnification granted therein and may further include provisions establishing reasonable procedures for determining and enforcing the rights granted therein.

(b) The authorization, adoption, approval, or favorable recommendation by the board of directors of a public corporation of any provision in any articles of incorporation, bylaw, contract or resolution, as permitted in this section, shall not be deemed an act or corporate transaction in which a director has a conflict of interest, and no such articles of incorporation or bylaw provision or contract or resolution shall be void or voidable on such grounds. The authorization, adoption, approval, or favorable recommendation by the board of directors of a nonpublic corporation of any provision in any articles of incorporation, bylaw, contract or resolution, as permitted in this section, which occurred prior to July 1, 1990, shall not be deemed an act or corporate transaction in which a director has a conflict of interest, and no such articles of incorporation, bylaw provision, contract or resolution shall be void or voidable on such grounds. Except as permitted in G.S. 55-8-31, no such bylaw, contract, or resolution not adopted, authorized, approved or ratified by shareholders shall be effective as to claims made or liabilities asserted against any director prior to its adoption, authorization, or approval by the board of directors.

(c) A corporation may purchase and maintain insurance on behalf of an individual who is or was a director, officer, employee, or agent of the corporation, or who, while a director, officer, employee, or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise, against liability asserted against or incurred by him in that capacity or arising from his status as a director, officer, employee, or agent, whether or not the corporation would have power to indemnify him against the same liability under any provision of this Chapter. (1955, c. 1371, s. 1; 1969, c. 797, s. 1; 1973, c. 469, s. 5; 1985 (Reg. Sess., 1986), c. 1027, ss. 35-38; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.14.)

OFFICIAL COMMENT

Section 8.57 authorizes a corporation to purchase and maintain insurance on behalf of directors, officers, employees, or agents against liabilities imposed on them by reason of actions in their official capacity or arising from their service to the corporation or another entity at the corporation's request. Insurance is not limited to claims against which corporations are entitled to indemnify under this subchapter. This insurance, usually referred to as "D&O Liability Insurance," provides a useful supplement to the rights of indemnification created by this subchapter, providing a source of reimbursement for corporations who indemnify directors and others for conduct covered by the insurance, and protecting the insureds against the corporation's failure to pay indemnification required or permitted by this subchapter. On the other hand, policies do not cover uninsurable events like self-dealing, bad faith, knowing violations of the securities acts, or other willful misconduct. See generally Johnston, "Corporate Indemnification and Liability Insurance," 33 BUS. LAW. 1993 (1978); Hinsey, "The New Lloyd's Policy Form for Directors and Officers' Liability Insurance — An Analysis," 33 BUS. LAW. 1961 (1978).

AMENDED NORTH CAROLINA COMMENTARY

Section 8.57 of the Model Act is entitled "Insurance" and deals only with that subject. In the North Carolina version the catchline has been expanded and the section is intended to permit broad nonstatutory indemnification completely in addition to and notwithstanding any other provisions of this Act. G.S. 55-8-50(a) expressly states that purpose and declares it to be the public policy of North Carolina.

This section permits indemnification, insurance and reimbursement of expenses in addition to, and notwithstanding, any other provisions of this Chapter. The section embodies the public policy of this State set forth in G.S. 55-8-50(a) to permit a corporation organized under this Chapter to spread the risk of corporate management, notwithstanding any other general or special law of this State or of any other jurisdiction including the federal government.

Subsection (a) permits and defines the scope of contractual indemnification under which the corporation, essentially as a self-insurer, may commit in advance to indemnify its directors, officers, employees or agents. This provision brings forward and clarifies all of former G.S. 55-19(a), which was added by the 1986 amendments. It adds an express statement, for example, that a corporation may agree in advance to indemnify its personnel even in a corporate or derivative action, subject only to the limitation brought forth from former G.S. 55-19(a).

Similarly, subsection (b) brings forward former G.S. 55-19(b) relating to the conflict of interest rules in G.S. 55-8-31 (which replaced former G.S. 55-30), but the application of the subsection to indemnification plans adopted on or after July 1, 1990 has been limited to public corporations (i.e., those required to file reports under Section 12 of the Securities Exchange Act of 1934). This limitation to public corporations was considered appropriate because (1) former G.S. 55-19(b) was intended to deal with the need to attract qualified outside directors — a need experienced mainly by public corporations, (2) shareholders of public corporations receive current disclosure of material changes in the indemnification scheme, and (3) shareholders have an active market in which they can dispose of their shares if they disapprove of a particular scheme of indemnification. Subsection (b) does not prevent a shareholder from challenging indemnification in a particular case. Instead, its effect is to shift to the shareholder of a public corporation the burden of proving that indemnification constitutes a breach of duty to the corporation under all of the facts and circumstances, including the facts and circumstances existing at the time indemnification was authorized or approved.

Subsection (c) replaces former G.S. 55-19(c) with section 8.57 of the Model Act because the drafters concluded that these insurance provisions of the Model Act are broader and clearer than former G.S. 55-19(c). Subsection (c) applies whether or not a corporation provides additional indemnification pursuant to subsections (a) and (b). As previously noted, former G.S. 55-19(d) was brought forward as G.S. 55-8-53.

§ 55-8-58. Application of Part.

(a) If articles of incorporation limit indemnification or advance for expenses, indemnification and advance for expenses are valid only to the extent consistent with the articles.

(b) This Part does not limit a corporation's power to pay or reimburse expenses incurred by a director in connection with his appearance as a witness in a proceeding at a time when he has not been made a named defendant or respondent to the proceeding.

(c) This Part shall not affect rights or liabilities arising out of acts or omissions occurring before July 1, 1990. (1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 8.58(a) provides that a provision treating the indemnification of directors by the corporation in articles of incorporation, bylaws, shareholders' or directors' resolution, or contract "is valid only if and to the extent it is consistent with" this subchapter. Earlier versions of the Model Act and the statutes of many states provided that the statutory provisions were not "exclusive" and made no attempt to limit the nonstatutory creation of rights of indemnification. This kind of language is subject to misconstruction, however, since nonstatutory conceptions of public policy limit the power of a corporation to indemnify or to contract to indemnify directors, officers, employees, or agents.

The language of the first sentence of section 8.58(a), "to the extent it is consistent with this subchapter," is believed to be a more accurate description of the limited validity of nonstatutory indemnification provisions than the "nonexclusive" provisions of earlier versions of the Model Act. It is important to recognize that "to the extent it is consistent with" is not synonymous with "exclusive." Situations may well develop from time to time in which indemnification is permissible under section 8.58 but would be precluded if all portions of subchapter E were viewed as exclusive. But indemnification provisions protecting against the consequences of bad faith or willful misconduct are not consistent with this subchapter and would not be valid. Furthermore, they would violate well-understood principles of public policy and doubtless would be invalidated on that ground even under statutes purporting to make "nonexclusive" the statutory provisions for indemnification. To the extent the consistency language may preclude indemnification in circumstances where it is reasonable and violates no statutory policy, an escape valve is provided in section 8.55(2), which authorizes a court to grant indemnification if a director "is fairly and reasonably entitled to indemnification in view of all the relevant circumstances," even though he may not have fully met the standards of conduct set forth in section 8.51.

Section 8.58 does not preclude provisions in articles of incorporation, bylaws, resolutions, or contracts designed to provide procedural machinery different from that provided by section 8.55 or to make mandatory the permissive provisions of subchapter E. For example, a corporation may properly obligate the board of directors to consider and act expeditiously on an application for indemnification or advances, or obligate the board of directors to cooperate in the procedural steps required to obtain a judicial determination under section 8.54.

Some corporations currently commit themselves, in one form or another, to indemnify directors to the fullest extent permitted by applicable law. These commitments are consistent with subchapter E, subject to appropriate interpretation in light of the facts and circumstances of the particular case. Furthermore, a commitment to maintain liability insurance for a director, pursuant to section 8.57, is consistent with this subchapter.

The first sentence of section 8.58(a) applies only to directors; it does not apply to officers, employees, or agents who are not directors. See section 8.56 and its Official Comment. The inherent problems of conflict of interest and the need to encourage persons to serve as directors are not present to the same degree in the case of nondirector officers, employees, or agents. The standard for permissible indemnification of these persons in section 8.56(3) is "consistent with law" without regard to this subchapter.

Section 8.58(b) is designed to make clear that subchapter E deals only with directors who are actual or prospective defendants or respondents in a proceeding, and that expenses incurred in connection with appearance as a witness may be indemnified without regard to the limitations of subchapter E. Indeed, most of the standards described in sections 8.51 and 8.54 by their own terms can have no meaningful application to a director whose only connection with a proceeding is that he has been called as a witness.

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This section differs from the Model Act in two respects. First, the first sentence of subsection 8.58(a) of the Model Act, dealing with nonstatutory contractual indemnification, has been omitted because the subject is more broadly covered by G.S. 55-8-57; and second, the new subsection (c) has been added.

ARTICLE 9.

Shareholder Protection Act.

§ 55-9-01. Short title and definitions.

(a) The provisions of this Article shall be known and may be cited as The North Carolina Shareholder Protection Act.

(b) In this Article:

(1) "Business combination" includes any merger, consolidation, or conversion of a corporation with or into any other corporation or any unincorporated entity, or the sale or lease of all or any substantial part of the corporation's assets to, or any payment, sale or lease to the corporation or any subsidiary thereof in exchange for securities of the corporation of any assets (except assets having an aggregate fair market value of less than five million dollars ($5,000,000)) of any other entity.

(2) "Common stock" means the shares of capital stock of the corporation that were not entitled to preference over any other shares, either in payment of dividends or in dissolution, at the time that the other entity acquired in excess of ten percent (10%) of the voting shares.

(3) "Continuing director" means a person who was a member of the board of directors of the corporation elected by the public shareholders prior to the time that the other entity acquired in excess of ten percent (10%) of the voting shares of the corporation, or a person recommended to succeed a continuing director by a majority of the continuing directors.

(4) "Exchange Act" means the act of Congress known as the Securities Exchange Act of 1934, as the same has been or hereafter may be amended from time to time.

(5) "Other consideration to be received" means, for the purposes of G.S. 55-9-03(1) and G.S. 55-9-03(2), the corporation's common stock retained by its existing public shareholders in the event of a business combination with the other entity in which the corporation is the surviving corporation.

(6) "Other entity" includes any domestic or foreign corporation, person or other form of entity and any such entity with which it or its "affiliate" or "associate" has an agreement, arrangement or understanding, directly or indirectly, for the purpose of acquiring, holding, voting or disposing of capital stock of the corporation, or which is its "affiliate" or "associate", as those terms are defined in the General Rules and Regulations under the Exchange Act, together with the successors and assigns of such persons in any transaction or series of transactions not involving a public offering of the corporation's capital stock within the meaning of the Securities Act of 1933, as amended.

(7) "Voting shares" means shares of the corporation's capital stock entitled to vote in the election of directors. (1987, c. 88, s. 1; c. 124, s. 1; 1989, c. 265, s. 1; 1999-369, s. 1.5; 2001-387, s. 16.)

Editor's Note. — Article 9, as set out in Session Laws 1989, ch. 265, is essentially former Article 7 of Chapter 55, as enacted by Session Laws 1987, c. 88, s. 1. Amendments by Session Laws 1987, c. 124, ss. 1, 1.1 and 2 expired by the terms of that act on June 30, 1989. This article is not in the Revised Model Business Corporation Act, and there are no Official Comments or North Carolina Comments thereto.

The present Article 9, as set out in Session Laws 1989, c. 265, differs from former Article 7 as it was on June 30, 1989, in the following particulars: (1) In G.S. 55-9-01, the definition of "corporation" found in former G.S. 55-75 has expired and was not reenacted (see Session Laws 1987, c. 124, s. 1) and the definition of "other entity" has been amended by changing the first reference to "corporation" to read "domestic or foreign corporation." (2) In G.S. 55-9-05, there are new opt-out provisions different from those of former G.S. 55-79. (3) Former G.S. 55-79.1 and 55-80, relating to conflict of laws and severability, expired and were not reenacted. (See Session Laws 1987, c. 124, ss. 1.1, 2.)

Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Legal Periodicals. — For note, "The North Carolina Shareholder Protection Act," see 66 N.C.L. Rev. 1146 (1988).

For article, "State Anti-Takeover Legislation: The Second and Third Generations," see 23 Wake Forest L. Rev. 77 (1988).

For article, "Government Regulation of Business: Golden Parachutes Revisited," see 23 Wake Forest L. Rev. 121 (1988).

For comment, "The Duty to Disclose v. The Duty Not to Mislead During Merger Negotiations," see 23 Wake Forest L. Rev. 143 (1988).

For comment, "Fiduciary Duties of Directors: How Far Do They Go?," see 23 Wake Forest L. Rev. 163 (1988).

For article, "Should Corporate Statutes Providing Special Protection for Directors Be Limited to Publicly Traded Corporations?," see 24 Wake Forest L. Rev. 79 (1989).

For article, "The Corporate Persona, Contract (and Market) Failure, and Moral Values," see 69 N.C.L. Rev. 273 (1991).

For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

For article, "Silencing the Shareholder's Voice," see 80 N.C.L. Rev. 1897 (2002).

§ 55-9-02. Voting requirement.

Notwithstanding any other provisions of the North Carolina Business Corporation Act, the affirmative vote of the holders of ninety-five percent (95%) of the voting shares of a corporation, considered for the purposes of this section as one class, shall be required for the adoption or authorization of a business combination with any other entity if, as of the record date for the determination of shareholders entitled to notice thereof and to vote thereon, the other entity is the beneficial owner, directly or indirectly, of more than twenty percent (20%) of the voting shares of the corporation, considered for the purposes of this section as one class. (1987, c. 88, s. 1; 1989, c. 265, s. 1.)

Legal Periodicals. — For article, "State Anti-Takeover Legislation: The Second and Third Generations," see 23 Wake Forest L. Rev. 77 (1988).

§ 55-9-03. Exception to voting requirement.

The voting requirement of G.S. 55-9-02 shall not be applicable to a business combination if each of the following conditions is met:

(1) The cash, or fair market value of other consideration, to be received per share by the holders of the corporation's common stock in such business combination bears the same or a greater percentage relationship to the market price of the corporation's common stock immediately prior to the announcement of such business combination by the corporation as the highest per share price (including brokerage commissions and/or soliciting dealers' fees) which such other entity has theretofore paid for any of the shares of the corporation's common stock already owned by it bears to the market price of the corporation's common stock immediately prior to the commencement of acquisition of the corporation's common stock by such other entity, directly or indirectly;

(2) The cash, or fair market value of other consideration, to be received per share by holders of the corporation's common stock in such business combination (i) is not less than the highest per share price (including brokerage commissions and/or soliciting dealers' fees) paid by such other entity in acquiring any of its holdings of the shares of the corporation's common stock and (ii) is not less than the earnings per share of the corporation's common stock for the four full consecutive fiscal quarters immediately preceding the record date for the solicitation of votes on such business combination, multiplied by the then price/earnings multiple, if any, of such other entity as customarily computed and reported in the financial community;

(3) After the other entity has acquired a twenty percent (20%) interest and prior to the consummation of such business combination: (i) the other entity shall have taken steps to ensure that the corporation's board of directors included at all times representation by continuing directors proportionate to the outstanding shares of the corporation's common stock held by persons not affiliated with the other entity (with a continuing director to occupy any resulting fractional board position); (ii) there shall have been no reduction in the rate of dividends payable on the corporation's common stock, except as may have been approved by a unanimous vote of its directors; (iii) the other entity shall have not acquired any newly issued shares of the corporation's capital stock, directly or indirectly, from the corporation, except upon conversion of any convertible securities acquired by the other entity prior to obtaining a twenty percent (20%) interest or as a result of a pro rata stock dividend or stock split; and (iv) the other entity shall not have acquired any additional shares of the corporation's outstanding common stock, or securities convertible into common stock, except as part of the transaction which resulted in the other entity acquiring its twenty percent (20%) interest;

(4) The other entity shall not have (i) received the benefit, directly or indirectly, except proportionately with other shareholders, of any loans, advances, guarantees, pledges, or other financial assistance or tax credits provided by the corporation or (ii) made any major change

in the corporation's business or equity capital structure unless by a unanimous vote of the directors, in either case prior to the consummation of the business combination; and

(5) A proxy statement responsive to the requirements of the Exchange Act shall be mailed to the public shareholders of the corporation for the purpose of soliciting shareholder approval of the business combination and shall contain prominently in the forepart thereof any recommendations as to the advisability or inadvisability of the business combination which the continuing directors, or any of them, may choose to state and, if deemed advisable by a majority of the continuing directors, an opinion of a reputable investment banking firm as to the fairness (or not) of the terms of the business combination to the remaining public shareholders of the corporation, which investment banking firm shall be selected by a majority of the continuing directors and shall be paid by the corporation a reasonable fee for its services upon receipt of such opinion. (1987, c. 88, s. 1; 1989, c. 265, s. 1.)

§ 55-9-04. General.

(a) The provisions of this Article shall also apply to a business combination with an other entity which at any time has been the beneficial owner, directly or indirectly, of more than twenty percent (20%) of the outstanding voting shares, considered for the purposes of this section as one class, notwithstanding that the other entity has reduced its percentage of shares below twenty percent (20%) if, as of the record date for the determination of shareholders entitled to notice of and to vote on the business combination, the other entity is an "affiliate" of the corporation.

(b) For the purposes of the Article, an other entity shall be deemed the beneficial owner of any shares of the corporation's capital stock which the other entity has the right to acquire pursuant to any agreement, or upon exercise of any conversion rights, warrants or options, or otherwise (whether the right to acquire shares is exercisable immediately or only after the passage of time); and, further, the outstanding shares of any class of capital stock of the corporation shall include shares deemed beneficially owned through the application of the foregoing, but shall not include any other shares which may be issuable pursuant to any agreement, or upon exercise of any conversion rights, warrants or options, or otherwise.

(c) A majority of the continuing directors shall have the power and duty to determine for the purposes of this Article on the basis of information known to them whether (i) an other entity beneficially owns more than twenty percent (20%) of the voting shares; (ii) an other entity is an "affiliate" or "associate" of another; (iii) an other entity has an agreement, arrangement or understanding with another; and (iv) the assets to be acquired by the corporation, or any subsidiary thereof, have an aggregate fair market value of less than five million dollars ($5,000,000).

(d) Nothing contained in this Article shall be construed to relieve any other entity from any fiduciary obligation imposed by law. This Article shall be broadly construed so as to be applicable to any transaction reasonably calculated to avoid the application of the provisions hereof including, without limitation, any merger or other recapitalization, initiated by or for the benefit of an other entity that owns more than twenty percent (20%) of the voting shares, which would reincorporate a corporation under the laws of another state or which would reorganize a corporation as an unincorporated entity. (1987, c. 88, s. 1; 1989, c. 265, s. 1; 1999-369, s. 1.6.)

§ 55-9-05. Exemptions.

The provisions of G.S. 55-9-02 shall not be applicable to any corporation that shall be made the subject of a business combination by an other entity if: (i) the corporation was not a public corporation (as defined in G.S. 55-1-40 (18a)) at the time such other entity acquired in excess of ten percent (10%) of the voting shares; (ii) on or before September 30, 1990 (or such earlier date as may be irrevocably established by resolution of the board of directors), the board of directors of a corporation to which G.S. 55-9-02 was not applicable on July 1, 1990, (other than a corporation described in G.S. 55-9-05 (iii)) adopted a bylaw stating that the provisions of this Article shall not be applicable to the corporation; (iii) in the case of a corporation to which G.S. 55-9-02 was not applicable on July 1, 1990, as the result of adoption by its board of directors under G.S. 55-9-05(ii) of a bylaw providing that G.S. 55-9-02 not apply to such corporation, the board of directors of such corporation shall not have rescinded such bylaw on or before September 30, 1990 (or such earlier date as may be irrevocably established by resolution of the board of directors); (iv) in the case of a corporation (including its predecessors) which becomes a public corporation for the first time after July 1, 1990, such corporation adopts a bylaw within 90 days of becoming a public corporation stating that the provisions of this Article shall not be applicable to it; (v) in the case of a newly formed corporation after April 23, 1987, the initial articles of incorporation of the corporation shall provide that the provisions of this Article shall not be applicable; (vi) such business combination was the subject of an existing agreement of the corporation on April 23, 1987; or (vii) on or after September 1, 2000, and on or before December 31, 2000, the board of directors of a corporation to which G.S. 55-9-02 was applicable on September 1, 2000, adopts a bylaw stating that the provisions of this Article shall not be applicable to the corporation. Neither the adoption or failure to adopt a bylaw of the type set forth in G.S. 55-9-05(ii), (iv), or (vii) of this section nor the rescission or failure to rescind a bylaw of the type referred to in G.S. 55-9-05(iii) shall constitute grounds for any cause of action, at law or in equity, against the corporation or any of its directors. (1987, c. 88, s. 1; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.15; 2000-140, s. 44.)

Legal Periodicals. — For article, "State Anti-Takeover Legislation: The Second and Third Generations," see 23 Wake Forest L. Rev. 77 (1988).

Article 9A.

Control Share Acquisitions.

§ 55-9A-01. Short title and definitions.

(a) The provisions of this Article shall be known and may be cited as The North Carolina Control Share Acquisition Act.

(b) In this Article:

(1) "Beneficial ownership" of shares means the sole or shared ownership of any shares or the sole or shared power to vote any shares or to direct the exercise of voting power of any shares, whether such ownership or power is direct or indirect or through any contract, arrangement, understanding, relationship or otherwise, and includes shares beneficially owned by any person acting in concert with such beneficial owner pursuant to any contract, arrangement, understanding, relationship or otherwise. Notwithstanding the foregoing, beneficial ownership does not include shares acquired in the ordinary course of

business for the benefit of others in good faith and not for the purpose of circumventing this Article, unless the acquiror of such shares may exercise or direct the exercise of voting of such shares without instruction from others.

(2) "Control shares" means shares of a covered corporation that when added to all other shares of the corporation beneficially owned by a person would entitle (except for this Article) that person to voting power in the election of directors that is equal to or greater than any of the following levels of voting power:
a. One-fifth of all voting power.
b. One-third of all voting power.
c. A majority of all voting power.

(3) "Control share acquisition" means the acquisition by any person of beneficial ownership of control shares, except that the acquisition of beneficial ownership of any shares of a covered corporation does not constitute a control share acquisition if the acquisition is consummated in any of the following circumstances:
a. Before April 30, 1987.
b. Pursuant to a contract existing before April 30, 1987, with either:
(i) The covered corporation; or
(ii) A seller of such shares who owned such shares before April 30, 1987.
c. Pursuant to the laws of descent and distribution.
d. Pursuant to the satisfaction of a pledge or other security interest created in good faith and not for the purpose of circumventing this Article.
e. Pursuant to a transaction effected in compliance with applicable law, but only if the transaction is pursuant to an agreement to which the covered corporation is a party.
f. Pursuant to the sale of such shares by the covered corporation or its parent or subsidiary corporation.
g. Pursuant to a written agreement to which the covered corporation is a party that permits the purchasers of shares from the covered corporation or its parent or subsidiary corporation also to purchase in any manner within 90 days before or after the purchase from the covered corporation or its parent or subsidiary up to the same aggregate number of shares as were sold by the covered corporation or its parent or subsidiary corporation.
h. By an employee benefit plan established by the covered corporation.
i. Before the corporation became a covered corporation.

For purposes of this definition, shares acquired within any consecutive 90-day period or shares acquired pursuant to a plan to make a control share acquisition are considered to have been acquired in the same acquisition.

(4) "Interested shares" means the shares of a covered corporation beneficially owned by any of the following persons:
a. Any person who has acquired or proposes to acquire control shares in a control share acquisition.
b. Any officer of the covered corporation.
c. Any employee of the covered corporation who is also a director of the corporation.

(5) "Covered corporation" means a corporation that:
a. Is incorporated under the laws of North Carolina and has substantial assets within North Carolina;
b. Has a class of shares registered under Section 12 of the Securities Exchange Act of 1934;

c. Has its principal place of business or principal office within North Carolina; and

d. Has either:

(i) More than ten percent (10%) of its shareholders resident in North Carolina; or

(ii) More than ten percent (10%) of its shares owned by North Carolina residents.

(6) The residence of a shareholder is presumed to be the address appearing in the records of the corporation.

(7) For purposes of calculating the percentages or numbers described in subsection (b)(5) of this section, any shares held in trust or by a nominee shall be deemed to be held by the beneficiaries of such trust or by the beneficiaries of such shares held by such nominee. (1987, c. 182, s. 1; 1989, c. 200, s. 1; c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.16; 2001-201, s. 16.)

Editor's Note. — Article 9A, as set out in Session Laws 1989, c. 265, is essentially former Article 7A of Chapter 55, as enacted by Session Laws 1987, c. 182, s. 1, and c. 773, s. 12, and amended by Session Laws 1989, c. 200. This article is not in the Revised Model Business Corporation Act, and there are no Official Comments or North Carolina Comments thereto.

The present Article 9A, as set out in Session Laws 1989, c. 265, differs from former Article 7A in three main respects. First, the term "issuing public corporation" was changed to "covered corporation." Second, former G.S. 55-98, dealing with the effect of former Article 7A on former Article 7, was deleted. Third, § 55-9A-08 was added. In addition, minor amendments to conform new Article 9A to the rest of new Chapter 55 were made throughout the Article.

Legal Periodicals. — For note, "The Constitutionality of the North Carolina Control Share Acquisition Act," see 66 N.C.L. Rev. 1123 (1988).

For article, "Tender Offer Regulation: The Need for Reform," see 23 Wake Forest L. Rev. 1 (1988).

For article, "Multiservice Securities Firms: Coping with Conflicts in a Tender Offer Context," see 23 Wake Forest L. Rev. 41 (1988).

For article, "State Anti-Takeover Legislation: The Second and Third Generations," see 23 Wake Forest L. Rev. 77 (1988).

For article, "Government Regulation of Business: Golden Parachutes Revisited," see 23 Wake Forest L. Rev. 121 (1988).

For comment, "The Duty to Disclose v. The Duty Not to Mislead During Merger Negotiations," see 23 Wake Forest L. Rev. 143 (1988).

For comment, "Fiduciary Duties of Directors: How Far Do They Go?," see 23 Wake Forest L. Rev. 163 (1988).

For article, "Should Corporate Statutes Providing Special Protection for Directors Be Limited to Publicly Traded Corporations?," see 24 Wake Forest L. Rev. 79 (1989).

For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

For article, "Silencing the Shareholder's Voice," see 80 N.C.L. Rev. 1897 (2002).

§ 55-9A-02. Acquiring person statement.

Any person who has made a control share acquisition or who has made a bona fide written offer to make a control share acquisition may at the person's election deliver an acquiring person statement to the covered corporation at the covered corporation's principal office. The acquiring person statement must set forth all of the following:

(1) The identity of the acquiring person and each other beneficial owner of shares that are beneficially owned by the acquiring person.

(2) A statement that the acquiring person statement is given pursuant to this Article.

(3) The number of shares of the covered corporation beneficially owned by the acquiring person and each other beneficial owner named under subdivision (1) of this section.

(4) The level of voting power above which the control share acquisition falls or would, if consummated, fall.

(5) If the control share acquisition has not taken place:
  a. A description in reasonable detail of the terms of the proposed control share acquisition; and
  b. Representations of the acquiring person, together with a statement in reasonable detail of the facts upon which they are based, that the proposed control share acquisition, if consummated, will not be contrary to law, and that the acquiring person has the financial capacity to make the proposed control share acquisition. (1987, c. 182, s. 1; 1989, c. 200, s. 1; c. 265, s. 1.)

§ 55-9A-03. Meeting of shareholders.

(a) If the acquiring person so requests at the time of delivery of an acquiring person statement and gives an undertaking to pay the covered corporation's expenses of a special meeting, within 10 days after delivery of such request the directors of the covered corporation shall call a special meeting of shareholders of the covered corporation for the purpose of considering the voting rights to be accorded the control shares acquired or to be acquired in the control share acquisition.

(b) Unless the acquiring person agrees in writing to another date, the special meeting of shareholders shall be held within 50 days after the receipt by the covered corporation of the request.

(c) If no request is made, the voting rights to be accorded the control shares acquired in the control share acquisition shall be considered at the next special or annual meeting of shareholders.

(d) If the acquiring person so requests in writing at the time of delivery of the acquiring person statement, the special meeting must not be held sooner than 30 days after receipt by the covered corporation of the acquiring person statement. (1987, c. 182, s. 1; 1989, c. 265, s. 1.)

§ 55-9A-04. Notice.

If a special meeting is requested pursuant to G.S. 55-9A-03, notice of the special meeting of shareholders shall be given as promptly as reasonably practicable by the covered corporation. Notice of any special or annual meeting at which the voting rights of control shares are to be considered shall be given to all shareholders who are entitled to vote at the meeting and who are shareholders of record as of the record date set for the meeting, and to all holders of interested shares, and such notice must include or be accompanied by each of the following:

(1) A copy of the acquiring person statement delivered to the covered corporation pursuant to this Article.
(2) A statement by the board of directors of the covered corporation, authorized by a majority of its directors, of its position or recommendation, or that it is taking no position or making no recommendation, with respect to granting voting rights to the control shares acquired or proposed to be acquired in the control share acquisition.
(3) If the shareholders would have a right of redemption under G.S. 55-9A-06, a statement, displayed with reasonable prominence, describing such right and advising the shareholders that it will be available only to those who give the written notice required by G.S. 55-9A-06(b). (1987, c. 182, s. 1; 1989, c. 200, s. 1; c. 265, s. 1.)

§ 55-9A-05. Voting rights.

(a) Control shares acquired in a control share acquisition shall not have voting rights unless such rights are granted by resolution adopted by the shareholders of the covered corporation.

(b) To be approved under this section, the resolution must be adopted by the affirmative vote of the holders of at least a majority of all the outstanding shares of the covered corporation (not including interested shares) entitled to vote for the election of directors; provided that if applicable law or an articles of incorporation or bylaw provision adopted by the shareholders before the occurrence of the control share acquisition that is the subject of the vote prescribes voting by separate classes of shares, the resolution must also be adopted by the affirmative vote of the holders of at least a majority of each such class (but excluding in any such case all interested shares); and provided further that if applicable law or an articles of incorporation or bylaw provision adopted by the shareholders before the occurrence of the control share acquisition that is the subject of the vote prescribes voting by shares that would not otherwise be entitled to vote, such shares shall be treated solely for purposes of this section as shares entitled to vote for directors (but excluding in any such case all interested shares). (1987, c. 182, s. 1; 1989, c. 265, s. 1.)

§ 55-9A-06. Right of redemption by shareholders.

(a) Unless otherwise provided in the articles of incorporation or a bylaw of the covered corporation adopted by the shareholders before a control share acquisition has occurred and subject to G.S. 55-6-40, if control shares acquired in a control share acquisition are accorded voting rights and the holders of the control shares have a majority of all voting power for the election of directors, all shareholders of the covered corporation (other than holders of control shares) have rights as prescribed in this section to have their shares redeemed by the corporation at the fair value of those shares as of the day prior to the date on which the vote was taken under G.S. 55-9A-05.

(b) If the notice of meeting at which voting rights are accorded to control shares contains the statement required by G.S. 55-9A-04(3), a shareholder will not have any right of redemption under this section unless he gives to the corporation, prior to or at the meeting of shareholders at which the voting rights to be accorded to control shares are considered, written notice that if voting rights are accorded to such shares he may ask for the redemption of his shares hereunder.

(c) As soon as practicable after control shares held by persons having a majority of all voting power for the election of directors have been accorded voting rights, the board of directors shall cause a notice to be sent to all shareholders of the corporation advising them of the facts and that if they gave the notice required by subsection (b) of this section they may have rights to have their shares redeemed at the fair value of those shares pursuant to this section.

(d) Within 30 days after the date on which a shareholder receives such notice, such shareholder may make written demand on the corporation for payment of the fair value of his shares, and after such demand, if such shareholder has complied with the notice requirement in subsection (b) of this section, the corporation shall redeem his shares at their fair value within 30 days after the date on which the corporation receives such shareholder's written demand for payment.

(e) As used in this section, "fair value" means a value not less than the highest price paid per share by the acquiring person in the control share acquisition. (1987, c. 182, s. 1; 1989, c. 200, s. 1; c. 265, s. 1.)

§ 55-9A-07. Severability.

If any provision or clause of this Article or application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Article that can be given effect without the invalid provision or application, and to this end the provisions of this Article are declared to be severable. (1987, c. 182, s. 1; 1989, c. 265, s. 1.)

§ 55-9A-08. Construction.

The provisions of this Article shall apply notwithstanding any provisions of Article 7 of this Chapter and in the event of any conflict between this Article and Article 7, the provisions of this Article shall control. (1989, c. 265, s. 1.)

§ 55-9A-09. Exemptions.

The provisions of this Article shall not be applicable to any corporation if, on or before September 30, 1990, or such earlier date as may be irrevocably established by resolution of the board of directors, or at any time before the corporation becomes, or after it ceases to be, a covered corporation, the board of directors adopts a bylaw stating that the provisions of this Article shall not be applicable to the corporation; or, in the case of a corporation formed after August 12, 1987, its initial articles of incorporation provide that this Article shall not be applicable to the corporation; or on or after September 1, 2000, and on or before December 31, 2000, the board of directors of a corporation to which the provisions of this Article were applicable on September 1, 2000, adopts a bylaw stating that the provisions of this Article shall not be applicable to the corporation. Neither adoption nor failure to adopt such a bylaw or provision shall constitute grounds for any cause of action against the corporation, or any officer or director of the corporation. (1987, c. 773, s. 12; 1989, c. 200, s. 1; c. 265, s. 1; 2000-140, s. 47.)

ARTICLE 10.

Amendment of Articles of Incorporation and Bylaws.

Part 1. Amendment of Articles of Incorporation.

§ 55-10-01. Authority to amend.

(a) A corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles of incorporation or to delete a provision not required in the articles of incorporation. Whether a provision is required or permitted in the articles of incorporation is determined as of the effective date of the amendment.

(b) A shareholder of the corporation does not have a vested property right resulting from any provision in the articles of incorporation, including provisions relating to management, control, capital structure, dividend entitlement, or purpose or duration of the corporation. (1901, c. 2, ss. 29, 30, 37; 1903, c. 510; Rev., ss. 1175, 1178; C.S., s. 1131; 1927, c. 142; G.S., s. 55-31; 1955, c. 1371, s. 1; 1959, c. 1316, s. 29; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 10.01(a) authorizes a corporation to amend its articles of incorporation by adding a new provision to its articles of incorporation, modifying an existing provision, or deleting a provision in its entirety. The sole test for the validity of an amendment is whether the provision could lawfully have been included in (or in the case of a deletion, omitted from) the original articles of incorporation as of the effective date of the amendment.

The power of amendment must be exercised pursuant to the procedures set forth in the rest of this chapter, which require significant amendments to be approved either by a majority of the votes cast on the proposed amendment or by a majority of all of the votes eligible to be cast on the proposed amendment (section 10.03). This majority vote requirement is supplemented by section 10.04, which establishes a right of voting by voting group on amendments that directly affect a single class or series of shares, and by section 7.27, which treats amendments that change the voting requirements for future amendments.

Section 10.01(b) restates explicitly the policy embodied in earlier versions of the Model Act and in all modern state corporation statutes, that a shareholder "does not have a vested property right" in any provision of the articles of incorporation. Corporations and their shareholders are also subject to amendments of the governing statute by the state under section 1.02.

Section 10.01(b) should be construed liberally and without qualification or restriction to achieve the fundamental purpose of this chapter of permitting corporate adjustment and change by majority vote. Section 10.01(b) rejects decisions by a few courts that have applied a "vested rights" or "property right" doctrine to restrict or invalidate amendments to articles of incorporation because they modified particular rights conferred on shareholders by the original articles of incorporation. These holdings are rejected because their effect often is to create a tyranny of the minority: the individual consent of each shareholder becomes necessary to adopt any important change, and each shareholder, no matter how small his holding, can prevent the change.

Section 10.01(b) does not change in any way the purpose of similar provisions in earlier versions of the Model Act, which included, along with general language similar to section 10.01(b), a long list of specific permissible amendments. This list was designed to eliminate the last possible vestige of the "vested rights" theory by expressly referring to and validating all types of amendments to which a vested rights challenge could be made. Section 10.01(b) omits this "laundry list" of permissible amendments as prolix and unnecessary to carry out the policies of the section. Examples of amendments that may be made under section 10.01 include:

(1) Amendments to eliminate a narrow or limited purpose clause (thereby authorizing the corporation to engage in any lawful business) or a limited duration clause (thereby authorizing the corporation to have perpetual duration).

(2) Amendments increasing or decreasing the number of shares a corporation is authorized to issue.

(3) Amendments exchanging, classifying, reclassifying, or cancelling any part of a corporation's shares, whether or not previously issued.

(4) Amendments limiting or cancelling the right of holders of a class of shares to receive dividends, whether or not the dividends or rights to receive the dividends had accumulated or accrued in the past.

(5) Amendments creating new classes of shares whether superior or inferior to shares already outstanding, or changing the designations of shares, or the preferences, limitations, or rights of classes of shares, whether or not previously issued.

(6) Amendments dividing a class of shares into series and authorizing the directors to fix the relative rights and preferences of a class or series.

(7) Amendments changing the voting rights of outstanding shares, including elimination of the power to vote cumulatively or assigning multiple or fractional votes per share, or denying the power to vote entirely to classes of shares, whether or not previously issued.

This listing is partial and illustrative only.

A provision in the articles of incorporation is subject to amendment under section 10.01 even though the provision is described, referred to, or stated in a share certificate, information statement, or other document issued by the corporation that reflects provisions of the articles of incorporation. The only exception to this unlimited power of amendment is section 6.27, which provides that share transfer restrictions may not be imposed by amendment on shares that were previously issued without the consent of the holder.

Section 10.01 relates only to amendments to articles of incorporation. It does not relate to the impairment of obligations of a corporation to its shareholders based upon contracts independent of the articles of incorporation. An amendment permitted by this section may constitute a breach of such a contract or of a contract between the shareholders themselves. A shareholder with contractual rights (or who otherwise is concerned about possible onerous amendments) may obtain complete protection against these amendments only by establishing procedures in the articles of incorporation or bylaws that limit the power of amendment without his consent. In appropriate cases, a shareholder may be able to enjoin an amendment that constitutes a breach of a contract.

Minority shareholders are protected from the power of the majority to impose onerous or objectionable amendments by two basic devices: the right to vote on amendments by separate voting groups (section 10.04) and the right to dissent under chapter 13. In addition, courts have held that a decision by majority shareholders to exercise the powers granted by this section in a way that is arguably detrimental or unfair to minority interests may be examined by a court under its inherent equity power to review transactions for good faith and fair dealing. *McNulty v. W. & J. Sloane,* 184 Misc. 835, 54 N.Y.S.2d 253 (Sup. Ct. 1945); *Kamena v. Janssen Dairy Corp.,* 133 N.J.Eq. 214, 31 A.2d 200, 203 (1943), aff'd, 134 N.J.Eq. 359, 35 A.2d 894 (1944) (where the court stated that it "is more a question of fair dealing between the strong and the weak than it is a question of percentages or proportions of the votes favoring the plan"). See also *Teschner v. Chicago Title & Trust Co.,* 59 Ill.2d 452, 322 N.E.2d 54, 57 (1974), where the court, in upholding a transaction that had a reasonable business purpose, relied partially on the fact that there was "no claim of fraud or deceptive conduct . . . [or] that the exchange offer was unfair or that the price later offered for the shares was inadequate."

Because of the broad power of amendment contained in this section, it is unnecessary and undesirable to make any reference to, or reserve, an express power to amend in articles of incorporation.

NORTH CAROLINA COMMENTARY

This section broadly authorizes a corporation to amend its articles of incorporation to include any provision required or permitted in the articles of incorporation. Former G.S. 55-99 contained a "laundry list" of permissive amendments.

Legal Periodicals. — For note on unanimous approval of corporate bylaws and creation of shareholder agreements, see 1 Campbell L. Rev. 153 (1979).

For article, "Using Alternative Dispute Resolution Techniques To Settle Conflicts Among Shareholders Of Closely Held Corporations," see 22 Wake Forest L. Rev. 105 (1987).

For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

For article on the evolution of corporate combination law, see 76 N.C.L. Rev. 687 (1998).

For article, "Silencing the Shareholder's Voice," see 80 N.C.L. Rev. 1897 (2002).

CASE NOTES

Editor's Note. — *The cases below were decided under prior law.*

Amendment Operates Prospectively. — Whether the law itself makes an amendment, or confers the power of amendment on the corporation, the amendment will not be construed to operate retrospectively to the detriment of rights already vested under the old charter. Patterson v. Durham Hosiery Mills, 214 N.C. 806, 200 S.E. 906 (1939).

A charter amendment requiring consent of three fourths in interest of the preferred stockholders to the issuing of bonds or securities of prior or equal rank is prospective in effect, and does not constitute a waiver of the right to the declaration of accrued, accumulated dividends, when earned, by permitting the interposing of new preferred stock by agreement of three fourths of the preferred stockholders, nor does legislative authority to amend the charter extend to authority to defeat the vested right to the declaration of such dividends by amendment of the charter. Patterson v. Durham Hosiery Mills, 214 N.C. 806, 200 S.E. 906 (1939).

Subscriber Released by Fundamental Change. — Any fundamental change in the charter of a corporation relieves a nonassenting subscriber from liability upon his stock. First Nat'l Bank v. City of Charlotte, 85 N.C. 433 (1881).

§ 55-10-02. Amendment by board of directors.

Unless the articles of incorporation provide otherwise, a corporation's board of directors may adopt any of the following amendments to the corporation's articles of incorporation without shareholder approval:

(1) Reserved for future codification purposes.
(2) To delete the names and addresses of the initial directors.
(3) To delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the Secretary of State.

(4) If the corporation has only one class of shares outstanding:
  a. To change each issued and unissued authorized share of the class into a greater number of whole shares of the class; or
  b. To increase the number of authorized shares of the class to the extent necessary to permit the issuance of shares as a share dividend.

(5) To change the corporate name by substituting the word "corporation", "incorporated", "company", "limited", or the abbreviation "corp.", "inc.", "co.", or "ltd.", for a similar word or abbreviation in the name, or by adding, deleting, or changing a geographical attribution for the name.

(5a) To reflect a reduction in authorized shares pursuant to G.S. 55-6-31(b) when the corporation has acquired its own shares and the articles of incorporation prohibit the reissue of the acquired shares.

(5b) To delete a class of shares from the articles of incorporation, as a result of the operation of G.S. 55-6-31(b), when there are no remaining authorized shares of the class because the corporation has acquired all authorized shares of the class and the articles of incorporation prohibit the reissue of the acquired shares.

(6) To make any other change expressly permitted by this Chapter to be made without shareholder approval. (1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 28, 29, 30, 37; 1903, c. 510; Rev., ss. 1174, 1175, 1178; C.S., ss. 1130, 1131; 1925, c. 118, ss. 1, 2a; 1927, c. 142; 1931, c. 243, ss. 4, 5; 1933, c. 100, ss. 7, 8; 1941, c. 97, s. 5; G.S., ss. 55-30, 55-31; 1953, c. 54; c. 119, ss. 1, 2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 25; 1973, c. 469, s. 30; 1989, c. 265, s. 1; 2005-268, s. 13.)

OFFICIAL COMMENT

The amendments described in clauses (1) through (6) are so routine and "housekeeping" in nature as not to require action by shareholders. None affects substantive rights in any meaningful way. For example, section 10.02(1) authorizes amendments by the board of directors to extend the duration of a corporation that was formed at a time when limited duration was required by law. The extension normally will be in the form of an amendment to delete all reference to the duration of the corporation, which automatically makes the duration perpetual. See section 3.02. Similarly, sections 10.02(2) and (3) authorize the board of directors to delete the names of initial directors, or the name and address of the initial registered agent and registered office, set forth in the original articles if that information is obsolete. Section 10.02(4) authorizes the board of directors to change each issued and unissued share of an outstanding class of shares into a greater number of whole shares if the corporation has only that class of shares outstanding. All shares of the class being changed must be treated identically under this clause. Section 10.02(5) authorizes minor name changes without shareholder approval.

Section 10.02(6) recognizes that other sections of the Model Act expressly permit other amendments to be made by the board of directors without prior shareholder approval. Examples of these include section 6.02 (creation of series of shares pursuant to authority already granted in the articles) and section 6.31 (cancellation of reacquired shares if the articles provide they are not to be reissued).

Amendments provided for in this section may be included in restated articles of incorporation under section 10.07 or in articles of merger under chapter 11.

NORTH CAROLINA COMMENTARY

This section authorizes the board of directors to adopt certain "housekeeping" amendments to the articles of incorporation without shareholder action. Under former G.S. 55-100(b), shareholder action was required for all amendments after the initial issuance of shares. Subdivision 10.02(1) of the Model Act, relating to an amendment to extend the duration of a corporation if it was incorporated at a time when limited duration was required by law, was omitted, because limited duration has not been required by North Carolina law.

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

Effective October 1, 2005, this section is amended to reflect (i) the relocation to this section from G.S. 55-6-31 of the provision authorizing a board of directors to amend articles of incorporation to reflect a reduction in authorized shares when the corporation is prohibited from reissuing acquired shares and (ii) the addition of a provision authorizing a board of directors to amend the articles of incorporation to increase the number of authorized shares as necessary to permit a share dividend if the corporation has only one class of shares outstanding.

§ 55-10-03. Amendment by board of directors and shareholders.

(a) If a corporation has issued shares, an amendment to the articles of incorporation shall be adopted pursuant to this section. Except as provided in G.S. 55-14A-01, the proposed amendment must be adopted by the board of directors.

(b) Except as provided in G.S. 55-10-02, 55-10-07, and 55-14A-01, after adopting the proposed amendment the board of directors must submit the amendment to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the amendment, unless the board of directors determines that, because of conflict of interest or other special circumstances, it should not make such a recommendation, in which event the board of directors must communicate the basis for that determination to the shareholders with the amendment.

(c) The board of directors may condition its submission of the amendment to the shareholders on any basis.

(d) If the amendment must be approved by the shareholders and the approval is to be given at a meeting, the corporation must notify each shareholder in accordance with G.S. 55-7-05, whether or not the shareholder is entitled to vote, of the meeting of shareholders at which the amendment is to be submitted for approval. The notice of meeting must state that the purpose, or one of the purposes, of the meeting is to consider the amendment and the notice must contain or be accompanied by a copy or summary of the amendment. If the amendment is required to be approved by the shareholders and the approval is to be obtained through action without meeting, the corporation must notify shareholders if required by G.S. 55-7-04(d).

(e) Unless this Chapter, the articles of incorporation, a bylaw adopted by the shareholders, or the board of directors (acting pursuant to subsection (c)) require a greater vote or a vote by voting groups, the amendment to be adopted must be approved by:

(1) A majority of the votes entitled to be cast on the amendment by any voting group with respect to which the amendment would create dissenters' rights; and

(2) The votes required by G.S. 55-7-25 and G.S. 55-7-26 by every other voting group entitled to vote on the amendment. (1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 28, 29, 30, 37; 1903, c. 510; Rev., ss. 1174, 1175, 1178; C.S., ss. 1130, 1131; 1925, c. 118, ss. 1, 2a; 1927, c. 142; 1931, c. 243, ss. 4, 5; 1933, c. 100, ss. 7, 8; 1941, c. 97, s. 5; G.S., ss. 55-30, 55-31; 1953, c. 54; c. 119, ss. 1, 2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 25; 1973, c. 469, s. 30; 1989, c. 265, s. 1; 1991, c. 645, s. 8; 2000-140, s. 101(b); 2005-268, s. 14.)

OFFICIAL COMMENT

Significant amendments to articles of incorporation must be approved by the shareholders after being proposed by the board of directors. When proposing an amendment, the board of directors must make a recommendation to the shareholders that the amendment be approved, unless it determines that because of conflict of interest or other special circumstances it should make no recommendation. If the board of directors so determines, it must describe the conflict or circumstance, and communicate the basis for its determination, when presenting the proposed amendment to the shareholders.

Section 10.03(c) codifies existing practice by expressly permitting the board of directors to submit an amendment to the shareholders on a conditional basis. This power of the board of directors does not alter the balance of power between the board of directors and shareholders since the board of directors may always withhold its approval entirely and not submit an amendment. Examples of conditions commonly imposed are that the amendment not be approved unless (1) a favorable vote by a specified proportion (larger than ordinarily required) of the shareholders is obtained, (2) no more than a specified fraction of the shareholders file written dissents, or (3) a class or series of shares must approve the amendment as a separate voting group. These conditions may be used, for example, to discourage unwise depletion of corporate assets by the adoption of the amendment. The board of directors is not limited to conditions of these types, however, and may condition the submission on any basis.

The vote of shareholders needed to approve an amendment depends in part on the voting groups entitled to vote separately on the amendment and in part on whether any of those voting groups would be entitled to dissenters' rights if the amendment were adopted. See section 10.04. However, section 10.03(e) itself establishes a dual requirement for approval by shareholders of each voting group depending on the nature of the amendment: under section 7.25 and 7.26 a majority of the votes cast affirmatively and negatively on the amendment at a meeting at which a quorum is present is necessary to approve most amendments; but if the amendment would give rise to dissenters' rights under chapter 13, section 10.03(e) requires that it be approved by a majority of the votes of the outstanding shares of each voting group that will have dissenters' rights if the amendment were adopted, and by the vote required by sections 7.25 and 7.26 by other voting groups that are entitled to vote on the amendment. This increased voting requirement reflects the importance of these proposals. Of course, the articles of incorporation may specify a greater quorum or voting requirement for a voting group to approve an amendment of any type. See section 7.27.

The articles of incorporation or the board of directors may require that a proposed amendment be approved by a class or series of shares voting as a separate voting group; such a requirement may only be in addition to that otherwise required by section 10.04 of this Act.

NORTH CAROLINA COMMENTARY

This section continues the usual procedure under former G.S. 55-100(b) for adoption of amendments to the articles of incorporation by action of the board of directors and then by the shareholders. It adds two new features. First, the board of directors must recommend the amendment to the shareholders, unless it determines that, because of conflict of interest or other special circumstances, it should make no recommendation and communicates the basis for its lack of a recommendation to the shareholders. Second, the section specifically authorizes the board of directors to condition its submission of a proposed amendment "on any basis."

This section omits the Model Act's requirement that notice of the meeting at which the proposed amendment will be considered and of the proposed amendment itself be given to all shareholders of the corporation whether or not entitled to vote on the proposed amendment. Accordingly, the section continues the procedure under former G.S. 55-100(b)(2) of giving notice only to those shareholders entitled to vote on the proposed amendment.

Under former G.S. 55-100(b)(1), an amendment to the articles of incorporation could be initiated by shareholders entitled to call a shareholders' meeting. There is no similar procedure in this Act.

A clarifying stylistic change was made to the Model Act's language in subsection (b) of this section.

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

Effective October 1, 2005, this section is changed to provide that once shares have been issued generally all amendments to the articles of incorporation must be adopted by the board of directors, including those that must be approved by the shareholders. Prior to this change, a board of directors was only required to propose amendments that required shareholder approval.

Legal Periodicals. — For article on the evolution of corporate combination law, see 76 N.C.L. Rev. 687 (1998).

§ 55-10-04. Voting on amendments by voting groups.

(a) The holders of the outstanding shares of a class are entitled to vote as a separate voting group (if shareholder voting is otherwise required by this Chapter) on a proposed amendment if the amendment would:

(1) Increase or decrease the aggregate number of authorized shares of the class;
(2) Effect an exchange or reclassification of all or part of the shares of the class into shares of another class;
(3) Effect an exchange or reclassification, or create the right of exchange, of all or part of the shares of another class into shares of the class;
(4) Change the designation, rights, preferences, or limitations of all or part of the shares of the class;
(5) Change the shares of all or part of the class into a different number of shares of the same class;
(6) Create a new class of shares having rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class;
(7) Increase the rights, preferences, or number of authorized shares of any class that, after giving effect to the amendment, have rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class;
(8) Limit or deny an existing preemptive right of all or part of the shares of the class;
(9) Cancel or otherwise affect rights to distributions or dividends that have accumulated but not yet been declared on all or part of the shares of the class; or
(10) Change the corporation into a nonprofit corporation or a cooperative organization.

(b) If a proposed amendment would affect a series of a class of shares in one or more of the ways described in subsection (a), the shares of that series are entitled to vote as a separate voting group on the proposed amendment.

(c) If a proposed amendment that entitles two or more series of shares to vote as separate voting groups under this section would affect those two or more series in the same or a substantially similar way, the shares of all the series so affected must vote together as a single voting group on the proposed amendment.

(d) A class or series of shares is entitled to the voting rights granted by this section although the articles of incorporation provide that the shares are nonvoting shares. (1955, c. 1371, s. 1; 1959, c. 1316, ss. 30, 31; 1969, c. 751, s. 36; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

A class or series of shares is generally entitled to vote separately as a voting group on any amendment that affects the class or series in the manner described in subdivisions (1) through (9) of section 10.04(a). Shares are entitled to vote as separate voting groups under this section even though they are designated as nonvoting shares in the articles of incorporation, or the articles of incorporation purport to deny them entirely the right to vote on the proposal in question, or purport to allow other classes or series of shares to vote as part of the same voting group. See section 10.04(d). If an amendment would create dissenters' rights with respect to any class or series of shares, the amendment must be approved by each voting group that would have dissenters' rights by a majority of all votes entitled to be cast on the amendment, and by other voting groups by the vote required by sections 7.25 and 7.26. See section 10.04(b). All other amendments are subject to the voting requirements generally applicable to voting groups under sections 7.25 and 7.26.

The right to vote by voting groups under section 10.04 is applicable only if "shareholder voting is otherwise required by this Act." An amendment that does not require shareholder approval, such as the creation of a new series of shares pursuant to authority reserved in the original articles of incorporation (see section 6.02), does not trigger the right to vote by voting groups under this section.

The right to vote as a separate voting group provides a major protection for classes or series of shares with preferential rights or classes or series of limited or nonvoting shares against amendments that are especially burdensome to that class. This section, however, does not make the right to vote by separate voting group dependent on an evaluation of whether the amendment is detrimental to the class or series: if the amendment is one of those described in section 10.04(a), the class or series is automatically entitled to vote as a separate voting group on the amendment. The question whether an amendment is detrimental is often a question of judgment, and approval by the affected class or series is required, irrespective of whether the board or other shareholders believe it is beneficial or detrimental to the affected class or series.

The nine types of changes that give rise to voting by voting groups are essentially the same as in earlier versions of the Model Act, though their number has been reduced based on the conclusion that some of the changes listed in earlier versions were subsumed within other listed changes. Subsections (b) and (c) extend the privilege of voting by separate voting group to one or more series of a class of shares if the series has unique financial or voting provisions and is affected in one or more of the ways described in subsection (a). These subsections must necessarily be phrased in general terms; any significant distinguishing feature of a series, which an amendment affects or alters, should trigger the right of voting by separate voting group for that series.

The application of subsections (b) and (c) may best be illustrated by an example. Assume there is a class of shares with preferential rights comprised of three series, each with different preferential dividend rights. A proposed amendment would reduce the rate of dividend applicable to the "Series A" shares and would change the dividend right of the "Series B" shares from a cumulative to a noncumulative right. The amendment would not affect the preferential dividend right of the "Series C" shares. Both Series A and B would be entitled to vote as separate voting groups on the proposed amendment; the holders of the Series C shares, not directly affected by the amendment, would not be entitled to vote at all unless the shares are otherwise voting shares under the articles of incorporation, in which case they would not vote as a separate voting group but in the voting group consisting of all shares with general voting rights under the articles of incorporation. If the proposed amendment would reduce the dividend right of Series A and change the dividend right of both Series B and C from a cumulative to a noncumulative right, the holders of Series A would be entitled to vote as a single voting group, and the holders of Series B and C would be required to vote together as a single, separate voting group.

Sections 7.25 and 7.26 set forth the mechanics of voting by multiple voting groups.

Section 10.04(d) makes clear that the limited right to vote by separate voting groups provided by section 10.04 may not be narrowed or eliminated by the articles of incorporation. Even if a class or series of shares is described as "nonvoting" and the articles purport to make that class or series nonvoting "for all purposes," that class or series nevertheless has the limited voting right provided by this section. Section 10.04(d) was included because of the ambiguity that would normally arise whenever a class or series of nonvoting shares is created; no inference of any kind should be drawn from section 10.04(d) as to whether other, unrelated sections of the Model Act may be modified by the provisions in the articles of incorporation.

NORTH CAROLINA COMMENTARY

This section differs from the Model Act in providing for class voting in the case of a proposed amendment to the articles of incorporation that would change the corporation into a nonprofit corporation or a cooperative organization. With this addition, the instances in which class voting is required under the Act are the same as under former G.S. 55-101.

§ 55-10-05. Amendment before issuance of shares.

If a corporation has not yet issued shares, the board of directors, or if the corporation has no directors, a majority of the incorporators may adopt one or more amendments to the corporation's articles of incorporation. (1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 28, 29, 30, 37; 1903, c. 510; Rev., ss. 1174, 1175, 1178; C.S., ss. 1130, 1131; 1925, c. 118, ss. 1, 2a; 1927, c. 142; 1931, c. 243, ss. 4, 5; 1933, c. 100, ss. 7, 8; 1941, c. 97, s. 5; G.S., ss. 55-30, 55-31; 1953, c. 54; c. 119, ss. 1, 2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 25; 1973, c. 469, s. 30; 1989, c. 265, s. 1; 1991, c. 645, s. 9.)

OFFICIAL COMMENT

Section 10.05 provides that, before any shares are issued, amendments may be made by the persons empowered to complete the organization of the corporation. Under section 2.04 the organizers may, at the option of the corporation, be either the incorporators or the initial directors named in the articles of incorporation. An amendment to the articles made at this stage of the formation process should involve a minimum of formality.

NORTH CAROLINA COMMENTARY

This section continues the procedure under former G.S. 55-100(a) by which the board of directors and incorporators may amend the articles of incorporation before the issuance of shares.

§ 55-10-06. Articles of amendment.

A corporation amending its articles of incorporation shall deliver to the Secretary of State for filing articles of amendment setting forth:

(1) The name of the corporation;
(2) The text of each amendment adopted;
(3) If an amendment provides for an exchange, reclassification, or cancellation of issued shares, provisions for implementing the amendment if not contained in the amendment itself;
(4) The date of each amendment's adoption;
(5) If an amendment was adopted by the incorporators or board of directors without shareholder action, a statement to that effect and a brief explanation of why shareholder action was not required;
(6) If an amendment was approved by the shareholders, a statement that shareholder approval was obtained as required by this Chapter. (1955, c. 1371, s. 1; 1959, c. 1316, s. 32; 1989, c. 265, s. 1; 1991, c. 645, s. 10(a).)

OFFICIAL COMMENT

The articles of amendment must set forth both the amendment itself and the manner in which it was adopted. In the case of an amendment approved by shareholder vote (sections 10.03 and 10.04), the articles must state either the total vote in favor and against the proposal or the undisputed vote for and a statement that this vote was sufficient to adopt the amendment. The latter tally method is permitted because in many situations the precise vote may depend on the resolution of protracted disputes with respect to proxy votes. The filing of the articles of amendment should not be dependent on the resolution of every dispute if it is certain that a sufficient vote has been obtained without considering the disputed votes. In most situations, of course, the precise vote can be readily determined, and when it can the articles should record it.

Section 10.06(a)(3) requires the articles of amendment to contain a statement of the manner in which an exchange, reclassification, or cancellation of issued shares is to be put into effect if not set forth in the amendment itself. This requirement avoids any possible confusion that may arise as to how the amendment is to be put into effect and also permits the amendment itself to be limited to provisions of permanent applicability, with transitional provisions having no long-range effect appearing only in the articles of amendment.

NORTH CAROLINA COMMENTARY

This section is essentially the same as former G.S. 55-103, except that no special statement is required in the case of an amendment effecting a change in the amount of stated capital and except that no statement is required with respect to dissenters' rights.

§ 55-10-07. Restated articles of incorporation.

(a) A corporation's board of directors may restate its articles of incorporation at any time, with or without shareholder approval, to consolidate all amendments into a single document.

(b) The restated articles of incorporation may include one or more new amendments to the articles. If the restated articles of incorporation include a new amendment requiring shareholder approval, it must be adopted and approved as provided in G.S. 55-10-03. The restated articles of incorporation may include a statement of the address of the current registered office and the name of the current registered agent of the corporation, and no other.

(c) Repealed by Session Laws 2005, c. 268, s. 15.

(d) A corporation restating its articles of incorporation shall deliver to the Secretary of State for filing articles of restatement which shall:

(1) Set forth the name of the corporation;

(2) Attach as an exhibit thereto the text of the restated articles of incorporation;

(3) State that the restated articles of incorporation consolidate all amendments into a single document; and

(4) If the restated articles of incorporation contain a new amendment to the articles, include the statements required by G.S. 55-10-06.

(e) Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments to the original articles of incorporation.

(f) The Secretary of State may certify restated articles of incorporation as the articles of incorporation currently in effect without including the other information required by subsection (d) of this section. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1991, c. 645, ss. 11, 18; 2005-268, s. 15.)

OFFICIAL COMMENT

Restated articles of incorporation serve the useful purpose of permitting articles of incorporation that have been amended from time to time to be consolidated into a single document. Such a restatement may also eliminate "historical" or obsolete provisions that have no present relevance.

A restatement of articles of incorporation that does not involve any substantive change in the articles (or that makes only amendments that may be made by the board of directors without shareholder approval) may be approved by the board of directors alone. In order to increase the reliability of restated articles as the definitive governing document of the corporation, section 10.07 authorizes the restated articles of incorporation to be submitted to the shareholders for approval in the same manner as amendments to the articles. If duly submitted to the shareholders, substantive variation between the original articles of incorporation, as amended, and the restated articles becomes academic if the shareholders' vote is the appropriate one required to amend the articles to the extent of the inconsistency.

Substantive amendments may also be adopted as part of a restatement. If substantive amendments are proposed, the same procedure must be followed as for the adoption of amendments under sections 10.02, 10.03, or 10.05.

If restated articles are submitted to the shareholders, the notice of meeting should identify changes in the articles that may reasonably be viewed as more than mere changes of form.

Section 10.07(e) makes it clear that the restated articles of incorporation supersede the original articles of incorporation and all amendments to them, and section 10.07(f) permits the secretary of state to certify the restatement uncluttered by the information set forth in subsection (e).

NORTH CAROLINA COMMENTARY

This section is in substance the same as former G.S. 55-105. The procedure for simultaneously amending and restating the articles of incorporation was clarified. The Model Act uses two terms in its comparable section, "restated articles of incorporation" and "restatement," to refer to the same document. Because the drafters concluded that the use of both could be confusing, they decided to use a single term, "restated articles of incorporation," and made other conforming and stylistic changes in subsections (c), (d), and (f).

§ 55-10-08: Reserved for future codification purposes.

NORTH CAROLINA COMMENTARY

Section 10.08 of the Model Act has been omitted and is replaced by G.S. 55-14A-01.

§ 55-10-09. Effect of amendment.

An amendment to articles of incorporation does not affect a cause of action existing against or in favor of the corporation, a proceeding to which the corporation is a party, or the existing rights of persons other than shareholders of the corporation. An amendment changing a corporation's name does not abate a proceeding brought by or against the corporation in its former name. (1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Under section 10.09, amendments to articles of incorporation do not interrupt the corporate existence and do not abate a proceeding by or against the corporation even though the amendment changes the name of the corporation.

Amendments are effective when filed unless a delayed effective date is elected. See section 1.23.

NORTH CAROLINA COMMENTARY

This section is in substance the same as former G.S. 55-104.

§§ 55-10-10 through 55-10-19: Reserved for future codification purposes.

Part 2. Amendment of Bylaws.

§ 55-10-20. Amendment by board of directors or shareholders.

(a) A corporation's board of directors may amend or repeal the corporation's bylaws, except to the extent otherwise provided in the articles of incorporation or a bylaw adopted by the shareholders or this Chapter, and except that a bylaw adopted, amended or repealed by the shareholders may not be readopted, amended or repealed by the board of directors if neither the articles of incorporation nor a bylaw adopted by the shareholders authorizes the board of directors to adopt, amend or repeal that particular bylaw or the bylaws generally.

(b) A corporation's shareholders may amend or repeal the corporation's bylaws even though the bylaws may also be amended or repealed by its board of directors. (1955, c. 1371, s. 1; 1959, c. 1316, ss. 2, 3; 1973, c. 469, s. 4; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

In the absence of a provision in the articles of incorporation, the power to amend or repeal bylaws is shared by the board of directors and shareholders. Amendment of bylaws by the board of directors is often simpler and more convenient than amendment by the shareholders and avoids the expense of calling a shareholders' meeting, a cost that may be significant in publicly held corporations. As used in this subchapter, "amendment" includes the adoption of a bylaw on a new subject as well as the alteration of existing bylaws.

Section 10.20(a) provides, however, that the power to amend or repeal bylaws may be reserved exclusively to the shareholders by an appropriate provision in the articles of incorporation. This option may appropriately be elected by a closely held corporation — for example, where control arrangements appear in the bylaws but one shareholder or group of shareholders has the power to name a majority of the board of directors. In such a corporation, the control arrangements may alternatively be placed in the articles of incorporation rather than the bylaws if there is no objection to making them a matter of public record.

Section 10.20(a)(1) provides that the power to amend or repeal the bylaws may be reserved to the shareholders "in whole or part." This language permits the reservation of power to be limited to specific articles or sections of the bylaws or to specific subjects or topics addressed in the bylaws. It is important that the areas reserved exclusively to the shareholders be delineated clearly and unambiguously.

Section 10.20(a)(2) permits the shareholders to adopt or amend a bylaw and reserve exclusively to themselves the power to amend or repeal it later. This reservation must be expressed in the action by the shareholders adopting or amending the bylaw. This option is also included for the benefit of closely held corporations.

Section 10.20(b) states that the power of shareholders to amend or repeal bylaws exists even though that power is shared with the board of directors. This section makes inapplicable the holdings of a few cases under differently phrased statutes that shareholders do not have a general or residual power to amend bylaws or that the power to amend bylaws may be vested exclusively in the board of directors. Under the Model Act the shareholders always have the power to amend or repeal the bylaws.

Sections 10.21 and 10.22 limit the power of directors to adopt or amend supermajority provisions in bylaws.

NORTH CAROLINA COMMENTARY

The Model Act was modified to provide that a bylaw adopted, amended or repealed by the shareholders may not be readopted, amended or repealed by the board of directors unless authorized by the articles of incorporation or a bylaw adopted by the shareholders. As modified, this section is consistent with former G.S. 55-16(a)(1).

Legal Periodicals. — For article discussing shareholder voting rights, see 71 N.C.L. Rev. 1 (1992).

§ 55-10-21: Reserved for future codification purposes.

NORTH CAROLINA COMMENTARY

This section of the Model Act was omitted because the subject is covered in G.S. 55-7-27.

§ 55-10-22. Bylaw increasing quorum or voting requirement for directors.

(a) A bylaw that fixes a greater quorum or voting requirement for the board of directors may be amended or repealed:

(1) If originally adopted by the shareholders, only by the shareholders, unless amendment or repeal by the board of directors is permitted pursuant to subsection (b);

(2) If originally adopted by the board of directors, either by the shareholders or by the board of directors.

(b) A bylaw adopted or amended by the shareholders that fixes a greater quorum or voting requirement for the board of directors may provide that it may be amended or repealed only by a specified vote of either the shareholders or the board of directors.

(c) A bylaw referred to in subsection (a):

(1) May not be adopted by the board of directors by a vote less than a majority of the directors then in office, and

(2) May not itself be amended by a quorum or vote of the directors less than the quorum or vote therein prescribed or prescribed by the shareholders pursuant to subsection (b). (1955, c. 1371, s. 1; 1959, c. 1316, ss. 2, 3; 1973, c. 469, s. 4; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Supermajority provisions relating to the board of directors may appear in the bylaws of the corporation without specific authorization in the articles of incorporation. See section 8.24(a) and (c). Like other bylaw provisions, they may be adopted either by the board of directors or by the shareholders. See section 10.20. Such provisions, further, may be amended or repealed by the board of directors or shareholders as provided in this section. This treatment of supermajority provisions for the board of directors should be contrasted with the treatment of analagous provisions for shareholders which must either be set forth in the articles of incorporation, section 7.27, or included in the bylaws when expressly authorized by the articles, section 10.21, and their adoption, amendment, or repeal must be approved by the shareholders by the vote specified in sections 7.27 and 10.21.

Supermajority provisions relating to the board of directors are usually part of control arrangements in closely held corporations, and section 10.22 is designed with this end in view. Its basic purpose is to ensure that control arrangements negotiated by shareholders for their own protection will not be prematurely terminated by a majority vote of the shareholders or the board of directors. Thus, section 10.22(a)(1) provides that if a supermajority requirement is originally imposed by a bylaw adopted by the shareholders, only the shareholders may amend or repeal it. Further, under section 10.22(b), that bylaw may impose restrictions on the manner in which it may be thereafter amended or repealed by the shareholders. On the other hand, if a supermajority requirement is originally imposed in a bylaw adopted by the board of directors, that bylaw may be amended either by the board of directors or shareholders (see section 10.22(a)(2)), but if it is to be amended by the board of directors, section 10.22(c) requires approval by the supermajority requirement then being imposed or amended, whichever is greater. This requirement is analogous to that imposed on supermajority amendments appearing in the articles of incorporation. See section 7.27. For an example of the application of this language, see the Official Comment to section 7.27.

NORTH CAROLINA COMMENTARY

The Model Act was modified in this section to conform to the provisions of G.S. 55-7-27.

Article 11.

Merger and Share Exchange.

§ 55-11-01. Merger.

(a) One or more corporations may merge into another corporation if the board of directors of each corporation adopts and its shareholders (if required by G.S. 55-11-03) approve a plan of merger.

(b) The plan of merger must set forth:

(1) The name of each corporation planning to merge and the name of the surviving corporation into which each other corporation plans to merge;

(2) The terms and conditions of the merger; and

(3) The manner and basis of converting the shares of each corporation into shares, obligations, or other securities of the surviving or any other corporation or into cash or other property in whole or part.

(c) The plan of merger may set forth:

(1) Amendments to the articles of incorporation of the surviving corporation; and

(2) Other provisions relating to the merger.

(d) The provisions of the plan of merger, other than the provisions referred to in subdivisions (b)(1) and (c)(1) of this section, may be made dependent on facts objectively ascertainable outside the plan of merger if the plan of merger sets forth the manner in which the facts will operate upon the affected provisions. The facts may include any of the following:

(1) Statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data.

(2) A determination or action by the corporation or by any other person, group, or body.

(3) The terms of, or actions taken under, an agreement to which the corporation is a party, or any other agreement or document. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G.S., s. 55-165; 1955, c. 1371, s. 1; 1969, c. 751, s. 37; 1973, c. 469, s. 31; 1989, c. 265, s. 1; 2005-268, s. 16.)

OFFICIAL COMMENT

1. Statutory mergers

Section 11.01(a) authorizes a statutory merger, to be accomplished by the adoption of a plan of merger under section 11.01(b), approval of the transaction by the shareholders (if required by section 11.03), and filing articles of merger under section 11.05. Upon the effective date of the merger, the surviving corporation becomes vested with all the assets of the disappearing corporations and becomes subject to their liabilities.

Under the Model Act there are virtually no restrictions or limitations on the terms of a statutory merger. Shareholders of the disappearing corporations may receive securities of the surviving corporation, securities of a third corporation, e.g., shares issued by the parent of the surviving or disappearing corporation (which may be publicly traded and marketable while the shares of the surviving or disappearing corporation are not), or cash or other property (a "cash" or "cash-out" merger). Some of the holders of a single class of shares may be required to accept securities or properties while the remaining holders may be compelled to accept different securities, property, or cash. The capitalization of the surviving corporation may be restructured in the merger, or its articles of incorporation may be amended by the articles of merger in any way deemed appropriate. Any other provisions considered necessary or desirable with respect to the merger may be included in the plan of merger.

Merger transactions may give rise to voting by separate voting groups of shareholders under section 11.03(f), and dissenting shareholders may have dissenters' rights under chapter 13.

Courts have held that merger transactions that are formally authorized by the procedures set forth in this chapter may in some circumstances constitute a breach of duty to minority shareholders where the effect of the transaction is to eliminate them from further equity participation in the enterprise. See McBride, "Delaware Corporate Law: Judicial Scrutiny of Mergers — The Aftermath of *Singer* v. *Magnavox Co.*," 33 BUS. LAW. 2231 (1978). In Delaware, case law establishes that these transactions must be fully disclosed and entirely fair to the minority shareholders. See *Singer* v. *Magnavox Co.*, 380 A.2d 969 (Del. 1977); *Weinberger* v. *UOP, Inc.*, 457 A.2d 701 (Del. 1983); *Harman* v. *Masoneilan International, Inc.*, 442 A.2d 487 (Del. 1982).

2. Equivalent nonstatutory transactions

A transaction may have the same economic effect as a statutory merger even though it is cast in the form of a nonstatutory transaction. For example, assets of the disappearing corporations may be sold for consideration in the form of shares of the surviving corporation, followed by the distribution of those shares by the disappearing corporations to their shareholders and their subsequent dissolution. Transactions have sometimes been structured in nonstatutory form for tax reasons or in an effort to avoid some of the consequences of a statutory merger, particularly appraisal rights to dissenting shareholders. Faced with these transactions, a few courts have developed or accepted the "de facto merger" concept which, to some uncertain extent, grants to dissenting shareholders the rights they would have had if the transaction had been structured as a statutory merger. See Folk, "De Facto Mergers in Delaware: *Hariton* v. *Arco Electronics, Inc.*," 49 VA. L. REV. 1261 (1963). These problems should not occur under the Model Act since the procedural requirements for authorization and consequences of various types of transactions are largely standardized. For example, dissenters' rights are granted not only in mergers but also in share exchanges, in sales of all or substantially all the corporate assets, and in amendments to articles of incorporation that significantly affect rights of shareholders.

NORTH CAROLINA COMMENTARY

Article 11 eliminates all references to statutory consolidation because of the infrequent use of the consolidation form of combination, in which all corporate parties to the combination disappear and an entirely new corporation is created, and because, if a new entity is desirable, it may be created before the merger and the disappearing entities may merge into it.

The third sentence of the second paragraph of the "Official Comment" to Section 11.01 of the Model Act indicates that a plan of merger can discriminate among holders of shares of the same class in the kind of property they receive in a merger. The drafters believed that this sentence does not reflect the current law in North Carolina. They believed that the current law does not permit discrimination among the holders of shares of a single class in the kind of property that can be received in a merger; all the shares of a single class must be treated the same, both in value and kind. Therefore, the drafters note their disagreement with this sentence in the "Official Comment." *But see* G.S. 55-6-24(b) (which expressly permits discrimination among holders of a single class or series of shares in certain shareholder rights plans). This section is not intended to change the current law in North Carolina under which shareholders may elect to receive alternative forms of consideration (e.g. cash or shares) and proration is provided if one of the alternatives is oversubscribed.

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

CASE NOTES

Editor's Note. — *Some of the cases below were decided under prior law.*

Statute Controls. — Where two corporations enter into an agreement for their union and the continuation of business under the name of one with the combined assets of both, the statute controls as to whether there is a merger or a consolidation. Carolina Coach Co. v. Hartness, 198 N.C. 524, 152 S.E. 489 (1930).

Merger changed the capitalization of a corporation and a corporation's approval of the merger pursuant to G.S. 55-11-01 to 55-11-10 violated the terms of its option agreement with a consultant who had a five-year option to purchase 50 percent of its shares; the corporation's principal was also liable for the breach because he voluntarily participated in the merger knowing that it would extinguish the consultant's stock options, and he was the sole shareholder and director of the corporation. Lee v. Scarborough, 164 N.C. App. 357, 595 S.E.2d 729, 2004 N.C. App. LEXIS 812 (2004).

Breach of Stock Option and Restriction Agreement. — Trial court properly granted partial summary judgment to a businessman against a shareholder and a corporation because the merger of a company into the corporation without any prior notice to or consent by the businessman resulted in a breach of a stock option and restriction agreement between the businessman and the company and its sole shareholder, as the merger clearly effected a change in the capitalization of the company. Lee v. Scarborough, 162 N.C. App. 674, 592 S.E.2d 43, 2004 N.C. App. LEXIS 259 (2004).

§ 55-11-02. Share exchange.

(a) A corporation may acquire all of the outstanding shares of one or more classes or series of another corporation if the board of directors of each corporation adopts and its shareholders (if required by G.S. 55-11-03) approve the exchange.

(b) The plan of exchange must set forth:

(1) The name of the corporation whose shares will be acquired and the name of the acquiring corporation;

(2) The terms and conditions of the exchange;

(3) The manner and basis of exchanging the shares to be acquired for shares, obligations, or other securities of the acquiring or any other corporation or for cash or other property in whole or part.

(c) The plan of exchange may set forth other provisions relating to the exchange.

(c1) The provisions of the plan of share exchange, other than the provision required by subdivision (b)(1) of this section, may be made dependent on facts objectively ascertainable outside the plan of share exchange if the plan of share exchange sets forth the manner in which the facts will operate upon the affected provisions. The facts may include any of the following:

(1) Statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data.

(2) A determination or action by the corporation or by any other person, group, or body.

(3) The terms of, or actions taken under, an agreement to which the corporation is a party, or any other agreement or document.

(d) This section does not limit the acquisition of all or part of the shares of one or more classes or series of a corporation through a voluntary exchange or otherwise. (1989, c. 265, s. 1; 2005-268, s. 17.)

OFFICIAL COMMENT

Section 11.02 establishes a procedure by which a direct exchange of shares for cash or other consideration in corporate combinations may be effected under the same safeguards applicable to statutory mergers or similar transactions. A share exchange under section 11.02 is binding upon all shareholders of the acquired class or series of shares.

It is often desirable to effect a reorganization or combination so that the corporation being acquired does not go out of existence but becomes a subsidiary of the acquiring corporation or holding company, the securities of which are issued as part of the transaction. These objectives often are particularly important in the formation of holding company systems for, or for the acquisition of, insurance companies and banks, but are not limited to these transactions. In the absence of a share exchange procedure, this kind of a transaction often may be accomplished only by the process of a "reverse triangular merger": the formation of a new subsidiary of the acquiring or holding company, followed by a merger of that subsidiary into the corporation to be acquired in which securities of the new subsidiary's parent are exchanged for securities of the corporation to be acquired. Section 11.02 provides a straightforward procedure to accomplish the same end.

Under section 11.02, all shares of a particular class or series of shares must be acquired. However, shares of one or more classes or series may be excluded from the plan or may be included on different bases. After the plan is adopted and approved by the shareholders as required by section 11.03, it is binding on all holders of shares of the class or series to be acquired; members of the class or series, however, have the right to dissent under chapter 13.

It is not necessary that a share exchange under section 11.02 be on a share-for-share basis. The consideration for the shares being acquired may be "shares, obligations, or other securities of the acquiring or any other corporation or . . . cash or other property in whole or part."

Section 11.02(c) is designed to make it clear that the mandatory exchange provided by section 11.02 does not affect the power of corporations to acquire shares by voluntary exchange or otherwise by agreement with the shareholders.

NORTH CAROLINA COMMENTARY

This section introduces a concept that is new to North Carolina, i.e., a share exchange, which is defined as a transaction by which a corporation becomes the owner of all the outstanding shares of one or more classes of another corporation by an exchange that is compulsory on all owners of the acquired shares.

The same kind of transaction that is accomplished by a share exchange has in the past been accomplished by the process of a "reverse triangular merger," which is the formation of a new subsidiary of the acquiring company, followed by a merger of that subsidiary into the corporation to be acquired in which the securities of the new subsidiary's parent are exchanged for securities of the corporation to be acquired.

Legal Periodicals. — For article on the evolution of corporate combination law, see 76 N.C.L. Rev. 687 (1998).

§ 55-11-03. Action on plan.

(a) After adopting a plan of merger or share exchange, the board of directors of each corporation party to the merger, and the board of directors of the corporation whose shares will be acquired in the share exchange, shall submit the plan of merger (except as provided in subsection (g)) or share exchange for approval by its shareholders.

(b) For a plan of merger or share exchange to be approved:

(1) The board of directors must recommend the plan of merger or share exchange to the shareholders, unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation, in which event the board of directors must communicate the basis for its lack of a recommendation to the shareholders with the plan; and

(2) The shareholders entitled to vote must approve the plan.

(c) The board of directors may condition its submission of the proposed merger or share exchange on any basis.

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with G.S. 55-7-05. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger or share exchange and contain or be accompanied by a copy or summary of the plan.

(e) Unless this Chapter, the articles of incorporation, a bylaw adopted by the shareholders, or the board of directors (acting pursuant to subsection (c)) require a greater vote, the plan of merger or share exchange to be authorized must be approved by each voting group entitled to vote separately on the plan by a majority of all the votes entitled to be cast on the plan by that voting group and, for the purpose of Article 9 or any provision in the articles of incorporation or bylaws adopted prior to July 1, 1990, a merger shall be deemed to include a share exchange. If any shareholder of a merging corporation has or will have personal liability for any existing or future obligation of the surviving corporation in the merger solely as a result of owning one or more shares in the surviving corporation, then, in addition to the requirements of this subsection, authorization of the plan of merger by the merging corporation shall require the affirmative vote or written consent of that shareholder.

(f) Separate voting by voting groups is required:

(1) On a plan of merger if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment under G.S. 55-10-04, except where the consideration to be received in exchange for the shares of that group consists solely of cash;

(2) On a plan of share exchange by each class or series of shares to be acquired in the exchange, with each class or series constituting a separate voting group.

(g) Unless the articles of incorporation provide otherwise, approval by the surviving corporation's shareholders of a plan of merger is not required if all of the following conditions are met:

(1) Except for amendments permitted by G.S. 55-10-02, its articles of incorporation will not be changed.

(2) Each shareholder of the corporation whose shares were outstanding immediately before the effective date of the merger will hold the same shares, with identical preferences, limitations, and relative rights, immediately after the effective date of the merger.

(3) The number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than twenty percent (20%) the total number of voting shares of the surviving corporation outstanding immediately before the merger.

(4) The number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than twenty percent (20%) the total number of participating shares outstanding immediately before the merger.

(h) As used in subsection (g):

(1) "Participating shares" means shares that entitle their holders to participate without limitation in distributions.

(2) "Voting shares" means shares that entitle their holders to vote unconditionally in elections of directors.

(i) After a plan of merger or share exchange is authorized, but before the articles of merger or share exchange become effective, the plan of merger or share exchange (i) may be amended as provided in the plan of merger or share exchange, or (ii) may be abandoned, subject to any contractual rights, as provided in the plan of merger or share exchange or, if there is no such provision, as determined by the board of directors without further shareholder action. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G.S., s. 55-165; 1955, c. 1371, s. 1; 1959, c. 1316, s. 37; 1973, c. 469, s. 33; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.17; 1993, c. 552, s. 14; 2005-268, ss. 18, 19, 20.)

OFFICIAL COMMENT

1. INTRODUCTION

Section 11.03 requires mergers or share exchanges to be approved by the shareholders as follows:

In the case of a merger:

(1) the transaction must always be approved by the shareholders of the disappearing corporation; and

(2) the transaction must be approved by the shareholders of the surviving corporation if the number of voting or participating shares is increased by more than 20 percent as a result of the transaction.

In the case of a share exchange:

(1) the transaction must always be approved by the shareholders of the corporation whose shares are being acquired; and

(2) the transaction need not be approved by the shareholders of the corporation acquiring the shares.

Section 11.03 requires the board of directors to propose the plan of merger or sale exchange and then submit the proposal to the shareholders. When proposing a plan of merger or share exchange, the board of directors must make a recommendation to the shareholders that the plan be approved, unless it determines that because of conflict of interest or other special circumstances it should make no recommendation. If the board of directors so determines, it must describe the conflict or circumstances, and communicate the basis for its determination, when presenting the proposed plan of merger or share exchange to the shareholders.

Section 11.03(c) permits the board of directors to condition its submission of a plan of merger or share exchange on any basis; for example, the board may direct that the plan is approved only if it receives a favorable vote of a specified percentage of the disinterested shareholders voting on the plan or that shareholders holding no more than a specified number or percentage of shares file notice of intent to demand payment under chapter 13. See the discussion of conditional submissions in the Official Comment to section 10.03.

A plan of merger or share exchange, to be approved, must be approved by each voting group entitled to vote on the merger by a majority of all the votes entitled to be cast on the plan. This is a greater vote than that required for ordinary matters under section 7.25. The articles of incorporation of either corporation, however, may require a greater vote by one or more voting groups of that corporation, and if the transaction involves an amendment to the articles of incorporation of the surviving corporation which affects the voting requirements for future amendments, the transaction must also be approved by the vote required by section 7.27. See section 11.03(e). In addition, voting by more than one voting group may be required by section 11.03(f) or by the articles of incorporation. Finally, the board of directors may require a greater vote or a vote by voting groups under their power to make conditional submissions to shareholders described above. The articles of incorporation or the board of directors, however, may only require a vote by separate voting groups in addition to that otherwise required by this Act.

Only shareholders who have the right to vote on a merger or share exchange under section 11.03 have the right to dissent and obtain payment for their shares under chapter 13.

2. WHEN SURVIVING CORPORATION SHAREHOLDER APPROVAL IS NOT REQUIRED

Section 11.03(g) describes when approval by the shareholders of the surviving corporation is not required. The theory behind this subsection is that shareholders' votes should be required only if the transaction fundamentally alters the character of the enterprise or substantially reduces the shareholders' participation in voting or profit distribution. It is believed that the transactions for which shareholder approval is not required by subsection (g) do not alter the investors' prospects any more than many other management decisions, and thus should not require a shareholder vote. In particular, the 20 percent requirement of subsections (g)(3) and (4) is broadly consistent with the statutes of several states, including Delaware (20 percent), Michigan (20 percent), and Pennsylvania (15 percent), and also with the New York Stock Exchange requirement that shareholders must be consulted if the number of outstanding shares is to be increased by more than 18.5 percent.

The requirement that shareholders of the surviving corporation in a statutory merger have a right to vote if the increase in the number of shares exceeds 20 percent may be avoided by arranging the transaction in the form of a merger involving a subsidiary of the acquiring corporation or as a share exchange under section 11.02. This anomaly reflects a compromise among basically conflicting points of view.

The 20 percent requirement is applicable only if the corporation has available enough authorized shares to permit it to issue the shares without amending its articles of incorporation to increase authorized capital. If it must amend its articles of incorporation to authorize the shares necessary to complete the transaction, a shareholder vote on the amendment will be necessary in all cases. See section 10.03.

3. Voting by multiple voting groups

Section 11.03(f)(1) requires voting by voting groups on a plan of merger if the plan contains a provision that "if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment." See section 10.04. Under this provision, voting by voting groups may be required for one or more classes or series of shares of the surviving corporation as well as for one or more classes or series of the disappearing corporation.

Section 11.03(f)(2) requires voting by voting groups in a share exchange, with each class or series of shares that is to be acquired in a share exchange entitled to vote as a separate voting group. This provision protects all classes of shareholders when more than one class or series of shares are being acquired on different terms.

4. Application of the 20-percent requirement

In a merger transaction that involves an increase in shares of more than 20 percent, section 11.03(g) requires a shareholder vote in order to prevent significant dilution without the approval of the shareholders involved. Sections 11.03(g)(3) and (4) separately apply the 20-percent test to increases in the "voting shares" (as defined in section 11.03(h)(2)) and increases in "participating shares" (as defined in section 11.03(h)(1)). If either type of shares is increased by more than 20 percent in the merger transaction, the transaction must be approved by the shareholders.

Under the definitions in subsections (h)(1) and (2), the 20-percent requirement may be applied to shares with preferential rights if they are either voting or fully participating, and to deferred or contingent shares issued as a result of the merger. On the other hand, it is typically not applicable to shares issuable under antidilution clauses to balance share splits or share dividends; these shares would not become issuable "pursuant to the merger," but by virtue of later corporate action authorizing the split or dividend.

Sections 11.03(g)(3) and (4) only determine when a shareholders' vote is required; they do not relate to voting by voting groups. Whether or not a class or series of shares is entitled to vote as a separate voting group is determined by section 11.03(f).

5. Abandonment of merger or share exchange

Section 11.03(i) makes it clear that the corporations may abandon without shareholder approval a merger or share exchange even though it has been previously approved by the shareholders. Abandonment under this section does not affect contract rights of third parties. The plan, however, may require that abandonments be approved by shareholders before they are effective.

AMENDED NORTH CAROLINA COMMENTARY

This section essentially follows the same pattern as former G.S. 55-108 and 55-108.1, except it does not carry forward the provision in former G.S. 55-108(b) allowing nonvoting shareholders to vote on mergers. However, the corporation must give nonvoting shareholders notice of the proposed shareholders' meeting so that they can act if their rights will be adversely affected. The Model Act's requirement that notice be given to nonvoting shareholders was retained in this section, in contrast to G.S. 55-10-03, involving shareholders' meetings to consider amendments to the articles of incorporation, because a proposed merger or share exchange is a fundamental change, whereas most amendments to the articles of incorporation are not. It should be noted that the last sentence in the first section of the Official Comment is not correct for this Act. That sentence indicates that nonvoting shareholders have no right to dissent and obtain payment for their shares in a merger or share exchange. G.S. 55-13-02(a)(1) and (2) give nonvoting shareholders this right.

The Model Act was modified in subsection (b) to conform to changes made in G.S. 55-10-03.

The Model Act was modified in subsection (e) by inserting between the word "incorporation" and the word "or" the words "a bylaw adopted by the shareholders." This modification continues the existing concept of allowing a bylaw adopted by the shareholders to impose a higher quorum or voting requirement. The subsection was further amended by inserting at the end a clause providing that for purposes of Article 9 or already existing provisions in articles of incorporation or bylaws, a "merger" includes a share exchange.

Subdivision 11.03(f)(1) of the Model Act requires voting by voting groups on a plan of merger if the plan contains a provision that "if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment." Under this provision, voting by voting groups may be required for one or more classes or series of shares of the surviving corporation as well as for one or more classes or series of the disappearing corporation. This provision was modified in subdivision (f)(1) to create an exception where the consideration to be received in exchange for the shares of the voting group consists solely of cash.

The Model Act was modified in subdivision (f)(2) by substituting "to be acquired" for "included."

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

Effective October 1, 2005, this section is amended (i) to require the approval of each shareholder who will have personal liability for any corporate obligation solely as a result of owning shares in the surviving corporation, (ii) to allow articles of incorporation to require shareholder approval of a merger for which G.S. 55-11-03(g) would not otherwise require shareholder approval, and (iii) to allow a plan of merger to be amended if the plan of merger makes provision for amendment.

Legal Periodicals. — For article on the evolution of corporate combination law, see 76 N.C.L. Rev. 687 (1998).

For recent development, "In re Wachovia Shareholders Litigation: The Case for the Common Benefit Doctrine," see 84 N.C. L. Rev. 2066 (2006).

CASE NOTES

Failure to comply with the statutory procedures required for a corporate merger constitutes a breach of a director's fiduciary duty as well as a breach of the majority stockholders' duty to the minority. Clark v. B.H. Holland Co., 852 F. Supp. 1268 (E.D.N.C. 1994).

§ 55-11-04. Merger with subsidiary.

(a) Subject to Article 9, a parent corporation owning at least ninety percent (90%) of the outstanding shares of each class of a subsidiary corporation may merge the subsidiary into itself without approval of the shareholders of the parent corporation unless the articles of incorporation of the parent corporation require approval of the shareholders or the plan of merger contains one or more amendments to the articles of incorporation of the parent corporation for which shareholder approval is required by G.S. 55-10-03, and without approval of the board of directors or shareholders of the subsidiary corporation unless the articles of incorporation of the subsidiary corporation require approval of the shareholders of the subsidiary corporation. Subject to Article 9, a parent corporation owning at least ninety percent (90%) of the outstanding shares of each class of a subsidiary corporation may merge itself into the subsidiary corporation without approval of the board of directors or shareholders of the subsidiary corporation unless the articles of incorporation of the subsidiary corporation provide otherwise or the plan of merger contains one or more amendments to the articles of incorporation of the subsidiary corporation for which shareholder approval is required by G.S. 55-10-03. Except as otherwise provided in this subsection, the provisions of G.S. 55-11-01 and G.S. 55-11-03 apply to any merger described in this subsection.

(b) If a merger is consummated without approval of the subsidiary corporation's shareholders, the surviving corporation shall, within 10 days after the effective date of the merger, notify each shareholder of the subsidiary corporation as of the effective date of the merger, that the merger has become effective.

(c) Repealed by Session Laws 2005, c. 268, s. 21.

(d) Repealed by Session Laws 2005, c. 268, s. 21.

(e) Repealed by Session Laws 2005, c. 268, s. 21.

(f) The provisions of G.S. 55-13-02(c) do not apply to subsidiary corporations that are parties to mergers consummated under this section. (1955, c. 1371, s.

1; 1959, c. 1316, s. 37; 1973, c. 469, s. 33; 1989, c. 265, s. 1; 1997-485, s. 29; 2005-268, s. 21; 2006-226, s. 16(a).)

OFFICIAL COMMENT

Section 11.04(a) defines a "parent" corporation as one that owns at least 90 percent of the outstanding shares of each class of another corporation, and a "subsidiary" corporation as one whose shares are so owned. Section 11.04 permits merger of a subsidiary into its parent corporation upon adoption of a plan of merger by the board of directors of the parent alone. Separate action by the board of directors of the subsidiary is unnecessary because the share ownership of the parent corporation is normally sufficient to permit it to elect or remove the subsidiary's board of directors.

Further, the merger transaction need not be approved by the shareholders of either corporation. Approval by the shareholders of the subsidiary is meaningless because the parent's share ownership is sufficient to ensure the plan will be approved. Approval by the parent's shareholders is also unnecessary because the transaction does not materially change their rights: the ownership of the parent corporation is being changed only from 90 percent indirect ownership to 100 percent direct ownership of the same assets, and no significant amendment of the parent's articles of incorporation is being made. For the same reason, shareholders of the parent corporation do not have the right to dissent from the transaction under chapter 13.

Minority shareholders of the subsidiary corporation may receive shares, obligations, or other securities of the parent or any other corporation, or cash or other property in whole or in part in exchange for their shares. These shareholders are entitled to 30 days' notice of the plan of merger before it is effectuated.

Shareholders of the subsidiary corporation have a right to dissent from the merger transaction under chapter 13. Courts have held that in some circumstances such a transaction may constitute a breach of duty owed by the parent corporation to the shareholders of the subsidiary. See *Roland International Corp. v. Najjar,* 407 A.2d 1032 (Del. 1979).

NORTH CAROLINA COMMENTARY

This section is substantially different from former G.S. 55-108.1 in that it permits a parent corporation to merge a 90% subsidiary into the parent without a vote of the minority shareholders of the subsidiary; but such minority shareholders would still have a right of dissent and appraisal. *See* G.S. 55-13-02(a)(1).

The Model Act was modified in this section by adding an introductory phrase to subsection (a) to provide that the section is subject to Article 9, and by specifying "copy or summary" in subsection (d) to parallel subsection (c).

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

Effective October 1, 2005, this section is amended (i) to provide that the articles of incorporation of a parent or subsidiary corporation may require shareholder approval for a merger for which this section would otherwise waive such approval, (ii) to waive approval by the subsidiary corporation's board of directors unless the subsidiary corporation's articles of incorporation require approval of the subsidiary corporation's shareholders, and (iii) to require that notice of the merger be given to the subsidiary corporation's shareholders (if the shareholders are not required to approve the merger) within ten days after the merger instead of providing notice at least 30 days before the merger.

Legal Periodicals. — For article on the evolution of corporate combination law, see 76 N.C.L. Rev. 687 (1998).

§ 55-11-05. Articles of merger or share exchange.

(a) After a plan of merger or a plan of share exchange for the acquisition of shares of a domestic corporation has been authorized as required by this

Chapter, the surviving or acquiring corporation shall deliver to the Secretary of State for filing articles of merger or share exchange.

In the case of a merger, the articles of merger shall set forth (i) the name and state or country of incorporation of each merging corporation, (ii) the name of the merging corporation that will survive the merger and, if the surviving corporation is not authorized to transact business or conduct affairs in this State, a designation of its mailing address and a commitment to file with the Secretary of State a statement of any subsequent change in its mailing address, (iii) any amendments to the articles of incorporation of the surviving corporation provided in the plan of merger if the surviving corporation is a domestic corporation, and (iv) a statement that the plan of merger has been approved by each merging corporation in the manner required by law.

In the case of a share exchange, the articles of share exchange shall set forth (i) the name of the corporation whose shares will be acquired, (ii) the name and state or country of incorporation of the acquiring corporation, (iii) a designation of its mailing address and a commitment to file with the Secretary of State a statement of any subsequent change in its mailing address if the acquiring corporation is not authorized to transact business or conduct affairs in this State, and (iv) a statement that the plan of share exchange has been approved by the corporation whose shares will be acquired and by the acquiring corporation in the manner required by law.

(a1) If the plan of merger or share exchange is amended after the articles of merger or share exchange have been filed but before the articles of merger or share exchange become effective and any statement in the articles of merger or share exchange becomes incorrect as a result of the amendment, the surviving or acquiring corporation shall deliver to the Secretary of State for filing prior to the time the articles of merger or share exchange become effective an amendment to the articles of merger or share exchange correcting the incorrect statement. If the articles of merger or share exchange are abandoned after the articles of merger or share exchange are filed but before the articles of merger or share exchange become effective, the surviving or acquiring corporation shall deliver to the Secretary of State for filing prior to the time the articles of merger or share exchange become effective an amendment reflecting abandonment of the plan of merger or share exchange.

(b) A merger or share exchange takes effect when the articles of merger or share exchange become effective.

(c) Certificates of merger shall also be registered as provided in G.S. 47-18.1.

(d) In the case of a merger pursuant to G.S. 55-11-07 or a share exchange pursuant to G.S. 55-11-07, references in subsections (a) and (a1) of this section to "corporation" shall include a domestic corporation, a domestic nonprofit corporation, a foreign corporation, and a foreign nonprofit corporation as applicable. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G.S., s. 55-165; 1955, c. 1371, s. 1; 1967, c. 823, s. 18; 1973, c. 469, s. 34; 1989, c. 265, s. 1; 1991, c. 645, s. 10(b); 2005-268, s. 22; 2006-226, s. 16(b); 2006-259, s. 14.5(a)-(b); 2006-264, s. 44(b).)

OFFICIAL COMMENT

The articles of merger or share exchange formally make the terms of the transaction a matter of public record and the effective date of the articles is the effective date of their filing unless a delayed effective date is utilized. See section 1.23. The articles of merger or share exchange must describe whether the plan was submitted to the vote of one or more voting groups of the participating corporations entitled to vote separately on the plan, and, if so, either the total vote in favor and against the plan or a statement that the plan was approved by at least the number of undisputed votes required to approve the merger or share exchange by each voting group of each participating corporation entitled to vote separately on the plan.

NORTH CAROLINA COMMENTARY

Former G.S. 55-109, relating to articles of merger and articles of consolidation, contained a cross-reference to G.S. 47-18.1, requiring the local registration of certificates of merger or consolidation with the register of deeds where title to real property is transferred by operation of law pursuant to the merger or consolidation. A similar cross-reference to G.S. 47-18.1 was therefore added to this section as subsection (c).

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

Effective October 1, 2005, this section is amended to delete the requirement that the plan of merger or plan of share exchange be included in the articles of merger or articles of share exchange except that identifying information about the corporations contained in the plan is required to be included in the articles plus, in the case of a merger, any amendments to the articles of incorporation of a surviving domestic corporation that are contained in the plan of merger. Other changes to this section clarify its application to mergers of domestic nonprofit corporations, foreign business corporations, and foreign nonprofit corporations with domestic business corporations and to share exchanges with foreign business corporations. In related changes, provisions requiring certain statements to be included in the articles of merger when a foreign business corporation or foreign nonprofit corporation is the surviving corporation are relocated to this section from G.S. 55-11-07 and 55-11-09, and provisions requiring certain statements to be included in the articles of share exchange when a foreign business corporation is the acquiring corporation are relocated to this section from G.S. 55-11-07.

§ 55-11-06. Effect of merger or share exchange.

(a) When a merger pursuant to G.S. 55-11-01, 55-11-04, 55-11-07, or 55-11-09 takes effect:

(1) Each other merging corporation merges into the surviving corporation and the separate existence of each merging corporation except the surviving corporation ceases.

(2) The title to all real estate and other property owned by each merging corporation is vested in the surviving corporation without reversion or impairment.

(3) The surviving corporation has all liabilities of each merging corporation.

(4) A proceeding pending by or against any merging corporation may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for a merging corporation whose separate existence ceases in the merger.

(5) If a domestic corporation survives the merger, its articles of incorporation are amended to the extent provided in the articles of merger.

(6) The shares of each merging corporation that are to be converted into shares, obligations, or other securities of the surviving or any other corporation or into the right to receive cash or other property are thereupon converted, and the former holders of the shares are entitled only to the rights provided to them in the plan of merger or, in the case of former holders of shares in a domestic corporation, any right they may have under Article 13 of this Chapter.

(7) If a foreign corporation or foreign nonprofit corporation survives the merger, it is deemed:

a. To agree that it will promptly pay to dissenting shareholders of any merging domestic corporation the amount, if any, to which they are entitled under Article 13 of this Chapter and otherwise to comply with the requirements of Article 13 as if it were a surviving domestic corporation in the merger.

b. To agree that it may be served with process in this State in any proceeding for enforcement (i) of any obligation of any merging domestic corporation, (ii) of the rights of dissenting shareholders of any merging domestic corporation under Article 13 of this Chapter, and (iii) of any obligation of the surviving foreign corporation or foreign nonprofit corporation arising from the merger.

c. To have appointed the Secretary of State as its agent for service of process in any proceeding for enforcement as specified in sub-subdivision b. of this subdivision. Service of process on the Secretary of State shall be made by delivering to, and leaving with, the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process and the fee required by G.S. 55-1-22(b). Upon receipt of service of process on behalf of a surviving foreign corporation or foreign nonprofit corporation in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the surviving foreign corporation or foreign nonprofit corporation. If the surviving foreign corporation or foreign nonprofit corporation is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office, or, if there is no principal office on file, its registered office. If the surviving foreign corporation or foreign nonprofit corporation is not authorized to transact business or conduct affairs in this State, the address for mailing shall be the mailing address designated pursuant to G.S. 55-11-05(a).

The merger shall not affect the liability or absence of liability of any holder of shares in a merging corporation for any acts, omissions, or obligations of any merging corporation made or incurred prior to the effectiveness of the merger.

(b) When a share exchange for the acquisition of shares of a domestic corporation pursuant to G.S. 55-11-02 or G.S. 55-11-07 takes effect:

(1) The shares of the acquired corporation are exchanged as provided in the plan of share exchange, and the former holders of the shares are entitled only to the exchange rights provided in the plan of share exchange or any right they may have under Article 13 of this Chapter.

(2) If the acquiring corporation is not a domestic corporation, it is deemed to agree that it will promptly pay to dissenting shareholders of the acquired corporation the amount, if any, to which they are entitled under Article 13 of this Chapter and otherwise to comply with the requirements of Article 13 as if it were an acquiring domestic corporation in the share exchange.

(3) If the acquiring corporation is not a domestic corporation, the acquiring corporation is deemed:

a. To agree that it may be served with process in this State in any proceeding for enforcement (i) of the rights of dissenting shareholders of the acquired corporation under Article 13 of this Chapter and (ii) of any obligation of the acquiring corporation arising from the share exchange; and

b. To have appointed the Secretary of State as its agent for service of process in any proceeding for enforcement as specified in sub-subdivision a. of this subdivision. Service of process on the Secretary of State shall be made by delivering to, and leaving with, the

Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process and the fee required by G.S. 55-1-22(b). Upon receipt of service of process on behalf of an acquiring corporation in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the acquiring corporation. If the acquiring corporation is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office or, if there is no principal office on file, its registered office. If the acquiring corporation is not authorized to transact business or conduct affairs in this State, the address for mailing shall be the mailing address designated pursuant to G.S. 55-11-05(a).

(c) In the case of a merger pursuant to G.S. 55-11-07 or G.S. 55-11-09 or a share exchange pursuant to G.S. 55-11-07, references in subsections (a) and (b) of this section to "corporation" shall include a domestic corporation, a domestic nonprofit corporation, a foreign corporation, and a foreign nonprofit corporation as applicable. (1925, c. 77, s. 1; 1943, c. 270; G.S., s. 55-166; 1955, c. 1371, s. 1; 1967, c. 950, s. 1; 1989, c. 265, s. 1; 1999-369, s. 1.7; 2005-268, s. 23; 2006-264, s. 44(c).)

OFFICIAL COMMENT

Section 11.06 describes the legal consequences of a merger or share exchange on its effective date.

Section 11.06(a) describes the effect of a merger. On the effective date every disappearing corporation that is a party to the merger disappears into the surviving corporation and the surviving corporation automatically becomes the owner of all real and personal property and becomes subject to all liabilities, actual or contingent, of each disappearing corporation. A merger is not a conveyance or transfer, and does not give rise to claims of reverter or impairment of title based on a prohibited conveyance or transfer. See section 11.06(a)(2). Further, all pending litigation is continued; the name of the surviving corporation may, but need not be, substituted for the name of a disappearing corporation that is a party to litigation.

Section 11.06(a)(6) provides that if any shareholders to any party to the merger are to receive different shares or cash or property under the plan of merger, the rights of those shareholders after the articles of merger are filed are limited to their rights under the plan of merger or their rights under chapter 13 of this Act.

The articles of incorporation of the surviving corporation are amended as provided in the plan of merger on the effective date of the merger. See section 11.06(a)(5).

Section 11.06(b) describes the effect of a share exchange. On the effective date, the shareholders of the acquired class of shares cease to be shareholders of the acquired corporation. On that date they are entitled to receive only the consideration provided in the plan of share exchange, or the rights of dissenting shareholders under chapter 13.

NORTH CAROLINA COMMENTARY

This section is identical to the comparable section of the Model Act, except for a minor modification to subdivision (a)(6). "Cash" in that subdivision was changed to "right to receive cash" and the word "thereupon" was added to clarify the meaning.

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

Effective October 1, 2005, this section is changed to provide that any amendments to the articles of incorporation of a surviving domestic corporation must be set forth in the articles of merger because G.S. 55-11-05 (as amended effective October 1, 2005) no longer requires the plan of merger to be included in the articles of merger. A provision is added stating that the merger does not affect the liability of a shareholder for obligations of a merging corporation incurred prior to the merger. Other amendments to this section clarify its application to mergers of domestic nonprofit corporations, foreign business corporations, and foreign nonprofit corporations with domestic business corporations and to share exchanges with foreign business corporations. In related changes, provisions applying when the surviving corporation in a merger is a foreign business corporation or foreign nonprofit corporation are relocated to this section from G.S. 55-11-07 and 55-11-09, and provisions applying when the acquiring corporation in a share exchange is a foreign business corporation are relocated to this section from G.S. 55-11-07.

Legal Periodicals. — For comment, "Beyond Budd Tire: Examing Corporate Successor Liability in North Carolina," see 30 Wake Forest L. Rev. 889 (1995).

For "Legislative Survey: Business & Banking," see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

Editor's Note. — *Most of the cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Merger does not create new or additional rights. The surviving corporation is vested with all the rights which each party to the merger could exercise, but only those rights. Good Will Distribs. (N.), Inc. v. Shaw, 247 N.C. 157, 100 S.E.2d 334 (1957).

Surviving Corporation Succeeds by Operation of Law. — In the event of a merger between corporations, the surviving corporation succeeds by operation of law to all of the rights, privileges, immunities, franchises and other property of the constituent corporations, without the necessity of a deed, bill of sale, or other form of assignment. Econo-Travel Motor Hotel Corp. v. Taylor, 301 N.C. 200, 271 S.E.2d 54 (1980).

Since a surviving corporation succeeded by operation of law to all of the rights and obligations of a constituent corporation under G.S. 55-11-06(a)(2), a company, which had merged with a former employee's employer, had standing to sue for enforcement of a noncompetition agreement entered into by the employee and his former employer. Philips Elecs. N. Am. Corp. v. Hope, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 55279 (M.D.N.C. June 30, 2009).

Application of Statute of Limitations Against Surviving Corporation. — The six-year statute of limitations of G.S. 1-50 did not apply to an action for fraud arising out of the collapse of the floor of a building where the corporate tenant of the building merged into the corporate plaintiff after the building collapsed. Since the plaintiff succeeded to the rights of the corporate tenant and thus was in possession of the building as tenant at the time of the injury, it came within the exception under G.S. 1-50(5) (see now G.S. 1-50(a)(5). Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Breach of Stock Option and Restriction Agreement. — Trial court properly granted partial summary judgment to a businessman against a shareholder and a corporation because the merger of a company into a corporation without any prior notice to or consent by the businessman resulted in a breach of a stock option and restriction agreement between the businessman and the company and its sole shareholder, as the merger clearly effected a change in the capitalization of the company. Lee v. Scarborough, 162 N.C. App. 674, 592 S.E.2d 43, 2004 N.C. App. LEXIS 259 (2004).

Surviving corporation was liable, pursuant to G.S. 55-11-06(a)(3), for a breach of an option agreement by a merged corporation that had given a consultant a five-year option to purchase 50 percent of its shares; because the merger could not have been accomplished without the actions of the sole shareholder and director, who was the only person could vote for and approve the merger, he was also personally liable. Lee v. Scarborough, 164 N.C. App. 357, 595 S.E.2d 729, 2004 N.C. App. LEXIS 812 (2004).

§ 55-11-07. Merger or share exchange with foreign corporation.

(a) One or more foreign corporations may merge with one or more domestic corporations, and a foreign corporation may enter into a share exchange with a domestic corporation if:

(1) In a merger, the merger is permitted by the law of the state or country under whose law each foreign corporation is incorporated and, to the extent applicable, each domestic or foreign corporation complies with that law in effecting the merger;

(2) In a share exchange, if the corporation whose shares will be acquired is a foreign corporation, the share exchange is permitted by the law of the state or country under whose law the foreign corporation is incorporated and the foreign corporation and the acquiring domestic corporation comply with that law in effecting the share exchange;

(3) The foreign corporation complies with G.S. 55-11-05 if it is the surviving corporation of the merger or acquiring corporation of the share exchange; and

(4) Each domestic corporation complies with the applicable provisions of G.S. 55-11-01 through G.S. 55-11-04 and, if it is the surviving corporation of the merger with G.S. 55-11-05.

(b) Repealed by Session Laws 2005, c. 268, s. 24.

(c) This section does not limit the power of a foreign corporation to acquire all or part of the shares of one or more classes or series of a domestic corporation through a voluntary exchange or otherwise, or the power of a domestic corporation to acquire all or part of the shares of one or more classes or series of a foreign corporation through a voluntary exchange or otherwise. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G.S., s. 55-165; 1955, c. 1371, s. 1; 1973, c. 469, s. 35; 1989, c. 265, s. 1; 2001-387, ss. 18, 19; 2005-268, s. 24.)

OFFICIAL COMMENT

Section 11.07 permits mergers or share exchanges between domestic and foreign corporations.

In connection with a plan of merger, the plan must be permitted under the law of the state or country of incorporation of the foreign corporation as well as under the law of the domestic state. The surviving corporation, if it is a foreign corporation, must file articles of merger to accomplish the disappearance of the domestic corporation or corporations, and thereby irrevocably appoints the secretary of state as agent for service of process and agrees to pay dissenters in accordance with chapter 13.

A plan of share exchange, unlike a plan of merger, need not be authorized by the state or country of incorporation of the acquiring foreign corporation. If the domestic law authorizes a compulsory share exchange to acquire a class or series of shares of a domestic corporation, it makes no difference whether the acquiring corporation is foreign or domestic. This kind of transaction does not affect the separate corporate existence of, or impose the liabilities of the disappearing corporation on, the acquiring foreign corporation.

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

Effective October 1, 2005, this section is amended to provide that if the corporation whose shares are to be acquired in a share exchange is a foreign business corporation, the laws of the state or country of incorporation of the foreign business corporation must permit the share exchange and both the foreign business corporation and the acquiring domestic business corporation must comply with those laws. In the case of a merger involving a foreign business corporation, the merging domestic business corporation must comply with the laws of the state or country of incorporation of the merging foreign business corporation to the extent applicable in addition to the merging foreign business corporation complying with those laws. Other amendments reflect the relocation to G.S. 55-11-05 and 55-11-06 from this section of certain provisions applying if a foreign business corporation is the surviving corporation in a merger or the acquiring corporation in a share exchange.

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 55-11-08. Article 9 to control.

Nothing in this Article shall be construed to modify in any manner the provisions or applicability of Article 9. (1989, c. 265, s. 1.)

NORTH CAROLINA COMMENTARY

This section, which does not appear in the Model Act, was added to clarify that Article 11 does not in any manner modify the provisions of Article 9.

§ 55-11-09. Merger with nonprofit corporation.

(a) One or more domestic or foreign nonprofit corporations may merge with one or more domestic corporations if:

(1) Each domestic nonprofit corporation complies with the applicable provisions of G.S. 55A-11-01 through G.S. 55A-11-03;

(2) In a merger involving one or more foreign nonprofit corporations, the merger is permitted by law of the state or country under whose law each foreign nonprofit corporation is incorporated and, to the extent applicable, each domestic corporation and each domestic or foreign nonprofit corporation complies with that law in effecting the merger;

(3) The domestic or foreign nonprofit corporation complies with G.S. 55-11-05 if it is the surviving corporation; and

(4) Each domestic corporation complies with the applicable provisions of G.S. 55-11-01, 55-11-03, and 55-11-04 and, if it is the surviving corporation, with G.S. 55-11-05.

(b) Repealed by Session Laws 2005, c. 268, s. 25.

(c) This section does not limit the power of a domestic or foreign nonprofit corporation to acquire all or part of the shares of one or more classes or series of a domestic corporation through a voluntary exchange or otherwise. (1995, c. 400, s. 13; 2001-387, ss. 20, 21; 2005-268, s. 25.)

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

Effective October 1, 2005, this section is amended to provide that if any of the merging corporations is a foreign nonprofit corporation, each merging domestic business corporation and any merging domestic nonprofit corporation must comply with the laws of the state or country of incorporation of the foreign nonprofit corporation to the extent applicable in addition to the merging foreign nonprofit corporation complying with those laws. Other amendments reflect the relocation to G.S. 55-11-05 and 55-11-06 from this section of certain provisions applying if a foreign nonprofit corporation is the surviving corporation in the merger.

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 55-11-10. Merger with unincorporated entity.

(a) Repealed by Session Laws 2001-387, s. 22, effective January 1, 2002.

(b) One or more domestic corporations may merge with one or more unincorporated entities and, if desired, one or more foreign corporations, domestic nonprofit corporations, or foreign nonprofit corporations if:

(1) The merger is permitted by the laws of the state or country governing the organization and internal affairs of each other merging business entity; and

(2) Each merging domestic corporation and each other merging business entity comply with the requirements of this section and, to the extent applicable, the laws referred to in subdivision (1) of this subsection.

(c) Each merging domestic corporation and each other merging business entity shall approve a written plan of merger containing:

(1) For each merging business entity, its name, type of business entity, and the state or country whose laws govern its organization and internal affairs;

(2) The name of the merging business entity that shall survive the merger;

(3) The terms and conditions of the merger;

(4) The manner and basis for converting the interests in each merging business entity into interests, obligations, or securities of the surviving business entity or into cash or other property in whole or in part; and

(5) If the surviving business entity is a domestic corporation, any amendments to its articles of incorporation that are to be made in connection with the merger.

(c1) The plan of merger may contain other provisions relating to the merger.

(c2) The provisions of the plan of merger, other than the provisions referred to in subdivisions (1), (2), and (5) of subsection (c) of this section, may be made dependent on facts objectively ascertainable outside the plan of merger if the plan of merger sets forth the manner in which the facts will operate upon the affected provisions. The facts may include any of the following:

(1) Statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data.

(2) A determination or action by the corporation or by any other person, group, or body.

(3) The terms of, or actions taken under, an agreement to which the corporation is a party, or any other agreement or document.

(c3) In the case of a domestic corporation, approval of the plan of merger requires that the plan of merger be adopted by its board of directors as provided in G.S. 55-11-03 and, unless shareholder approval is not required under subsection (g) of G.S. 55-11-03, be approved by its shareholders as provided in G.S. 55-11-03. If any shareholder of a merging domestic corporation has or will have personal liability for any existing or future obligation of the surviving business entity solely as a result of holding an interest in the surviving business entity, then in addition to the requirements of the preceding sentence, approval of the plan of merger by the domestic corporation shall require the affirmative vote or written consent of that shareholder. In the case of each other merging business entity, the plan of merger must be approved in accordance with the laws of the state or country governing the organization and internal affairs of that merging business entity.

(c4) After a plan of merger has been approved by a domestic corporation but before the articles of merger become effective, the plan of merger (i) may be amended as provided in the plan of merger, or (ii) may be abandoned (subject to any contractual rights) as provided in the plan of merger or, if there is no such provision, as determined by the board of directors without further shareholder action.

(d) After a plan of merger has been approved by each merging domestic corporation and each other merging business entity as provided in subsection (c) of this section, the surviving business entity shall deliver articles of merger to the Secretary of State for filing. The articles of merger shall set forth all of the following:

(1) Repealed by Session Laws 2005, c. 268, s. 27.

(2) For each merging business entity, its name, type of business entity, and the state or country whose laws govern its organization and internal affairs.

(3) The name of the merging business entity that shall survive the merger and, if the surviving business entity is not authorized to transact business or conduct affairs in this State, a designation of its mailing address and a commitment to file with the Secretary of State a statement of any subsequent change in its mailing address.

(3a) If the surviving business entity is a domestic corporation, any amendment to its articles of incorporation as provided in the plan of merger.

(4) A statement that the plan of merger has been approved by each merging business entity in the manner required by law.

(5) Repealed by Session Laws 2005, c. 268, s. 27.

If the plan of merger is amended after the articles of merger have been filed but before the articles of merger become effective, and any statement in the articles of merger becomes incorrect as a result of the amendment, the surviving business entity shall deliver to the Secretary of State for filing prior to the time the articles of merger become effective an amendment to the articles of merger correcting the incorrect statement. If the articles of merger are abandoned after the articles of merger are filed but before the articles of merger become effective, the surviving business entity shall deliver to the Secretary of State for filing prior to the time the articles of merger become effective an amendment reflecting abandonment of the plan of merger.

Certificates of merger shall also be registered as provided in G.S. 47-18.1.

(e) A merger takes effect when the articles of merger become effective. When a merger takes effect:

(1) Each other merging business entity merges into the surviving business entity and the separate existence of each merging business entity except the surviving business entity ceases;

(2) The title to all real estate and other property owned by each merging business entity is vested in the surviving business entity without reversion or impairment;

(3) The surviving business entity has all liabilities of each merging business entity;

(4) A proceeding pending by or against any merging business entity may be continued as if the merger did not occur, or the surviving business entity may be substituted in the proceeding for a merging business entity whose separate existence ceases in the merger;

(5) If a domestic corporation is the surviving business entity, its articles of incorporation shall be amended to the extent provided in the articles of merger;

(6) The interests in each merging business entity that are to be converted into interests, obligations, or securities of the surviving business entity or into the right to receive cash or other property are thereupon so converted, and the former holders of the interests are entitled only to the rights provided to them in the plan of merger or, in the case of former holders of shares in a domestic corporation, any rights they may have under Article 13 of this Chapter; and

(7) If the surviving business entity is not a domestic corporation, the surviving business entity is deemed to agree that it will promptly pay to the dissenting shareholders of any merging domestic corporation the amount, if any, to which they are entitled under Article 13 of this

Chapter and otherwise to comply with the requirements of Article 13 as if it were a surviving domestic corporation in the merger.

The merger shall not affect the liability or absence of liability of any holder of an interest in a merging business entity for any acts, omissions, or obligations of any merging business entity made or incurred prior to the effectiveness of the merger. The cessation of separate existence of a merging business entity in the merger shall not constitute a dissolution or termination of the merging business entity.

(e1) If the surviving business entity is not a domestic limited liability company, a domestic corporation, a domestic nonprofit corporation, or a domestic limited partnership, when the merger takes effect the surviving business entity is deemed:

(1) To agree that it may be served with process in this State in any proceeding for enforcement (i) of any obligation of any merging domestic limited liability company, domestic corporation, domestic nonprofit corporation, domestic limited partnership, or other partnership as defined in G.S. 59-36 that is formed under the laws of this State, (ii) the rights of dissenting shareholders of any merging domestic corporation under Article 13 of this Chapter, and (iii) any obligation of the surviving business entity arising from the merger; and

(2) To have appointed the Secretary of State as its agent for service of process in any such proceeding. Service on the Secretary of State of any such process shall be made by delivering to and leaving with the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of such process and the fee required by G.S. 55-1-22(b). Upon receipt of service of process on behalf of a surviving business entity in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the surviving business entity. If the surviving business entity is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office or, if there is no principal office on file, its registered office. If the surviving business entity is not authorized to transact business or conduct affairs in this State, the address for mailing shall be the mailing address designated pursuant to subdivision (3) of subsection (d) of this section.

(f) This section does not apply to a merger that does not include a merging unincorporated entity. (1999-369, s. 1.8; 2000-140, s. 45; 2001-387, ss. 22, 23, 24, 25; 2005-268, ss. 26, 27, 28; 2007-385, s. 2.)

Editor's Note. — Session Laws 1999-369, s. 1.8 set out present subsection (e1) within subsection (e). The redesignation of this subsection was set out above pursuant to directions from the Revisor of Statutes.

Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Legal Periodicals. — For "Legislative Survey: Business & Banking," see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

Cited in Lee v. Scarborough, 162 N.C. App. 674, 592 S.E.2d 43, 2004 N.C. App. LEXIS 259 (2004).

ARTICLE 11A.

Conversions.

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Part 1. Conversion to Corporation.

§ 55-11A-01. Conversion.

A business entity, other than a domestic corporation, may convert to a domestic corporation if:

(1) The conversion is permitted by the laws of the state or country governing the organization and internal affairs of the converting business entity; and

(2) The converting business entity complies with the requirements of this Part and, to the extent applicable, the laws referred to in subdivision (1) of this section. (2001-387, s. 17.)

§ 55-11A-02. Plan of conversion.

(a) The converting business entity shall approve a written plan of conversion containing:

(1) The name of the converting business entity, its type of business entity, and the state or country whose laws govern its organization and internal affairs;

(2) The name of the resulting domestic corporation into which the converting business entity shall convert;

(3) The terms and conditions of the conversion; and

(4) The manner and basis for converting the interests in the converting business entity into shares, obligations, or other securities of the resulting domestic corporation or into cash or other property in whole or in part.

(a1) The plan of conversion may contain other provisions relating to the conversion.

(a2) The provisions of the plan of conversion, other than the provisions required by subdivisions (1) and (2) of subsection (a) of this section, may be made dependent on facts objectively ascertainable outside the plan of conversion if the plan of conversion sets forth the manner in which the facts will operate upon the affected provisions. The facts may include any of the following:

(1) Statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data.

(2) A determination or action by the converting business entity or by any other person, group, or body.

(3) The terms of, or actions taken under, an agreement to which the converting business entity is a party, or any other agreement or document.

(b) The plan of conversion shall be approved in accordance with the laws of the state or country governing the organization and internal affairs of the converting business entity.

(c) After a plan of conversion has been approved as provided in subsection (b) of this section, but before articles of incorporation for the resulting domestic corporation become effective, the plan of conversion may be amended or abandoned to the extent permitted by the laws that govern the organization and internal affairs of the converting business entity. (2001-387, s. 17; 2005-268, s. 29.)

§ 55-11A-03. Filing of articles of incorporation by converting entity.

(a) After a plan of conversion has been approved by the converting business entity as provided in G.S. 55-11A-02, the converting business entity shall deliver articles of incorporation to the Secretary of State for filing. In addition to the matters required or permitted by G.S. 55-2-02, the articles of incorporation shall contain articles of conversion stating:

(1) That the corporation is being formed pursuant to a conversion of a business entity;
(2) The name of the converting business entity, its type of business entity, and the state or country whose laws govern its organization and internal affairs; and
(3) That a plan of conversion has been approved by the converting business entity as required by law.

(b) If the plan of conversion is abandoned after the articles of incorporation have been filed with the Secretary of State but before the articles of incorporation become effective, the converting business entity shall deliver to the Secretary of State for filing prior to the time the articles of incorporation become effective an amendment to the articles of incorporation withdrawing the articles of incorporation.

(c) The conversion takes effect when the articles of incorporation become effective.

(d) Certificates of conversion shall also be registered as provided in G.S. 47-18.1. (2001-387, s. 17.)

§ 55-11A-04. Effects of conversion.

When the conversion takes effect:

(1) The converting business entity ceases its prior form of organization and continues in existence as the resulting domestic corporation;
(2) The title to all real estate and other property owned by the converting business entity continues vested in the resulting domestic corporation without reversion or impairment;
(3) All liabilities of the converting business entity continue as liabilities of the resulting domestic corporation;
(4) A proceeding pending by or against the converting business entity may be continued as if the conversion did not occur; and
(5) The interests in the converting business entity that are to be converted into shares, obligations, or other securities of the resulting domestic corporation or into the right to receive cash or other property are thereupon so converted, and the former holders of interests in the converting business entity are entitled only to the rights provided in the plan of conversion.

The conversion shall not affect the liability or absence of liability of any holder of an interest in the converting business entity for any acts, omissions, or obligations of the converting business entity made or incurred prior to the effectiveness of the conversion. The cessation of the existence of the converting business entity in its prior form of organization in the conversion shall not constitute a dissolution or termination of the converting business entity. (2001-387, s. 17.)

§§ 55-11A-05 through 55-11A-09: Reserved for future codification purposes.

Part 2. Conversion of Corporation.

§ 55-11A-10. Conversion.

A domestic corporation may convert to a different business entity if:

(1) The conversion is permitted by the laws of the state or country governing the organization and internal affairs of such other business entity; and

(2) The converting domestic corporation complies with the requirements of this Part and, to the extent applicable, the laws referred to in subdivision (1) of this section. (2001-387, s. 17.)

§ 55-11A-11. Plan of conversion.

(a) The converting domestic corporation shall approve a written plan of conversion containing:

(1) The name of the converting domestic corporation;

(2) The name of the resulting business entity into which the domestic corporation shall convert, its type of business entity, and the state or country whose laws govern its organization and internal affairs;

(3) The terms and conditions of the conversion; and

(4) The manner and basis for converting the shares of the domestic corporation into interests, obligations, or securities of the resulting business entity or into cash or other property in whole or in part.

(a1) The plan of conversion may contain other provisions relating to the conversion.

(a2) The provisions of the plan of conversion, other than the provisions required by subdivisions (1) and (2) of subsection (a) of this section, may be made dependent on facts objectively ascertainable outside the plan of conversion if the plan of conversion sets forth the manner in which the facts will operate upon the affected provisions. The facts may include any of the following:

(1) Statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data.

(2) A determination or action by the converting domestic corporation or by any other person, group, or body.

(3) The terms of, or actions taken under, an agreement to which the converting domestic corporation is a party, or any other agreement or document.

(b) For a plan of conversion to be approved:

(1) The board of directors shall recommend the plan of conversion to the shareholders, unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation, in which event the board of directors shall communicate the basis for its lack of a recommendation to the shareholders with the plan; and

(2) The shareholders entitled to vote shall approve the plan.

(c) The board of directors may condition its submission of the proposed conversion on any basis.

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with G.S. 55-7-05. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the plan of conversion and contain or be accompanied by a copy of the plan.

(e) Unless this Chapter, the articles of incorporation, a bylaw adopted by the shareholders or the board of directors, acting pursuant to subsection (c) of this section, require a greater vote or a vote by voting groups, the plan of conversion to be authorized shall be approved by each voting group entitled to vote separately on the plan by a majority of all the votes entitled to be cast on the plan by that voting group and, for the purpose of Article 9 of this Chapter or any provision in the articles of incorporation or bylaws adopted prior to January 1, 2002, a conversion shall be deemed to be included within the term "merger". If any shareholder of the converting domestic corporation has or will have personal liability for any existing or future obligation of the resulting business entity solely as a result of holding an interest in the resulting business entity, then in addition to the requirements of the preceding sentence, approval of the plan of conversion by the domestic corporation shall require the affirmative vote or written consent of that shareholder.

(f) Separate voting by voting groups is required on a plan of conversion if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment under G.S. 55-10-04, except where the consideration to be received in exchange for the shares of that group consists solely of cash.

(g) After a plan of conversion has been approved by a domestic corporation but before the articles of conversion become effective, the plan of conversion (i) may be amended as provided in the plan of conversion, or (ii) may be abandoned, subject to any contractual rights, as provided in the plan of conversion or, if there is no such provision, as determined by the board of directors without further shareholder action. (2001-387, s. 17; 2005-268, s. 30.)

§ 55-11A-12. Articles of conversion.

(a) After a plan of conversion has been approved by the converting domestic corporation as provided in G.S. 55-11A-11, the converting domestic corporation shall deliver articles of conversion to the Secretary of State for filing. The articles of conversion shall state:

(1) The name of the converting domestic corporation;

(2) The name of the resulting business entity, its type of business entity, the state or country whose laws govern its organization and internal affairs, and, if the resulting business entity is not authorized to transact business or conduct affairs in this State, a designation of its mailing address and a commitment to file with the Secretary of State a statement of any subsequent change in its mailing address; and

(3) That a plan of conversion has been approved by the domestic corporation as required by law.

(b) If the domestic corporation is converting to a business entity whose formation, or whose status as a registered limited liability partnership as defined in G.S. 59-32, requires the filing of a document with the Secretary of State, then notwithstanding subsection (a) of this section, the articles of conversion shall be included as part of that document and shall contain the information required by the laws governing the organization and internal affairs of the resulting business entity.

(c) If the plan of conversion is abandoned after the articles of conversion have been filed with the Secretary of State but before the articles of conversion become effective, the converting domestic corporation shall deliver to the Secretary of State for filing prior to the time the articles of conversion become effective an amendment to the articles of conversion withdrawing the articles of conversion.

(d) The conversion takes effect when the articles of conversion become effective.

(e) Certificates of conversion shall also be registered as provided in G.S. 47-18.1. (2001-387, s. 17; 2001-487, s. 62(d).)

§ 55-11A-13. Effects of conversion.

(a) When the conversion takes effect:

(1) The converting domestic corporation ceases its prior form of organization and continues in existence as the resulting business entity;

(2) The title to all real estate and other property owned by the converting domestic corporation continues vested in the resulting business entity without reversion or impairment;

(3) All liabilities of the converting domestic corporation continue as liabilities of the resulting business entity;

(4) A proceeding pending by or against the converting domestic corporation may be continued as if the conversion did not occur;

(5) The shares in the converting domestic corporation that are to be converted into interests, obligations, or securities of the resulting business entity or into the right to receive cash or other property are thereupon so converted, and the former shareholders of the converting domestic corporation are entitled only to the rights provided in the plan of conversion or any rights they may have under Article 13 of this Chapter; and

(6) The resulting business entity is deemed to agree that it will promptly pay to the dissenting former shareholders of the converting domestic corporation the amount, if any, to which they are entitled under Article 13 of this Chapter and otherwise to comply with the requirements of Article 13 as if it were a domestic corporation.

The conversion shall not affect the liability or absence of liability of any shareholder of the converting domestic corporation for any acts, omissions, or obligations of the converting domestic corporation made or incurred prior to the effectiveness of the conversion. The cessation of the existence of the converting domestic corporation in its form of organization as a domestic corporation in the conversion shall not constitute a dissolution or termination of the converting domestic corporation.

(b) If the resulting business entity is not a domestic limited liability company or a domestic limited partnership, when the conversion takes effect the resulting business entity is deemed:

(1) To agree that it may be served with process in this State for enforcement of (i) any obligation of the converting domestic corporation, the rights of dissenting shareholders of the converting domestic corporation under Article 13 of this Chapter, and (iii) any obligation of the resulting business entity arising from the conversion; and

(2) To have appointed the Secretary of State as its agent for service of process in any proceeding described in subdivision (1) of this subsection. Service on the Secretary of State of any such process shall be made by delivering to and leaving with the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process and the fee required by G.S.

55-1-22(b). Upon receipt of service of process on behalf of a resulting business entity in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the resulting business entity. If the resulting business entity is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office or, if there is no principal office on file, its registered office. If the resulting business entity is not authorized to transact business or conduct affairs in this State, the address for mailing shall be the mailing address designated pursuant to G.S. 55-11A-12(a)(2). (2001-387, s. 17.)

ARTICLE 12.

Transfer of Assets.

NORTH CAROLINA COMMENTARY

The title of this article in the Model Act was broadened to describe better the subject matter of the article, which is the sale, lease, exchange, or mortgage of assets.

§ 55-12-01. Sale of assets in regular course of business and mortgage of assets.

(a) A mortgage of or other security interest in all or any part of the property of a corporation may be made by authority of the board of directors without approval of the shareholders, unless otherwise provided in the articles of incorporation or in bylaws adopted by the shareholders.

(b) Unless otherwise provided in the articles of incorporation or in bylaws adopted by the shareholders, a corporation may, on the terms and conditions and for the consideration determined by the board of directors, and without approval by the shareholders:

(1) Sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property in the usual and regular course of business; or

(2) Transfer any or all of its property to a corporation or an unincorporated entity all the shares or ownership interests of which are owned by the corporation. (1925, c. 235; 1929, c. 269; 1939, c. 279; G.S., s. 55-26; 1955, c. 1371, s. 1; 1989, c. 265, s. 1; 2001-508, s. 1.)

OFFICIAL COMMENT

A sale of "all or substantially all" the corporate assets in the regular course of business is governed by section 12.01. Mortgages of all of the corporation's assets or redeployment of those assets through a wholly owned subsidiary are also covered by section 12.01. All other sales of "all or substantially all" the corporate assets are governed by section 12.02. Dispositions or transfers of property that do not involve "all or substantially all" the property of the corporation are not controlled by statute and may be approved by the board of directors (or authorized corporate officer) in the same manner as any other corporate transaction.

1. THE MEANING OF "ALL OR SUBSTANTIALLY ALL"

The phrase "all or substantially all," chosen by the draftsmen of the Model Act, is intended to mean what it literally says, "all or substantially all." The phrase "substantially all" is synonymous with "nearly all" and was added merely to make it clear that the statutory requirements could not be avoided by retention of some minimal or nominal residue of the original assets. A sale of all the corporate assets other than cash or cash equivalents is normally the sale of "all or substantially all" of the corporation's property. A sale of several distinct manufacturing lines while retaining one or more lines is normally not a sale of "all or substantially all" even though the lines being sold are substantial and include a significant fraction of the corporation's former business. If the lines retained are viewed only as a temporary operation or as a pretext to avoid the "all or substantially all" requirements, however, the statutory requirements of chapter 12 must be complied with. Similarly, a sale of a plant but retention of operating assets (e.g., machinery and equipment), accounts receivable, good will, and the like with a view toward continuing the operation at another location is not a sale of "all or substantially all" the corporation's property.

Some court decisions have adopted a narrower construction of somewhat similar statutory language. These decisions should be viewed as resting on the diverse statutory language involved in those cases and should not be viewed as illustrating the meaning of "all or substantially all" intended by the draftsmen of the Model Act.

2. TRANSFERS OF "ALL OR SUBSTANTIALLY ALL" OF A CORPORATION'S ASSETS THAT DO NOT REQUIRE SHAREHOLDER APPROVAL

Section 12.01 describes transfers or dispositions of "all or substantially all" the corporate assets that do not require shareholder approval unless the articles of incorporation require it. These transactions consist of (1) mortgages or pledges of all the corporation's property, whether or not the loan they secure is in the ordinary course of business, (2) transactions within the usual and regular course of business, and (3) transfers to wholly owned subsidiaries.

a. Mortgages or pledges

Mortgages or pledges of all the corporate assets may be demanded by lenders. They are essentially and substantively different from a sale or other disposition of assets even though they may take the form of a formal transfer of title to the mortgagee for security purposes, or of a dedication of assets to the repayment of indebtedness, as in the case of oil and gas production payments. The corporation remains in possession of the mortgaged property, may continue to use it for corporate purposes, in most cases must continue to manage the property, and may recover full title to the property by discharging the indebtedness.

b. Sales in the usual and regular course of business

Most transfers of "all or substantially all" the corporate property (as defined above) are, almost by definition, not in the usual and regular course of business; sales by real estate corporations and by corporations organized to liquidate a business are examples of sales that may be included in this part of section 12.01(a). Typically, sales falling within the usual and regular course of business do not involve the sale of the corporate name or good will.

c. Transfers to a subsidiary

Section 12.01 provides that a transfer of property to a wholly owned subsidiary does not require a vote of shareholders. This provision, however, may not be used as a device to avoid a vote of shareholders by a multiple-step transaction.

NORTH CAROLINA COMMENTARY

Subsection (a) is identical to former G.S. 55-112(a) and was substituted for the comparable provision in the Model Act (subdivision 12.01(a)(2)) to avoid an unintended implication that all mortgages or security interests require express approval by the board of directors. Subsection (b) consists of subsection 12.01(a) of the Model Act, except for an introductory phrase taken from former G.S. 55-112(b) and the omission of the Model Act's subdivision 12.01(a)(2). Because the Model Act's subsection 12.02(b) serves the same function as the language taken from former G.S. 55-112(b), that subsection was omitted.

Legal Periodicals. — For comment on the disposition of corporate assets, see 43 N.C.L. Rev. 957 (1965).

For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

CASE NOTES

Editor's Note. — *The case below was decided under the Business Corporation Act adopted in 1955.*

Noncompliance with Statute as Breach of Duty. — Failure to conform to the mandates of former G.S. 55-112 constituted a breach of director's fiduciary duty as well as a breach of the majority stockholders' duty to the minority. Loy v. Lorm Corp., 52 N.C. App. 428, 278 S.E.2d 897 (1981).

§ 55-12-02. Sale of assets other than in regular course of business.

(a) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, otherwise than in the usual and regular course of business, on the terms and conditions and for the consideration determined by the corporation's board of directors, if the board of directors proposes and its shareholders approve the proposed transaction.

(b) For a transaction to be authorized:

(1) The board of directors must recommend the proposed transaction to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation, in which event the board of directors must communicate the basis for its lack of a recommendation to the shareholders with the submission of the proposed transaction; and

(2) The shareholders entitled to vote must approve the transaction.

(c) The board of directors may condition its submission of the proposed transaction on any basis.

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with G.S. 55-7-05. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all, or substantially all, the property of the corporation and contain or be accompanied by a description of the transaction.

(e) Unless the articles of incorporation, a bylaw adopted by the shareholders, Article 9 or the board of directors (acting pursuant to subsection (c)) require a greater vote or a vote by voting groups, the transaction to be authorized must be approved by a majority of all the votes entitled to be cast on the transaction.

(f) After a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned (subject to any contractual rights) without further shareholder action.

(g) A transaction that constitutes a distribution is governed by G.S. 55-6-40 and not by this section. (1925, c. 235; 1929, c. 269; 1939, c. 279; G.S., s. 55-26; 1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

The scope of the phrase "all or substantially all" is discussed in the Official Comment to section 12.01. All transactions that involve the sale or transfer of "all or substantially all" the corporate property must be approved by the shareholders unless they fall within one of the exceptions of section 12.01.

Section 12.02 requires the board of directors to propose the sale and then submit the proposal to the shareholders. The board of directors must make a recommendation to the shareholders that the transaction be approved, unless the board determines that because of conflict of interest or other special circumstances it should make no recommendation. If the board so determines, it must describe the conflict or circumstances, and communicate the basis for its determination, to the shareholders when it presents the proposed sale.

The proposed sale, to be approved, must receive the vote of a majority of the outstanding votes entitled by the articles of incorporation to be cast on the proposal. This is a greater vote than that required for ordinary matters under section 7.25. Nonvoting classes of shares are not given a statutory right to vote on proposed sales (either as separate voting groups or together with voting shares) by the revised Model Act on the theory that classes or series of shares that are made nonvoting by the articles of incorporation generally did not retain a voice in the areas of business the corporation may engage in the future. The articles of incorporation, however, may stipulate that specified classes or series of shares are entitled to vote by separate voting groups. Thus, in the absence of special provision in the articles of incorporation, only the shares of the corporation entitled to vote generally by the articles of incorporation are entitled to vote on sales of substantially all the assets of the corporation. The articles of incorporation may also specify that a greater percentage of votes is required to approve the proposal than specified in section 12.02.

The board of directors may condition its submission of a proposal to the shareholders under subsection (c) on any basis—for example, on its receiving a certain percentage of shareholders' affirmative votes or that specified classes or series of shares, voting by separate voting groups, must approve the transaction or on some other basis; see the discussion of conditional submissions in the Official Comment to section 10.03.

The approval of most sales of "all or substantially all" of the corporation's assets gives rise to dissenters' rights under chapter 13 to shareholders who are entitled to vote on the transaction and avail themselves of the procedures described in that chapter. Sales subject to section 12.02 that do not give rise to dissenters' rights even for voting shares include (1) sales pursuant to a court order and (2) sales that require all or substantially all of the net proceeds to be distributed to the shareholders in accordance with their respective interests within one year after the date of sale. See section 13.02. Shares not entitled to vote on the transaction do not have dissenters' rights by statute; the articles of incorporation may grant those rights or the board of directors may elect to make them available.

Section 12.02(f) authorizes a board of directors to abandon a proposed sale without shareholder approval after it has been previously approved by the shareholders. An abandonment does not affect contractual rights that third persons may have against the corporation.

Certain corporate divisions, often called "spin offs," "split offs," or "split ups," sometimes involve transactions that may be formally characterized as sales of "all or substantially all" the corporate assets when in fact they are only a step in a corporate division that does not give rise to the problem of a major change in corporate direction and therefore does not need shareholder approval. Section 12.02(g) is designed to make clear that transactions like this, which actually constitute a distribution, are not subject to section 12.02. See Siegal, "When Corporations Divide: A Statutory and Financial Analysis," 79 HARV. L. REV. 534 (1966).

NORTH CAROLINA COMMENTARY

Article 12 changes the former law by requiring a simple majority of the shares entitled to vote instead of a two-thirds majority of all shares outstanding, whether or not otherwise entitled to vote, for the sale of substantially all of the assets of a corporation.

The Model Act's subsection 12.02(a) provides that a corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property "(with or without the good will)." Because the drafters believed that the language in parentheses is unclear and probably adds nothing to the subsection, it was not included in subsection (a).

The Model Act was modified in subsection (b) to conform to changes made in G.S. 55-10-03.

The phrase "a bylaw adopted by the shareholders" was inserted in subsection (e) to preserve the practice under prior law.

Legal Periodicals. — For article on the evolution of corporate combination law, see 76 N.C.L. Rev. 687 (1998).

§ 55-12-03. Article 9 to control.

Nothing in this Article shall be construed to modify in any manner the provisions or applicability of Article 9. (1989, c. 265, s. 1.)

NORTH CAROLINA COMMENTARY

This section, which does not appear in the Model Act, was added to clarify that Article 12 does not in any manner modify the provisions of Article 9.

ARTICLE 13.

Dissenters' Rights.

Part 1. Right to Dissent and Obtain Payment for Shares.

§ 55-13-01. Definitions.

In this Article:

(1) "Corporation" means the issuer of the shares held by a dissenter before the corporate action, or the surviving or acquiring corporation by merger or share exchange of that issuer.

(2) "Dissenter" means a shareholder who is entitled to dissent from corporate action under G.S. 55-13-02 and who exercises that right when and in the manner required by G.S. 55-13-20 through 55-13-28.

(3) "Fair value", with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.

(4) "Interest" means interest from the effective date of the corporate action until the date of payment, at a rate that is fair and equitable under all the circumstances, giving due consideration to the rate currently paid by the corporation on its principal bank loans, if any, but not less than the rate provided in G.S. 24-1.

(5) "Record shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

(6) "Beneficial shareholder" means the person who is a beneficial owner of shares held in a voting trust or by a nominee as the record shareholder.

(7) "Shareholder" means the record shareholder or the beneficial shareholder. (1925, c. 77, s. 1; 1943, c. 270; G.S., s. 55-167; 1955, c. 1371, s. 1; 1969, c. 751, s. 39; 1973, c. 469, ss. 36, 37; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 13.01 contains specialized definitions applicable only to chapter 13.

(1) The definition of "corporation" in section 13.01(1) includes successor or acquiring corporations in mergers or share exchanges within the scope of that definition. In these transactions, the obligations of the disappearing or acquired corporations must be assumed by the successor or acquiring corporation and they are thus included within the definition of "corporation."

(2) The definition of "dissenter" in section 13.01(2) is phrased in terms of a "shareholder," a term that is itself specially defined in section 13.01(7). The definition of "shareholder" for purposes of chapter 13 differs from the definition of that term used elsewhere in the Model Act. Section 1.40 defines "shareholder" as used elsewhere in the Act to include only "record shareholders" as defined in section 13.01(5). Section 13.01(7), on the other hand, defines "shareholder" to include not only "record shareholders" but "beneficial shareholders," a term that is itself defined in section 13.01(6). The specially defined terms "record shareholder" and "beneficial shareholder" appear primarily in section 13.03, which establishes the manner in which beneficial shareholders, and record shareholders who are acting as nominees for more than one beneficial shareholder, establish dissenters' rights. The broadest definition of "shareholder" is used generally throughout the balance of chapter 13 in order to permit beneficial shareholders to take advantage of the provisions of this chapter as provided in section 13.03.

The definition of "dissenter" in section 13.01(2) is also limiting, since only a shareholder who has performed all the conditions imposed on him by this chapter in order to obtain payment for his shares is a "dissenter." Under this definition, a shareholder who initially objects but fails to perform any of these conditions within the times specified by this chapter loses his status as "dissenter" under this section.

(3) The definition of "fair value" in section 13.01(3) leaves to the parties (and ultimately to the courts) the details by which "fair value" is to be determined within the broad outlines of the definition. This definition thus leaves untouched the accumulated case law about market value, value based on prior sales, capitalized earnings value, and asset value. It specifically preserves the former language excluding appreciation and depreciation in anticipation of the proposed corporate action, but permits an exception for equitable considerations. The purpose of this exception ("unless exclusion would be inequitable") is to permit consideration of factors similar to those approved by the Supreme Court of Delaware in *Weinberger v. UOP, Inc.,* 457 A.2d 701 (Del. 1983), a case in which the court found that the transaction did not involve fair dealing or fair price: "In our view this includes the elements of recissory damages if the Chancellor considers them susceptible of proof and a remedy appropriate to all the issues of fairness before him." Consideration of appreciation or depreciation which might result from other corporate actions is permitted; these effects in the past have often been reflected either in market value or capitalized earnings value.

"Fair value" is to be determined immediately before the effectuation of the corporate action, instead of the date of the shareholder's vote, as is the case under most state statutes that address the issue. This comports with the plan of this chapter to preserve the dissenter's prior rights as a shareholder until the effective date of the corporate action, rather than leaving him in a twilight zone where he has lost his former rights, but has not yet gained his new ones.

(4) The definition of "interest" in section 13.01(4) is included to make interest computations under this chapter more realistic. The right to receive interest is based on the elementary consideration that the corporation has the use of the dissenter's money, and the dissenter has no use of it, from the effective date of the corporate action until the date of payment. The definition also requires the adjustment of rates to accommodate radical changes in prevailing rates like those seen in the late 1970s and early 1980s and that may be seen again in the future. The specification of the rate currently paid by the corporation provides a prima facie standard which should facilitate voluntary settlements. The date from which interest runs has been changed from the date of the shareholders' vote to the effective date of the corporate action, in conformity with the change of the valuation date in section 13.01(3).

NORTH CAROLINA COMMENTARY

The reference in the definition of "fair value" (in subdivision (3)) to "the effectuation of the corporate action" means the actual merger or other transaction that will occur after the shareholders vote on the transaction.

Subdivision 13.01(4) of the Model Act fixes the interest on fair value at the average rate currently paid by the corporation on its principal bank loans or, if none, at a rate that is fair and equitable under all the circumstances. This section differs from that provision in fixing the statutory "legal rate" as a floor and allows the court more flexibility in fixing a fair interest rate by providing that it should be fair and equitable under the circumstances and that the rate currently paid by the corporation on its principal bank loans, if any, is just one of those circumstances.

Legal Periodicals. — For article, "The Exclusivity of the Appraisal Remedy Under the New North Carolina Business Corporation Act: Deciding the Standard of Review for Cash-Out Mergers," see 69 N.C.L. Rev. 501 (1991).

For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

For article on the evolution of corporate combination law, see 76 N.C.L. Rev. 687 (1998).

For "Legislative Survey: Business & Banking," see 22 Campbell L. Rev. 253 (2000).

§ 55-13-02. Right to dissent.

(a) In addition to any rights granted under Article 9, a shareholder is entitled to dissent from, and obtain payment of the fair value of his shares in the event of, any of the following corporate actions:

(1) Consummation of a plan of merger to which the corporation (other than a parent corporation in a merger whose shares are not affected under G.S. 55-11-04) is a party unless (i) approval by the shareholders of that corporation is not required under G.S. 55-11-03(g) or (ii) such shares are then redeemable by the corporation at a price not greater than the cash to be received in exchange for such shares;

(2) Consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired, unless such shares are then redeemable by the corporation at a price not greater than the cash to be received in exchange for such shares;

(2a) Consummation of a plan of conversion pursuant to Part 2 of Article 11A of this Chapter;

(3) Consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than as permitted by G.S. 55-12-01, including a sale in dissolution, but not including a sale pursuant to court order or a sale pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed in cash to the shareholders within one year after the date of sale;

(4) An amendment of the articles of incorporation that materially and adversely affects rights in respect of a dissenter's shares because it (i) alters or abolishes a preferential right of the shares; (ii) creates, alters, or abolishes a right in respect of redemption, including a provision respecting a sinking fund for the redemption or repurchase, of the shares; (iii) alters or abolishes a preemptive right of the holder of the shares to acquire shares or other securities; (iv) excludes or limits the right of the shares to vote on any matter, or to cumulate votes, other than an amendment of the articles of incorporation permitting action without meeting to be taken by less than all shareholders entitled to vote, without advance notice, or both, as provided in G.S. 55-7-04; (v) reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under G.S. 55-6-04; or (vi) changes the corporation into a nonprofit corporation or cooperative organization; or

(5) Any corporate action taken pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.

(b) A shareholder entitled to dissent and obtain payment for his shares under this Article may not challenge the corporate action creating his entitlement, including without limitation a merger solely or partly in exchange for cash or other property, unless the action is unlawful or fraudulent with respect to the shareholder or the corporation.

(c) Notwithstanding any other provision of this Article, there shall be no right of shareholders to dissent from, or obtain payment of the fair value of the shares in the event of, the corporate actions set forth in subdivisions (1), (2), or (3) of subsection (a) of this section if the affected shares are any class or series which, at the record date fixed to determine the shareholders entitled to receive notice of and to vote at the meeting at which the plan of merger or share exchange or the sale or exchange of property is to be acted on, were (i) listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc., or (ii) held by at least 2,000 record shareholders. This subsection does not apply in cases in which either:

(1) The articles of incorporation, bylaws, or a resolution of the board of directors of the corporation issuing the shares provide otherwise; or

(2) In the case of a plan of merger or share exchange, the holders of the class or series are required under the plan of merger or share exchange to accept for the shares anything except:
  a. Cash;
  b. Shares, or shares and cash in lieu of fractional shares of the surviving or acquiring corporation, or of any other corporation which, at the record date fixed to determine the shareholders entitled to receive notice of and vote at the meeting at which the plan of merger or share exchange is to be acted on, were either listed subject to notice of issuance on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc., or held by at least 2,000 record shareholders; or
  c. A combination of cash and shares as set forth in sub-subdivisions a. and b. of this subdivision. (1925, c. 77, s. 1; c. 235; 1929, c. 269; 1939, c. 279; 1943, c. 270; G.S., ss. 55-26, 55-167; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 30, 31; 1969, c. 751, ss. 36, 39; 1973, c. 469, ss. 36, 37; c. 476, s. 193; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.18; 1991, c. 645, s. 12; 1997-202, s. 1; 1999-141, s. 1; 2001-387, s. 26; 2003-157, s. 1.)

OFFICIAL COMMENT

1. Transactions giving rise to dissenters' rights

Section 13.02(a) establishes the scope of a shareholder's right to dissent (and his resulting right to obtain payment for his shares) by defining the transactions with respect to which a right to dissent exists. These transactions are:

(1) A plan of merger if the shareholder (i) is entitled to vote on the merger under section 11.03 or pursuant to provisions in the articles of incorporation, or (ii) is a shareholder of a subsidiary that is merged with a parent under section 11.04. The right to vote on a merger under section 11.03 extends to corporations whose separate existence disappears in the merger and to the surviving corporations if the number of its outstanding shares is increased by more than 20 percent as a result of the merger.

(2) A share exchange under section 11.02 if the corporation is a party whose shares are being acquired by the plan and the shareholder is entitled to vote on the exchange.

(3) A sale or exchange of all or substantially all of the property of the corporation not in the usual course of business under section 12.02 if the shareholder is entitled to vote on the sale or exchange. Section 13.02(a)(3) generally grants dissenters' rights in connection with sales in the process of dissolution but excludes them in connection with sales by court order and sales for cash that require substantially all the proceeds to be distributed to the shareholders within one year. The inclusion of sales in dissolution is designed to ensure that the right to dissent cannot be avoided by characterizing sales as made in the process of dissolution long before distribution is made. An exception is provided for sales for cash pursuant to a plan that provides for distribution within one year. These transactions are unlikely to be unfair to minority shareholders since majority and minority are being treated in precisely the same way and all shareholders will ultimately receive cash for their shares. A sale other than for cash gives rise to a right of dissent since property sometimes cannot be converted into cash until long after receipt and a minority shareholder should not be compelled to assume the risk of delays or market declines. Similarly, a plan that provides for a prompt distribution of the property received gives rise to the right of dissent since the minority shareholder should not be compelled to accept for his shares different securities or other property that may not be readily marketable.

The exclusion of court-ordered sales from the dissenter's right is based on the view that court review and approval ensures that an independent appraisal of the fairness of the transaction has been made.

(4) Amendments to articles of incorporation that impair the shareholders' rights as shareholders in any of the enumerated ways. The reasons for granting a right of dissent in these situations are similar to those granting such rights in cases of merger and transfer of assets. The grant of these rights increases the security of investors by allowing them to

escape when the nature of their investment rights is fundamentally altered or they are compelled to accept cash for their investment in an amount established by the corporation. The grant also enhances the freedom of the majority to make changes, because the existence of an escape hatch makes fair and reasonable a change that might be unfair if it forced a fundamental change of rights upon unwilling investors without giving them a reasonable alternative.

(5) Any corporate action to the extent the articles, bylaws, or a resolution of the board of directors grant a right of dissent. Corporations may wish to grant on a voluntary basis dissenters' rights in connection with important transactions (e.g., those submitted for shareholder approval). The grant may be to nonvoting shareholders in connection with transactions that give rise to dissenters' rights with respect to voting shareholders. The grant of dissenters' rights may add to the attractiveness of preferred shares, and may satisfy shareholders who would, in the absence of dissenters' rights, sue to enjoin the transaction. Also, in situations where the existence of dissenters' rights may otherwise be disputed, the voluntary offer of those rights under this section will avoid a dispute.

Generally, only shareholders who are entitled to vote on the transaction are entitled to assert dissenters' rights with respect to the transaction. The right to vote may be based on the articles of incorporation or other provisions of the Model Act. For example, a class of nonvoting shares may nevertheless be entitled to vote (either as a separate voting group or as part of the general voting group) on an amendment to the articles of incorporation that affects them as provided in one of the ways set forth in section 10.04; such a class is entitled to assert dissenters' rights if the transaction also falls within section 13.02. On the other hand, such a class does not have the right to vote on a sale of substantially all the corporation's assets not in the ordinary course of business, and therefore that class is not entitled to assert dissenters' rights with respect to that sale. One exception to this principle is the merger of a subsidiary into its parent under section 11.04 in which minority shareholders of the subsidiary have the right to assert dissenters' rights even though they have no right to vote.

2. Exclusivity of dissenters' rights

Section 13.02(b) basically adopts the New York formula as to exclusivity of the dissenters' remedy of this chapter. The remedy is the exclusive remedy unless the transaction is "unlawful" or "fraudulent." The theory underlying this section is as follows: when a majority of shareholders has approved a corporate change, the corporation should be permitted to proceed even if a minority considers the change unwise or disadvantageous, and persuades a court that this is correct. Since dissenting shareholders can obtain the fair value of their shares, they are protected from pecuniary loss. Thus in general terms an exclusivity principle is justified. But the prospect that shareholders may be "paid off" does not justify the corporation in proceeding unlawfully or fraudulently. If the corporation attempts an action in violation of the corporation law on voting, in violation of clauses in articles of incorporation prohibiting it, by deception of shareholders, or in violation of a fiduciary duty—to take some examples—the court's freedom to intervene should be unaffected by the presence or absence of dissenters' rights under this chapter. Because of the variety of situations in which unlawfulness and fraud may appear, this section makes no attempt to specify particular illustrations. Rather, it is designed to recognize and preserve the principles that have developed in the case law of Delaware, New York and other states with regard to the effect of dissenters' rights on other remedies of dissident shareholders. See *Weinberger v. UOP, Inc.,* 457 A.2d 701 (Del. 1983) (appraisal remedy may not be adequate "where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross or palpable overreaching are involved"). See also Vorenberg, "Exclusiveness of the Dissenting Stockholders' Appraisal Right," 77 HARV. L. REV. 1189 (1964).

AMENDED NORTH CAROLINA COMMENTARY

Subdivisions (a)(1), (a)(2), and (a)(3) give a right of dissent for all shares, whether voting or nonvoting, in the case of a merger or sale or exchange of assets; the corresponding provisions in the Model Act give the right of dissent only to voting shareholders.

The right of dissent under this section, however, does not apply in a merger to shares of a corporation when approval by the shareholders of that corporation is not required under G.S. 55-11-03(g) or to shares of a parent corporation in a merger under G.S. 55-11-04. In addition, the right of dissent does not apply in a merger or share exchange to shares that are redeemable by the corporation at the time of the transaction at a price not greater than the cash to be received in exchange for such shares. The Model Act was modified in clause (i) of subdivision (a)(1) to clarify that the absence of a right of dissent applies only to the shares of the corporation covered by G.S. 55-11-03(g) and not to shares of a corporation if approval by its shareholders is required.

The Model Act was also modified in subdivision (a)(3) to provide that a right of dissent will not be available if the sale of property is pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed in cash to the shareholders within one year after the date of the sale. This is different from the Model Act, which requires the sale itself to be in cash. This subdivision thus allows more flexibility in permitting, for example, the sale to be for promissory notes or other property that will be converted to cash for distribution within the one-year period.

The language of the Model Act which excepts from the operation of the section "a limitation by dilution through issuance of shares or other securities with similar voting rights" was eliminated from the end of clause (iv) of subdivision (a)(4). The only reason for this elimination was the drafters' opinion that the language is unnecessary; if it were necessary, it should also have been added to the end of G.S. 55-10-04(a)(4).

Clause (vi) of subdivision (a)(4), which is not in the Model Act, brings forward the same provisions in former G.S. 55-101(b). However, the drafters decided not to bring forward the unusual provision in former G.S. 55-102(a) that gave a right of dissent to the holders of any class of preferred shares with dividend arrearages if the corporation offered to exchange such shares for shares with a prior preference and that offer was accepted by any of the preferred shareholders. Such a situation may be covered by clause (i) of subdivision (a)(4).

The introductory language of subsection 13.02(a) of the Model Act was modified to provide that the rights provided by this section are in addition to any rights provided by Article 9.

By making the appraisal remedy exclusive unless the transaction is "unlawful" or "fraudulent," subsection (b) effects a change from former G.S. 55-113(b), which provided that such remedy was "in addition to any other right [the shareholder] may have in law or in equity."

Language was added to the Model Act provision to make it clear that subsection (b) covers a cash merger and that, in determining whether a merger was "unlawful" or "fraudulent," the same standard applies, regardless of whether the consideration received was cash, other property, or shares of a surviving corporation.

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Legal Periodicals. — For note as to bad faith of the majority in close corporations, see 35 N.C.L. Rev. 271 (1957).

For article, "The Exclusivity of the Appraisal Remedy Under the New North Carolina Business Corporation Act: Deciding the Standard of Review for Cash-Out Mergers," see 69 N.C.L. Rev. 501 (1991).

For 1997 legislative survey, see 20 Campbell L. Rev. 389.

For article on the evolution of corporate combination law, see 76 N.C.L. Rev. 687 (1998).

For "Legislative Survey: Business & Banking," see 22 Campbell L. Rev. 253 (2000).

For article, "Silencing the Shareholder's Voice," see 80 N.C.L. Rev. 1897 (2002).

CASE NOTES

Editor's Note. — *Some of the cases below were decided under the Business Corporation Act adopted in 1955.*

A statutory appraisal is shareholder's exclusive remedy to redress what the minority shareholders perceived to be as an inadequate price for their shares. IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992).

A statutory appraisal is not a dissenting shareholder's exclusive remedy when the shareholder has presented claims of breach of fiduciary duty, fraud, self-dealing, securities violations, or similar claims based on allegations other than solely the inadequacy of the stock price. IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992).

When Statutory Appraisal Is Appropriate Remedy. — A statutory appraisal is a dissenting shareholder's exclusive remedy when the shareholder challenges only the fair value or price of the stock. IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992).

Exclusivity of Shareholders's Remedy. — Subsection (b) of this section now establishes the exclusivity of a dissenting shareholder's remedy in challenging a corporation's actions. The remedy is the exclusive remedy unless the transaction is unlawful or fraudulent. IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354, cert. denied, 332 N.C. 666, 424 S.E.2d 401 (1992).

Dissent and appraisal was the exclusive remedy for shareholders aggrieved by the price offered and the method by which the price was set in a cash-out merger of a North Carolina corporation; where a minority shareholder's complaint centered around an allegation that a corporation's directors and a buyer had engaged in a course of conduct designed to enable them to buy the shares of the minority at an unfair price, the complaint failed to adequately allege an unlawful or fraudulent transaction, and the complaint was properly dismissed. Osher v. Ridinger, 162 N.C. App. 155, 589 S.E.2d 905, 2004 N.C. App. LEXIS 37 (2004).

Legislative Intent to Increase Available Remedies. — The language "In addition to any other right he may have in law or equity" in former G.S. 55-113(b) showed that the legislature intended to increase the remedies available to a dissenting shareholder, not to supplant any other remedies that the shareholder might have. Austell v. Smith, 634 F. Supp. 326 (W.D.N.C.), appeal dismissed, 801 F.2d 393 (4th Cir. 1986).

Plaintiffs in derivative shareholders' action were not required to pursue statutory dissenters' rights under former G.S. 55-113 (see now Art. 13 of ch. 55) to oppose merger during litigation in order to maintain standing. Subdivision (c) of former G.S. 55-113 would have deprived them of all interest in defendant corporation. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Assertion of Claims in Federal Court. — Pending dissent and appraisal petitions did not bar minority stockholders from asserting damage claims in federal court. Austell v. Smith, 634 F. Supp. 326 (W.D.N.C.), appeal dismissed, 801 F.2d 393 (4th Cir. 1986).

Allegations of Fraud or Misrepresentation. — Minority shareholder's allegations failed to state a fraud claim, where they alleged that the majority stockholders intentionally engaged in a course of conduct designed to reduce the value of the corporation's assets, which would diminish the value of minority shares and thereby allow those shares to be purchased at a reduced price. Werner v. Alexander, 130 N.C. App. 435, 502 S.E.2d 897 (1998).

§ 55-13-03. Dissent by nominees and beneficial owners.

(a) A record shareholder may assert dissenters' rights as to fewer than all the shares registered in his name only if he dissents with respect to all shares beneficially owned by any one person and notifies the corporation in writing of the name and address of each person on whose behalf he asserts dissenters' rights. The rights of a partial dissenter under this subsection are determined as if the shares as to which he dissents and his other shares were registered in the names of different shareholders.

(b) A beneficial shareholder may assert dissenters' rights as to shares held on his behalf only if:

(1) He submits to the corporation the record shareholder's written consent to the dissent not later than the time the beneficial shareholder asserts dissenters' rights; and

(2) He does so with respect to all shares of which he is the beneficial shareholder. (1925, c. 77, s. 1; 1943, c. 270; G.S., s. 55-167; 1955, c. 1371, s. 1; 1969, c. 751, s. 39; 1973, c. 469, ss. 36, 37; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 13.03 addresses the relationship between dissenters' rights and the widespread practice of nominee or street name ownership of publicly held shares. Generally, a shareholder must dissent with respect to all the shares he owns or over which he has power to direct the vote. If a record shareholder is a nominee for several beneficial shareholders, however, some of whom wish to dissent and some of whom do not, section 13.03(a) permits the record shareholder to dissent with respect to a portion of the shares owned by him but only with respect to all the shares beneficially owned by a single person. This limitation is necessary to prevent speculative abuse by a single beneficial shareholder who is not fundamentally opposed to the proposed corporate action but who may wish to gamble, as to some of his shares, on the possibility of a high payment to dissenters.

Section 13.03(a) also requires a record shareholder who dissents with respect to a portion of the shares held by him to notify the corporation of the name and address of the beneficial owner on whose behalf he has dissented.

Section 13.03(b) permits a beneficial shareholder to assert dissenters' rights directly if he submits the record shareholder's written consent. Generally, corporations treat the record shareholder as the owner of shares, and a beneficial shareholder is entitled to assert dissenters' rights only as set forth in this section. It would be foreign to the premises underlying nominee and street name ownership to require these record shareholders to forward demands and participate in litigation on behalf of their clients. In order to make dissenters' rights effective without burdening record shareholders, beneficial shareholders should be allowed to assert their own claims as provided in this subsection. The beneficial shareholder is required to submit a written consent by the record shareholder to his assertion of dissenters' rights to verify the beneficial shareholder's entitlement and to permit the protection of any security interest in the shares. In practice, a broker's customer who receives a forwarded notice of proposed corporate action and who wishes to dissent may request the broker to supply him with the name of the record shareholder (which may be a house nominee or a nominee of the Depository Trust Company), and a form of consent signed by the record shareholder. From that point forward, the corporation must deal with the beneficial shareholder.

NORTH CAROLINA COMMENTARY

The drafters did not include the language at the end of subsection 13.03(b)(3) of the Model Act requiring a beneficial owner to dissent with respect to all shares "over which he has power to direct the vote" because they concluded that it could be construed to include shares which that person did not own either as beneficial or record holder but for which he or she was a proxy or could exercise a power of attorney. That result was not deemed desirable.

§§ 55-13-04 through 55-13-19: Reserved for future codification purposes.

Part 2. Procedure for Exercise of Dissenters' Rights.

§ 55-13-20. Notice of dissenters' rights.

(a) If proposed corporate action creating dissenters' rights under G.S. 55-13-02 is submitted to a vote at a shareholders' meeting, the meeting notice must state that shareholders are or may be entitled to assert dissenters' rights under this Article and be accompanied by a copy of this Article.

(b) If corporate action creating dissenters' rights under G.S. 55-13-02 is taken without a vote of shareholders or is taken by shareholder action without meeting under G.S. 55-7-04, the corporation shall no later than 10 days thereafter notify in writing all shareholders entitled to assert dissenters' rights that the action was taken and send them the dissenters' notice described in G.S. 55-13-22. A shareholder who consents to shareholder action taken without meeting under G.S. 55-7-04 approving a corporate action is not entitled to payment for the shareholder's shares under this Article with respect to that corporate action.

(c) If a corporation fails to comply with the requirements of this section, such failure shall not invalidate any corporate action taken; but any shareholder may recover from the corporation any damage which he suffered from such failure in a civil action brought in his own name within three years after the taking of the corporate action creating dissenters' rights under G.S. 55-13-02 unless he voted for such corporate action. (1925, c. 77, s. 1; c. 235; 1929, c. 269; 1939, c. 5; c. 279; 1943, c. 270; G.S., ss. 55-26, 55-165, 55-167; 1955, c. 1371, s. 1; 1969, c. 751, s. 39; 1973, c. 469, ss. 36, 37; 1989, c. 265, s. 1; 2002-58, s. 2.)

OFFICIAL COMMENT

Section 13.20(a) requires the corporation to notify record shareholders of the existence of dissenters' rights before the vote is taken on the corporate action. This notice provides the reassurance to investors that the right to dissent is intended to provide because many shareholders have no idea what rights of dissent they may have or how to assert them. If the corporation is uncertain whether or not the shareholders have dissenters' rights, it may comply with this notice requirement by stating that the shareholders "may have" dissenters' rights.

A similar requirement of notice is expressly required by proxy rules, by the dissenters' rights statutes of several states, and possibly under more general disclosure requirements of federal and state securities laws.

Section 13.20(b) provides that notice be given after the action is taken in situations where the action is validly taken without a vote of shareholders, e.g., in a merger of a subsidiary into its parent under section 11.04. This notice may be combined with the dissenters' notice required by section 13.22.

NORTH CAROLINA COMMENTARY

This section adds to the Model Act's provisions the 10-day requirement in subsection (b) and the new subsection (c). A similar 10-day requirement is included in G.S. 55-13-22(b) and in section 13.22(b) of the Model Act. The new subsection (c) was adapted from former G.S. 55-113(f), except that the period within which the damage action may be brought was increased from one to three years, thus increasing the burden on the corporation to comply with the statute. The shareholder must bring the damage action "in his own name," and not as a class or derivative action.

Legal Periodicals. — For article, "The Exclusivity of the Appraisal Remedy Under the New North Carolina Business Corporation Act: Deciding the Standard of Review for Cash-Out Mergers," see 69 N.C.L. Rev. 501 (1991).

§ 55-13-21. Notice of intent to demand payment.

(a) If proposed corporate action creating dissenters' rights under G.S. 55-13-02 is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert dissenters' rights:

(1) Must give to the corporation, and the corporation must actually receive, before the vote is taken written notice of his intent to demand payment for his shares if the proposed action is effectuated; and

(2) Must not vote his shares in favor of the proposed action.

(b) A shareholder who does not satisfy the requirements of subsection (a) is not entitled to payment for his shares under this Article. (1925, c. 77, s. 1; 1943, c. 270; G.S., s. 55-167; 1955, c. 1371, s. 1; 1969, c. 751, s. 39; 1973, c. 469, ss. 36, 37; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

If a shareholder's vote is called for, section 13.21(a) requires the shareholder to give notice of his intent to demand payment before the vote on the corporate action is taken. This notice enables other voters to determine how much of a cash payment may be required. It also serves to limit the number of persons to whom the corporation must give further notice, including the technical details of depositing share certificates. This subsection has no application to actions taken without a shareholder vote.

In order to be and remain a dissenter eligible to demand payment for his shares, the section requires that a shareholder must not only give the notice required by this section but must also vote against, or abstain from voting on, the proposal.

NORTH CAROLINA COMMENTARY

This section is substantially the same as section 13.21 of the Model Act with minor clarifying changes.

§ 55-13-22. Dissenters' notice.

(a) If proposed corporate action creating dissenters' rights under G.S. 55-13-02 is approved at a shareholders' meeting, the corporation shall mail by registered or certified mail, return receipt requested, a written dissenters' notice to all shareholders who satisfied the requirements of G.S. 55-13-21.

(b) The dissenters' notice must be sent no later than 10 days after shareholder approval, or if no shareholder approval is required, after the approval of the board of directors, of the corporate action creating dissenters' rights under G.S. 55-13-02, and must:

(1) State where the payment demand must be sent and where and when certificates for certificated shares must be deposited;

(2) Inform holders of uncertificated shares to what extent transfer of the shares will be restricted after the payment demand is received;

(3) Supply a form for demanding payment;

(4) Set a date by which the corporation must receive the payment demand, which date may not be fewer than 30 nor more than 60 days after the date the subsection (a) notice is mailed; and

(5) Be accompanied by a copy of this Article. (1925, c. 77, s. 1; 1943, c. 270; G.S., s. 55-167; 1955, c. 1371, s. 1; 1969, c. 751, s. 39; 1973, c. 469, ss. 36, 37; 1989, c. 265, s. 1; 1997-485, s. 4; 2001-387, s. 27; 2002-58, s. 3.)

OFFICIAL COMMENT

The basic purpose of section 13.22 is to require the corporation to tell all actual or potential dissenters what they must do in order to take advantage of their right of dissent. The requirements of what this notice (called a "dissenters' notice") must contain are spelled out in detail to ensure that this notice serves this basic purpose.

In the case of an action that is submitted to the vote of shareholders, the dissenters' notice must be sent only to those persons who gave notice of their intention to dissent under section 13.21 and who refrained from voting in favor of the proposed actions. In the case of a transaction not involving a vote by shareholders, the dissenters' notice must be sent to all persons who are eligible to dissent and demand payment. In either case the dissenters' notice must be sent within 10 days after the corporate action is taken and must be accompanied by a copy of this chapter.

The notice must contain or be accompanied by a form which a person asserting dissenters' right may use to complete the demand for payment under section 13.23. The form must specify the date by which it must be received by the corporation, which date must be at least 30 days after the effective date of the notice of how to demand payment.

The dissenters' notice must also specify where and when share certificates must be deposited, or, in the case of uncertificated shares, when restrictions on transfer will become effective under section 13.24. The date for deposit of share certificates may not be set at a date earlier than the date for receiving the demand for payment.

Section 13.22(b)(3) requires the corporation to specify the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action. This is the critical date for determining the rights of shareholder-transferees: persons who became shareholders prior to that date are entitled to the full right to dissent and obtain payment for their shares, while persons who became shareholders on or after that date are entitled only to the more limited rights provided by section 13.27. See the Official Comments to sections 13.23 and 13.27. It is appropriate for the corporation to furnish this critical date since it knows when information relating to the transaction was publicly released. The date selected should be the date the terms were announced, not the earlier date when consideration of the proposed transaction may have been announced.

NORTH CAROLINA COMMENTARY

This section is substantially the same as section 13.22 of the Model Act with minor clarifying changes, except that the specified contents of the form required by subdivision (b)(3) were omitted in light of the changes in G.S. 55-13-25.

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2001)

Effective January 1, 2002, subsection (a) was amended in light of changes in G.S. 55-7-04 to permit less than unanimous shareholder action without meeting for corporation other than public corporations and to clarify that a shareholder who consents to action without meeting is not entitled to payment for the shareholder's shares under this Article.

Editor's Note. — Session Laws 2001-387, s. 154(a), authorizes the Revisor of Statutes to cause to be printed all explanatory comments of the drafters of the act as the Revisor deems appropriate.

Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 55-13-23. Duty to demand payment.

(a) A shareholder sent a dissenters' notice described in G.S. 55-13-22 must demand payment and deposit his share certificates in accordance with the terms of the notice.

(b) The shareholder who demands payment and deposits his share certificates under subsection (a) retains all other rights of a shareholder until these rights are cancelled or modified by the taking of the proposed corporate action.

(c) A shareholder who does not demand payment or deposit his share certificates where required, each by the date set in the dissenters' notice, is not entitled to payment for his shares under this Article. (1925, c. 77, s. 1; 1943, c. 270; G.S., s. 55-167; 1955, c. 1371, s. 1; 1969, c. 751, s. 39; 1973, c. 469, ss. 36, 37; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

The demand for payment required by section 13.23 is the definitive statement by the dissenter. In the case of a transaction involving a vote by shareholders, it is a confirmation of the "intention" expressed earlier; in the case of any other transaction, it is the person's first statement of position. In either event, the filing of these demands informs the corporation of the extent of the potential cash drain if it proceeds with the proposed corporate action.

The demand for payment must include a certificate as to whether the date on which the dissenter acquired ownership of the shares was before (or on or after) the announcement date. See section 13.22(b)(3). This information permits the issuer to detect acquisitions made for speculative or obstructive purposes and to exercise its right under section 13.27 to defer payment of compensation for these shares.

Section 13.23(a) also requires a person who files a demand for payment to deposit his share certificates as directed by the corporation in its dissenters' notice. The deposit of share certificates is necessary to prevent dissenters from giving themselves a 30-day option to take payment if the market price of the shares goes down, but sell their shares on the open market if the price goes up. If this kind of speculation were possible, all sophisticated investors might be expected to file demands that they would not intend to carry through unless the price should fall. If the shares are not represented by certificates, the corporation can prevent speculation by restricting their transfer, as authorized by section 13.24.

With respect to certificated shares, this provision differs from many statutes in that the certificates are "deposited" for retention, rather than "submitted for notation." This change assumes that the corporation will retain the certificates unless it fails to effectuate the proposed corporate actions; it thus avoids the need of sending the certificates back to the shareholders, only to be surrendered again when payment is made. In most cases, payment will be made promptly, and the shuttling of certificates back and forth is unnecessary.

A person who fails to file the demand for payment or does not deposit his share certificates as required by section 13.23(a) loses his status as a dissenter entitled to payment for his shares. But a person who fails to certify whether he acquired his shares before (or on or after) the announcement date does not lose his right to dissent; if he does not thereafter establish that he acquired his shares before the announcement date, the corporation may treat him as an after-acquiring shareholder under section 13.27.

A shareholder who deposits his shares retains all other rights of a shareholder until those rights are modified by effectuation of the proposed corporate action. See section 13.23(b).

NORTH CAROLINA COMMENTARY

This section makes minor changes from subsection 13.22(a) of the Model Act to conform it to the modifications made in G.S. 55-13-25.

§ 55-13-24. Share restrictions.

(a) The corporation may restrict the transfer of uncertificated shares from the date the demand for their payment is received until the proposed corporate action is taken or the restrictions released under G.S. 55-13-26.

(b) The person for whom dissenters' rights are asserted as to uncertificated shares retains all other rights of a shareholder until these rights are cancelled or modified by the taking of the proposed corporate action. (1925, c. 77, s. 1; 1943, c. 270; G.S., s. 55-167; 1955, c. 1371, s. 1; 1969, c. 751, s. 39; 1973, c. 469, ss. 36, 37; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 13.24 deals with uncertificated shares in the dissent process. Section 13.23(a) requires certificated shares to be deposited as directed by the corporation in its dissenters' notice; the restrictions on transfer of uncertificated shares provided by this section impose an analogous restriction on uncertificated shares for the same reasons. See the Official Comment to section 13.23.

Section 13.24(b) makes express that the restriction on transfer of shares provided by this section does not affect any other rights of the shareholder until these rights are modified by the corporate action.

§ 55-13-25. Payment.

(a) As soon as the proposed corporate action is taken, or within 30 days after receipt of a payment demand, the corporation shall pay each dissenter who complied with G.S. 55-13-23 the amount the corporation estimates to be the fair value of his shares, plus interest accrued to the date of payment.

(b) The payment shall be accompanied by:

(1) The corporation's most recent available balance sheet as of the end of a fiscal year ending not more than 16 months before the date of payment, an income statement for that year, a statement of cash flows for that year, and the latest available interim financial statements, if any;

(2) An explanation of how the corporation estimated the fair value of the shares;

(3) An explanation of how the interest was calculated;

(4) A statement of the dissenter's right to demand payment under G.S. 55-13-28; and

(5) A copy of this Article. (1925, c. 77, s. 1; 1943, c. 270; G.S., s. 55-167; 1955, c. 1371, s. 1; 1969, c. 751, s. 39; 1973, c. 469, ss. 36, 37; 1989, c. 265, s. 1; c. 770, s. 69; 1997-202, s. 2.)

OFFICIAL COMMENT

Section 13.25 changes the relative balance between corporation and dissenting shareholders by requiring immediate payment by the corporation upon the completion of the transaction or (if the transaction did not need shareholder approval and has been completed) upon receipt of the demand for payment. The corporation may not wait for a final agreement on value before making payment, and the shareholder has the immediate use of the amount determined by the corporation to represent fair value without waiting for the conclusion of appraisal proceedings.

This obligation to make immediate payment is based on the view that since the person's rights as a shareholder are terminated with the completion of the transaction, he should have immediate use of the money to which the corporation agrees it has no further claim. A difference of opinion over the total amount to be paid should not delay payment of the amount that is undisputed.

Since the shareholder must decide whether or not to accept the payment in full satisfaction, he must be furnished at this time with the financial information specified in section 13.25(b), with a reminder of his further rights and liabilities, and with a copy of this chapter.

NORTH CAROLINA COMMENTARY

This section differs from the Model Act by requiring the corporation to send its offer of payment, rather than payment itself, to the dissenter upon completion of the transaction or (if the transaction did not need shareholder approval and has been completed) upon receipt of payment demand. Payment is made to the dissenter upon his acceptance of the corporation's offer in writing. Payment is made to the nonaccepting dissenter at the commencement of the court proceeding under G.S. 55-13-30.

Subdivision (b)(1) was further modified to refer to a "statement of cash flows" instead of a "statement of changes in shareholders' equity," in accordance with the provisions of FASB-95.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 389.

CASE NOTES

Subsection (b) is Mandatory. — G.S. 55-13-25(b) made the inclusion of the required information in that subsection mandatory for a payment to be complete; a letter sent to a shareholder by merging banks failed to offer an explanation as to how the fair value of the stock was calculated, so the bank's proffered payment was incomplete, and the proper date for the determination of the shareholder's 60-day filing period was the date of the shareholder's payment demand. Foard v. Avery County Bank, 169 N.C. App. 625, 610 S.E.2d 460, 2005 N.C. App. LEXIS 686 (2005).

§ 55-13-26. Failure to take action.

(a) If the corporation does not take the proposed action within 60 days after the date set for demanding payment and depositing share certificates, the corporation shall return the deposited certificates and release the transfer restrictions imposed on uncertificated shares.

(b) If after returning deposited certificates and releasing transfer restrictions, the corporation takes the proposed action, it must send a new dissenters' notice under G.S. 55-13-22 and repeat the payment demand procedure. (1925, c. 77, s. 1; 1943, c. 270; G.S., s. 55-167; 1955, c. 1371, s. 1; 1969, c. 751, s. 39; 1973, c. 469, ss. 36, 37; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 13.26 essentially grants the corporation 60 days after the payment demand date to complete the transaction and make payment for the shares as required by section 13.25. If the corporation is unable to complete the corporate action within 60 days, it must release the shares, and give a new notice when it is ready to repeat the cycle. This requirement prevents the corporation from holding the dissenter indefinitely in a position where he has no possibility of realizing on his shares either by obtaining payment from the corporation or by selling them. If the transaction has been effected but the corporation fails to make payment as required by this chapter, it is subject to the sanctions of section 13.31(b).

Section 13.26(b) makes it clear that the corporation at any time after returning the deposited shares may send a new dissenters' notice under section 13.22 and repeat the procedure.

§ 55-13-27: Reserved for future codification purposes.

NORTH CAROLINA COMMENTARY

Section 13.27 of the Model Act has been omitted as unnecessary in light of G.S. 55-13-25.

§ 55-13-28. Procedure if shareholder dissatisfied with corporation's payment or failure to perform.

(a) A dissenter may notify the corporation in writing of his own estimate of the fair value of his shares and amount of interest due, and demand payment of the amount in excess of the payment by the corporation under G.S. 55-13-25 for the fair value of his shares and interest due, if:

(1) The dissenter believes that the amount paid under G.S. 55-13-25 is less than the fair value of his shares or that the interest due is incorrectly calculated;

(2) The corporation fails to make payment under G.S. 55-13-25; or

(3) The corporation, having failed to take the proposed action, does not return the deposited certificates or release the transfer restrictions imposed on uncertificated shares within 60 days after the date set for demanding payment.

(b) A dissenter waives his right to demand payment under this section unless he notifies the corporation of his demand in writing (i) under subdivision (a)(1) within 30 days after the corporation made payment for his shares or (ii) under subdivisions (a)(2) and (a)(3) within 30 days after the corporation has failed to perform timely. A dissenter who fails to notify the corporation of his demand under subsection (a) within such 30-day period shall be deemed to have withdrawn his dissent and demand for payment. (1925, c. 77, s. 1; 1943, c. 270; G.S., s. 55-167; 1955, c. 1371, s. 1; 1969, c. 751, s. 39; 1973, c. 469, ss. 36, 37; 1989, c. 265, s. 1; 1997-202, s. 3.)

OFFICIAL COMMENT

Section 13.28 also departs significantly from the prior law of dissenters' rights.

The dissenter who is not content with the corporation's remittance must state in writing the amount he is willing to accept. A dissenter who acquired his shares after public announcement of the transaction (section 13.27) and is dissatisfied with the corporation's offer must also state in writing the amount he is willing to accept. A dissenter cannot, by remaining silent, force the corporation into the expense and delay of a judicial appraisal. Furthermore, if his supplemental demand is unreasonable, he runs the risk of being assessed litigation expenses under section 13.31. These provisions are designed to encourage settlement without a judicial proceeding.

A dissenter to whom the corporation has made payment (or who has been offered payment under section 13.27) must make his supplemental demand within 30 days after receipt of the payment (or offer of payment) in order to permit the corporation to make an early decision on initiating appraisal proceedings. If he fails to do so, he loses the right to demand additional payment under section 13.28(b).

If the corporation, having failed to make payment, also fails to return the certificates previously deposited or release the restrictions on transfer of uncertificated securities within 60 days, the shareholder may treat the shares as purchased by the corporation and demand payment of the full amount claimed under this section. See section 13.30(a). This provision creates no hardship for the corporation since, if it cannot complete the transaction within 60 days, it may return the certificates (or release the restrictions on uncertified shares) and start the process over again at any time.

NORTH CAROLINA COMMENTARY

The Model Act was modified in this section to reflect the fact that under G.S. 55-13-25, a dissenter who has not accepted the corporation's offer has not yet received payment. A dissenter who fails to notify the corporation of his demand under this section resumes the status of a nondissenting shareholder.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 389.

§ 55-13-29: Reserved for future codification purposes.

Part 3. Judicial Appraisal of Shares.

§ 55-13-30. Court action.

(a) If a demand for payment under G.S. 55-13-28 remains unsettled, the dissenter may commence a proceeding within 60 days after the earlier of (i) the date payment is made under G.S. 55-13-25, or (ii) the date of the dissenter's payment demand under G.S. 55-13-28 by filing a complaint with the Superior Court Division of the General Court of Justice to determine the fair value of the shares and accrued interest. A dissenter who takes no action within the 60-day period shall be deemed to have withdrawn his dissent and demand for payment.

(a1) Repealed by Session Laws 1997-202, s. 4.

(b) Reserved for future codification purposes.

(c) The court shall have the discretion to make all dissenters (whether or not residents of this State) whose demands remain unsettled parties to the proceeding as in an action against their shares and all parties must be served with a copy of the complaint. Nonresidents may be served by registered or certified mail or by publication as provided by law.

(d) The jurisdiction of the superior court in which the proceeding is commenced under subsection (a) is plenary and exclusive. The court may appoint one or more persons as appraisers to receive evidence and recommend decision on the question of fair value. The appraisers have the powers described in the order appointing them, or in any amendment to it. The parties are entitled to the same discovery rights as parties in other civil proceedings. The proceeding shall be tried as in other civil actions. However, in a proceeding by a dissenter in a corporation that was a public corporation immediately prior to consummation of the corporate action giving rise to the right of dissent under G.S. 55-13-02, there is no right to a trial by jury.

(e) Each dissenter made a party to the proceeding is entitled to judgment for the amount, if any, by which the court finds the fair value of his shares, plus interest, exceeds the amount paid by the corporation. (1925, c. 77, s. 1; 1943, c. 270; G.S., s. 55-167; 1955, c. 1371, s. 1; 1969, c. 751, s. 39; 1973, c. 469, ss. 36, 37; 1989, c. 265, s. 1; 1997-202, s. 4; 1997-485, ss. 5, 5.1.)

OFFICIAL COMMENT

Section 13.30 retains the concept of judicial appraisal as the ultimate means of determining fair value. The proceeding is to be commenced by the corporation within 60 days after receiving a demand for payment under section 13.28. Section 13.30(a) makes this time period jurisdictional; if the petition is not commenced within this period the corporation must pay the additional amounts demanded by the shareholders under section 13.28. See the Official Comment to that section. Each shareholder may sue directly for this amount, if necessary, and in an appropriate case may be entitled to charge the corporation with the costs of suit.

All demands for payment made under section 13.28 are to be resolved in a single proceeding brought in the county where the corporation's principal office is located or, if none, in other specified counties. All shareholders making section 13.28 demands must be made parties, with service by publication authorized if necessary. Appraisers may be appointed within the discretion of the court. The final judgment establishes not only the fair value of the shares in the abstract but also determines how much each shareholder who made a section 13.28 demand should actually receive.

If the corporation fails to commence a judicial proceeding to establish the fair value of the shares as required by this section, it must pay the full amount claimed under this section.

NORTH CAROLINA COMMENTARY

This section differs from the Model Act in several respects. The North Carolina version provides for the court proceeding to be commenced by the dissenter rather than the corporation. At the commencement of the proceeding, the corporation must pay the amount of its offer to the dissenter. A dissenter who does not commence a timely court proceeding may either accept the corporation's offer or resume his status as a nondissenting shareholder. A dissenter who takes no action resumes the status of a nondissenting shareholder.

Subsection 13.30(b) of the Model Act contains special venue provisions for proceedings under this section. That provision was omitted, and general venue rules apply.

This section expressly provides in subsection (d) that dissenters in a public corporation are not entitled to a jury trial in the appraisal of the "fair value" of their shares.

Editor's Note. — This section was amended by both S.L. 1997-202, s. 4 (amending subsection (a) and repealing subsection (a1)), and S.L. 1997-485, ss. 5 and 5.1 (amending subsections (a), (c), and (d)). The effective date provisions of the two acts differ. S.L. 1997-202 applies to corporate actions to which shareholders may dissent occurring on or after October 1, 1997. S.L. 1997-485, s. 5, applies to proceedings commenced on or after October 1, 1997.

To fill a potential gap between the two acts, S.L. 1997-485, s. 5.1, amended subsection (a), as amended by s. 5 of that act, to read:

> "(a) If a demand for payment under G.S. 55-13-28 remains unsettled, the dissenter may commence a proceeding within 60 days after the date of his payment demand under G.S. 55-13-28 by filing a complaint with the Superior Court Division of the General Court of Justice to determine the fair value of the shares and accrued interest. Within 10 days after service upon it of [the] complaint, the corporation shall pay to the dissenter the amount offered by the corporation under G.S. 55-13-25."

This version of subsection (a) applies to proceedings commenced on or after October 1, 1997, by dissenters to corporate actions that occurred before October 1, 1997.

Subsection (a) of this section was amended by Session Laws 1997-202, s. 4, and Session Laws 1997-485, ss. 5 and 5.1, in the coded bill drafting format provided by § 120-20.1. It has been set out in the form above at the direction of the Revisor of Statutes.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 389.

CASE NOTES

Determination of 60-Day Filing Period. — G.S. 55-13-25(b) made the inclusion of the required information in that subsection mandatory for a payment to be complete; a letter sent to a shareholder by merging banks failed to offer an explanation as to how the fair value of the stock was calculated, so the bank's proffered payment was incomplete, and the proper date for the determination of the shareholder's 60-day filing period was the date of the shareholder's payment demand. Foard v. Avery County Bank, 169 N.C. App. 625, 610 S.E.2d 460, 2005 N.C. App. LEXIS 686 (2005).

§ 55-13-31. Court costs and counsel fees.

(a) The court in an appraisal proceeding commenced under G.S. 55-13-30 shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court, and shall assess the costs as it finds equitable.

(b) The court may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:

(1) Against the corporation and in favor of any or all dissenters if the court finds the corporation did not substantially comply with the requirements of G.S. 55-13-20 through 55-13-28; or

(2) Against either the corporation or a dissenter, in favor of either or any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this Article.

(c) If the court finds that the services of counsel for any dissenter were of substantial benefit to other dissenters similarly situated, and that the fees for those services should not be assessed against the corporation, the court may award to these counsel reasonable fees to be paid out of the amounts awarded the dissenters who were benefited. (1925, c. 77, s. 1; 1943, c. 270; G.S., s. 55-167; 1955, c. 1371, s. 1; 1969, c. 751, s. 39; 1973, c. 469, ss. 36, 37; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 13.31 provides that generally the costs of the appraisal proceeding should be assessed against the corporation. But the court is authorized to assess these costs, in whole or in part, against the dissenters if it concludes they acted arbitrarily, vexatiously, or not in good faith in making the section 13.28 demand for additional payment. Similarly, counsel fees may be charged against the corporation or against dissenters upon a finding of a failure to comply in good faith with the requirements of this chapter. Individual dissenters, in turn, can be called upon to pay counsel fees for other dissenters if the court finds that the services were of substantial benefit to the other dissenters.

The purpose of all these grants of discretion with respect to costs and counsel fees is to increase the incentives of both sides to proceed in good faith under this chapter to attempt to resolve their disagreement without the need of a formal judicial appraisal of the value of shares.

NORTH CAROLINA COMMENTARY

Subsection (a) of this section differs from the Model Act by providing simply that "the court shall assess the costs as it finds equitable." This language was adapted from former G.S. 55-113(e). The words "either or" were inserted before "any other" in subdivision (b)(2) to clarify a possible ambiguity.

Article 14.

Dissolution.

Part 1. Voluntary Dissolution.

§ 55-14-01. Dissolution by incorporators or directors.

(a) The board of directors or, if the corporation has no directors, a majority of the incorporators of a corporation that has not issued shares may dissolve the corporation by delivering to the Secretary of State for filing articles of dissolution that set forth:

(1) The name of the corporation;
(1a) The names and addresses of its officers, if any;
(1b) The names and addresses of its directors, if any, or if none, the names and addresses of its incorporators;
(2) The date of its incorporation;
(3) That none of the corporation's shares has been issued;
(4) That no debt of the corporation remains unpaid;
(5) Reserved for future codification purposes; and
(6) That a majority of the incorporators or the board of directors authorized the dissolution.

(b) A corporation is dissolved upon the effective date of its articles of dissolution. (1955, c. 1371, s. 1; 1959, c. 1316, s. 261/2; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.19.)

OFFICIAL COMMENT

Section 14.01 provides a simple method of voluntary dissolution for a corporation that has not issued shares or commenced business. These provisions are alternative: a corporation may utilize section 14.01 if it has not issued shares (even though it has commenced business) or if it has issued shares but has not commenced business. Dissolution may be accomplished in either of these situations simply by a majority vote of the incorporators or initial directors. (See section 2.05 and its Official Comment for a discussion of the roles of "incorporators" or "initial directors" in the organization of a corporation.)

This simple method of dissolution is likely to be used by name-holding corporations or by corporations formed for the initiation of a new venture when the reasons for the initial creation of the corporation have been completely realized or will never come to fruition.

The form of articles of dissolution provided in section 14.01 takes account of the fact that a corporation may utilize this section even though it has received capital from the issuance of shares or has incurred liabilities either from the commencement of business without issuing shares or from its organization; hence the articles must state that no debts remain unpaid, and that the net assets of the corporation remaining after winding up have been distributed to the shareholders.

AMENDED NORTH CAROLINA COMMENTARY

This section modifies the Model Act in that dissolution by the directors or incorporators is authorized only in the case of a corporation that has not issued shares. In addition, the incorporators are authorized to act only if the corporation has no directors, and the articles of dissolution must identify the officers and directors or, if none, the incorporators.

Subsection (b) was added for clarification; it parallels G.S. 55-14-03(b).

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

§ 55-14-02. Dissolution by board of directors and shareholders.

(a) A corporation's board of directors may propose dissolution for submission to the shareholders.

(b) For a proposal to dissolve to be adopted:

(1) The board of directors must recommend dissolution to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation, in which event the board of directors must communicate the

proposal and the basis for its lack of a recommendation to the shareholders; and

(2) The shareholders entitled to vote must approve the proposal to dissolve as provided in subsection (e).

(c) The board of directors may condition its submission of the proposal for dissolution on any basis.

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with G.S. 55-7-05. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider dissolving the corporation.

(e) Unless the articles of incorporation, a bylaw adopted by the shareholders, or the board of directors (acting pursuant to subsection (c)) require a greater vote or a vote by voting groups, the proposal to dissolve to be adopted must be approved by a majority of all the votes entitled to be cast on that proposal. (1901, c. 2, s. 34; Rev., s. 1195; C.S., s. 1182; 1941, c. 195; G.S., s. 55-121; 1951, c. 1005, s. 4; 1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

A corporation that has issued shares and commenced business may dissolve voluntarily only with the approval of its shareholders. Section 14.02 requires the board of directors to propose dissolution and then submit the proposal to the shareholders. The board of directors must make a recommendation to the shareholders that the proposal to dissolve be approved, unless it determines that because of conflict of interest or other special circumstances it should make no recommendation. If the board of directors so determines, it must describe the conflict or circumstances, and communicate the basis for its determination, to the shareholders when presenting the proposal to dissolve to the shareholders.

Dissolution, to be approved, must receive the vote of a majority of the outstanding votes entitled by the articles of incorporation to vote on the proposal. This is a greater vote than that required for ordinary matters under section 7.25. Nonvoting classes of shares are not given a statutory right to vote on proposals to dissolve (either as separate voting groups or together with voting shares) by the Revised Model Act on the theory that, upon dissolution, the rights of all classes or series of shares are fixed by the articles of incorporation. The articles of incorporation, however, may stipulate that specified classes or series of shares are entitled to vote by separate voting groups. Thus, in the absence of specific provision in the articles of incorporation, only the shares of the corporation entitled to vote generally by the articles of incorporation are entitled to vote on dissolution. The articles of incorporation may also specify that a greater percentage of votes is required to approve the proposal than is required by section 14.02.

The board of directors may condition its submission of a proposal to the shareholders under subsection (c) on its receiving a specified percentage of the votes of shareholders of one or more classes or series, voting by separate voting groups, or on some other basis. See the discussion of conditional submissions in the Official Comment to section 10.03.

Section 14.04 permits the corporation to revoke the dissolution under the circumstances described.

NORTH CAROLINA COMMENTARY

This section differs from former G.S. 55-118(a) in that only voting shares are entitled to vote on a proposal to dissolve and, unless otherwise provided in the articles of incorporation, a bylaw adopted by the shareholders, or the resolution of the board of directors approving the dissolution, only a majority of the voting shares is required to adopt the proposal. It should be noted that all shareholders, whether or not entitled to vote, are still entitled to notice of the shareholders' meeting at which the dissolution proposal will be considered. Under prior law, the board of directors was required to recommend the dissolution; under this section, the board must recommend the dissolution proposal to the shareholders unless it determines that, because of conflict of interest or other special circumstances, it should make no recommendation to the shareholders. In addition, the board of directors may now condition its submission of a dissolution proposal "on any basis."

The language of the Model Act was modified in subsection (b) to conform to changes made in G.S. 55-10-03.

Under former G.S. 55-117, a corporation could be dissolved by written consent of all of the shareholders, without action by the board of directors. This provision was not brought forward.

CASE NOTES

Editor's Note. *— The cases below were decided under prior law.*

Statute Settles Question as to When Dissolution Allowed. — Former G.S. 55-121 settled the question formerly much mooted in the courts as to whether, and under what circumstances, a corporation could be dissolved by the stockholders, when no time was fixed for its duration, upholding and extending this power of voluntary dissolution as established by the better considered decisions on the subject. White v. Kincaid, 149 N.C. 415, 63 S.E. 109 (1908).

Part of Every Charter. — The provision of the statute enters into every charter, and unless otherwise enacted by the legislature, every stockholder takes and holds his stock subject to the power of voluntary dissolution, by resolution of the directors concurred in by two thirds in interest of the stockholders. White v. Kincaid, 149 N.C. 415, 63 S.E. 109 (1908).

Directors Are Trustees in Dissolution Proceedings. — The directors of a corporation in proceedings for dissolution are trustees in the sense that they must act faithfully in their judgment for the benefit of the corporation and in furtherance of its interest, and not for the purpose of unjustly oppressing the holders of the minority stock, or to attain their own personal ends. White v. Kincaid, 149 N.C. 415, 63 S.E. 109 (1908).

Motive for Dissolution Generally Immaterial. — When a corporation lawfully proceeds to wind up its affairs in accordance with the statute, the motive prompting the act, however reprehensible or malicious, is not, as a rule, relevant to the inquiry; and the courts will not undertake to interfere with the honest exercise of discretionary powers vested by statute in the management of a corporation, however unwise or improvident it may seem in a given instance. White v. Kincaid, 149 N.C. 415, 63 S.E. 109 (1908).

Liquidation to Escape Judgment. — An attempted liquidation by a corporation, to escape judgment for the refund of money wrongfully distributed, is in fraud of creditors. Chatham v. Mecklenburg Realty Co., 180 N.C. 500, 105 S.E. 329 (1920).

Suits Pending Dissolution. — Where it appears in an action that the indebtedness sought to be recovered was claimed to be due a corporation, and that the suit was instituted by the individual stockholders, a judgment as of nonsuit is properly entered, though proceedings in dissolution of the corporation were being had under the statute, the proper party plaintiff being the corporation or a receiver appointed therefor. Worthington v. Gilmers, Inc., 190 N.C. 128, 129 S.E. 153 (1925).

§ 55-14-03. Articles of dissolution.

(a) At any time after dissolution is authorized pursuant to G.S. 55-14-02, the corporation may dissolve by delivering to the Secretary of State for filing articles of dissolution setting forth:

(1) The name of the corporation;
(1a) The names and addresses of its officers;
(1b) The names and addresses of its directors;
(2) The date dissolution was authorized;
(3) A statement that shareholder approval was obtained as required by this Chapter.
(4) Repealed by Session Laws 1991, c. 645, s. 10(c).

(b) A corporation is dissolved upon the effective date of its articles of dissolution.

(c) For purposes of this Chapter, a dissolved corporation is a corporation whose articles of dissolution have become effective and includes a successor entity to which the remaining assets of the corporation are transferred subject to its liabilities for purposes of a liquidation. (1901, c. 2, s. 34; Rev., s. 1195; C.S., s. 1182; 1941, c. 195; G.S., s. 55-121; 1951, c. 1005, s. 4; 1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1991, c. 645, s. 10(c); 2005-268, s. 31.)

OFFICIAL COMMENT

The act of filing the articles of dissolution makes the decision to dissolve a matter of public record and establishes the time when the corporation must begin the process of winding up and cease carrying on its business except to the extent necessary for winding-up. The articles of dissolution must describe the manner in which the proposal to dissolve was submitted to the shareholders and describe the vote taken.

Under the Model Act, articles of dissolution may be filed at the commencement of winding-up or at any time thereafter. This is the only filing required for voluntary dissolution; no filing is required to mark the completion of winding-up since the existence of the corporation continues for certain purposes even after the business is wound up and the assets remaining after satisfaction of all creditors are distributed to the shareholders. No time limit for filing the articles is specified, and it often may be desirable to postpone filing until winding up is far along or even complete.

A corporation is dissolved on the date the articles of dissolution are effective. After this date the corporation is referred to as a "dissolved corporation," although its existence continues under section 14.05 for purposes of winding up.

NORTH CAROLINA COMMENTARY

Articles of dissolution are the only required filing under this Act, and a corporation is dissolved on the effective date of its articles of dissolution. There is no filing comparable to the certificate of completed liquidation required under former G.S. 55-121. Articles of dissolution may be filed at any time after dissolution is authorized.

This section modifies the Model Act by providing that the articles of dissolution shall contain the names and addresses of the corporation's officers and directors, so that creditors and other interested parties can identify the persons responsible for winding up the affairs of the corporation. Minor clarifying changes were also made in subsection (a).

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

Effective October 1, 2005, this section adds a definition of "dissolved corporation" for purposes of the North Carolina Business Corporation Act.

CASE NOTES

Cited in Storr Office Supply Div. v. Radar Bus. Sys., 832 F. Supp. 154 (E.D.N.C. 1993).

§ 55-14-04. Revocation of dissolution.

(a) A corporation may revoke its dissolution within 120 days after its effective date.

(b) Revocation of dissolution must be authorized in the same manner as the dissolution was authorized unless an authorization under G.S. 55-14-02 permitted revocation by action of the board of directors alone, in which event the board of directors may revoke the dissolution without shareholder action.

(c) After the revocation of dissolution is authorized, the corporation may revoke the dissolution by delivering to the Secretary of State for filing articles of revocation of dissolution, together with a copy of its articles of dissolution, that set forth:

(1) The name of the corporation;
(2) The effective date of the dissolution that was revoked;
(3) The date that the revocation of dissolution was authorized;
(4) If the corporation's board of directors (or incorporators) revoked the dissolution, a statement to that effect;
(5) If the corporation's board of directors revoked a dissolution authorized by the shareholders, a statement that revocation was permitted by action by the board of directors alone pursuant to that authorization; and

(6) If shareholder action was required to revoke the dissolution, the information required by G.S. 55-14-03(a)(3) or (4) with respect to the revocation.

(d) Revocation of dissolution is effective upon the effective date of the articles of revocation of dissolution.

(e) When the revocation of dissolution is effective, it relates back to and takes effect as of the effective date of the dissolution and the corporation resumes carrying on its business as if dissolution had never occurred, subject to the rights of any person who reasonably relied to his prejudice upon the filing of the articles of dissolution. (1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Voluntary dissolution may be revoked within 120 days of the effective date of the dissolution. Because of the importance and finality of dissolution, the decision to revoke dissolution generally requires shareholder authorization (unless the dissolution was approved solely by the initial directors or incorporators under section 14.01). Section 14.04(b), however, contemplates that the board of directors may revoke dissolution if it is granted that authority in advance by the shareholders when approving the dissolution. Such authorization is often included in proposals to dissolve that are contingent upon the effectuation of another transaction, such as a sale of corporate assets not in the ordinary course of business.

Certain other action requiring shareholder approval may be revoked by the board of directors without express shareholder approval. (See sections 11.03 and 12.02). By contrast, dissolution under section 14.04 may not be revoked by the board of directors without approval of the shareholders.

Articles of revocation of dissolution must be filed to reflect the decision to resume the business of the corporation. The information required in these articles parallels the information required in the original articles of dissolution.

The effect of articles of revocation of dissolution is to eliminate the requirement that the corporation cease to conduct its business except as part of the winding-up process and permit it to resume its business without limitation and as if dissolution had never occurred.

NORTH CAROLINA COMMENTARY

Under former G.S. 55-120(a), a corporation could revoke its dissolution at any time prior to the filing of the certificate of completed liquidation. Since the provision for filing a certificate of completed liquidation has not been brought forward, this section provides that any revocation must occur within 120 days after the effective date of the dissolution.

Minor clarifying changes to the Model Act were made in subsections (a) and (b).

Subsection (e) changes former G.S. 55-120(b) by providing that the revocation relates back to the effective date of the dissolution as if the dissolution had never occurred. The Model Act was modified, however, to provide that the relation back rule is subject to the rights of any person who reasonably relied to his prejudice upon the filing of the articles of dissolution.

Former G.S. 55-120(c) expressly provided for a shareholder's suit to cancel articles of dissolution containing false statements. Although this Act contains no similar provision, such a suit could continue to be brought under general principles.

Editor's Note. — Subdivision (a)(4) of G.S. 55-14-03, referred to in subdivision (c)(6) of this section, was repealed by Session Laws 1991, c. 645, s. 10(c).

§ 55-14-05. Effect of dissolution.

(a) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:

(1) Collecting its assets;

(2) Disposing of its properties that will not be distributed in kind to its shareholders;

(3) Discharging or making provision for discharging its liabilities;
(4) Distributing its remaining property among its shareholders according to their interests; and
(5) Doing every other act necessary to wind up and liquidate its business and affairs.

(b) Dissolution of a corporation does not:
(1) Transfer title to the corporation's property;
(2) Prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation's share transfer records;
(3) Subject its directors or officers to standards of conduct different from those prescribed in Article 8;
(4) Change quorum or voting requirements for its board of directors or shareholders; change provisions for selection, resignation, or removal of its directors or officers or both; or change provisions for amending its bylaws;
(5) Prevent commencement of a proceeding by or against the corporation in its corporate name;
(6) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or
(7) Terminate the authority of the registered agent of the corporation.

(c) After the end of the tax year in which dissolution occurs, a dissolved corporation is not subject to the annual franchise tax unless it engages in business activities not appropriate to winding up and liquidating its business and affairs as permitted by subsection (a). (1955, c. 1371, s. 1; 1973, c. 469, ss. 39, 40; c. 476, s. 193; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 14.05(a) provides that dissolution does not terminate the corporate existence but simply requires the corporation thereafter to devote itself to winding up its affairs and liquidating its assets; after dissolution, the corporation may not carry on its business except as may be appropriate for winding-up.

The Model Act uses the term "dissolution" in the specialized sense described above and not to describe the final step in the liquidation of the corporate business. This is made clear by section 14.05(b), which provides that chapter 14 dissolution does not have any of the characteristics of common law dissolution, which treated corporate dissolution as analogous to the death of a natural person and abated lawsuits, vested equitable title to corporate property in the shareholders, imposed the fiduciary duty of trustees on directors who had custody of corporate assets, and revoked the authority of the registered agent. Section 14.05(b) expressly reverses all of these common law attributes of dissolution and makes clear that the rights, powers, and duties of shareholders, the directors, and the registered agent are not affected by dissolution and that suits by or against the corporation are not affected in any way.

NORTH CAROLINA COMMENTARY

The consequences of filing articles of dissolution under this Act remain the same as under former G.S. 55-114(b). Subdivision (b)(2) expressly permits the dissolution proposal to provide for closing of the corporation's share transfer records, a procedure that was not specifically addressed under prior law.

Subsection (c) brings forward the provision of former G.S. 55-114(c), under which a dissolved corporation was not subject to franchise tax unless it engaged in business activities not appropriate to winding up and liquidating its business.

Legal Periodicals. — For article, "Close Corporation Shareholder Reasonable Expectations: The Larger Context," see 22 Wake Forest L. Rev. 41 (1987).

For article, "The Statutory Protection Of Minority Shareholders in the United Kingdom," see 22 Wake Forest L. Rev. 81 (1987).

For article, "Using Alternative Dispute Resolution Techniques to Settle Conflicts Among Shareholders of Closely Held Corporations," see 22 Wake Forest L. Rev. 105 (1987).

CASE NOTES

Editor's Note. *— Most of the cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Dissolution does not terminate the corporation's existence nor its amenability to suit. Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

Effect of Dissolution on Pending Action. — Where a corporation has been served with summons and has filed answer, the action against it does not abate upon its subsequent dissolution. Lertz v. Hughes Bros., 208 N.C. 490, 181 S.E. 342 (1935).

Magistrate's order denying defendant employer's motions to extend time on three discovery matters based on the employer's dissolution was contrary to law as the employer's existence did not end at the employer's dissolution, which was but the first part of the winding up and termination process; defending a lawsuit was one of the limited activities allowed a company in dissolution to continue the winding up process. Miceli v. KBRG of Statesville, LLC, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 61169 (W.D.N.C. July 23, 2008).

Effect of Temporary Suspension of Charter Under § 105-230. — Allegations in the complaint to the effect that plaintiff corporation's charter was temporarily suspended under G.S. 105-230 less than a year prior to the institution of the action did not disclose that the corporation did not have legal capacity to institute the action. Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

A corporation could not bring suit to enforce a contract entered into during a period of revenue suspension. South Mecklenburg Painting Contractors v. Cunnane Group, Inc., 134 N.C. App. 307, 517 S.E.2d 167 (1999).

Effect of Dissolution on Power to File Bankruptcy. — Administrative dissolution of North Carolina corporation pursuant to G.S. 55-14-05 does not strip the corporation of the power and ability to file a Chapter 7 bankruptcy because G.S. 55-14-05 allows dissolved corporations to retain their corporate existence for the purpose of engaging in activities to wind up their business and liquidate their assets and the filing of a Chapter 7 bankruptcy is an obvious way to liquidate those assets; thus, a motion to dismiss for lack of jurisdiction filed by a defendant against which the debtor corporation had filed an adversary proceeding was properly denied and overruled. Saslow v. Times Oil Corp. (In re 4 Seasons Express Mart, Inc.), — Bankr. —, 2007 Bankr. LEXIS 439 (Bankr. M.D.N.C. Feb. 6, 2007).

Failure to Reinstate Suspended Charter. — When a corporation's charter is suspended pursuant to G.S. 105-230, the same may be reinstated within five years upon payment of fees and taxes due; and if the charter is not so reinstated within five years, then liquidation of corporate assets is as provided in G.S. 105-232. Raleigh Swimming Pool Co. v. Wake Forest Country Club, 11 N.C. App. 715, 182 S.E.2d 273 (1971).

Standing to Maintain Action on Contract Where Articles Suspended. — A corporation whose articles of incorporation were suspended under G.S. 105-230 for failure to pay taxes had standing under former G.S. 55-114(b) to maintain an action to recover the amount due on a contract. Raleigh Swimming Pool Co. v. Wake Forest Country Club, 11 N.C. App. 715, 182 S.E.2d 273 (1971).

Property Does Not Revert or Escheat. — Upon the dissolution or extinction of a corporation for any cause, the real property conveyed to it in fee does not revert to the original grantors or their heirs, and its personal property does not escheat to the State; and this is so whether or not the duration of the corporation was limited by its charter or general statute. Wilson v. Leary, 120 N.C. 90, 26 S.E. 630 (1897).

How Assets Distributed. — When the receiver has collected the assets, he is required to pay all the debts, if the funds are sufficient, and if the funds are not sufficient, to distribute the same ratably, among all the creditors who prove their claims. When the court of equity, through its receiver, takes charge of the assets, they are to be distributed pro rata among the creditors, subject to such priorities as have already accrued. Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894).

Creditors Come Before Stockholders. — A corporation cannot settle with its members, by the application of assets to the retirement or redemption of the stock of the shareholders, until it has first settled and discharged all its liabilities, and any agreement among the shareholders looking to such arrangement will be void as to creditors. Heggie v. People's Bldg. & Loan Ass'n, 107 N.C. 581, 12 S.E. 275 (1890).

When Bondholders Are General Creditors. — Where payment of interest on bonds issued to preferred stockholders in reorganization of corporation was not restricted to payment out of earnings, but, on the contrary, the obligation was fixed and certain in the payment of interest out of assets of the corporation, this made and constituted the holders of such bonds under North Carolina statutory law general creditors. Bemis Hardwood Lumber Co. v. United States, 117 F. Supp. 851 (W.D.N.C. 1954).

Acquisition of New Property Not Incident to Winding Up. — While former G.S. 55-114(b) provided that a dissolved corporation continued to function for the limited purpose of winding up its affairs, the acquisition of new property was not incident to the winding up process. Piedmont & W. Inv. Corp. v. Carnes-Miller Gear Co., 96 N.C. App. 105, 384 S.E.2d 687 (1989), cert. denied, 326 N.C. 49, 389 S.E.2d 93 (1990).

Certificate of Completed Liquidation Not Required. — Unlike prior law, a dissolved corporation is not required to file a certificate of completed liquidation. North Carolina ex rel. Howes v. Peele, 876 F. Supp. 733 (E.D.N.C. 1995).

Company's failure to file a certificate of completed liquidation or to send or publish notice of dissolution, did not trigger the two-year "survival" period nor did its corporate existence cease; thus, the company was an existing entity to which the current North Carolina Business Corporation Act applied. North Carolina ex rel. Howes v. Peele, 876 F. Supp. 733 (E.D.N.C. 1995).

Applied in Storr Office Supply Div. v. Radar Bus. Sys., 832 F. Supp. 154 (E.D.N.C. 1993); Becker v. Graber Bldrs., Inc., 149 N.C. App. 787, 561 S.E.2d 905, 2002 N.C. App. LEXIS 308 (2002).

Cited in Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993); In re Brokers, Inc., — Bankr. —, 2008 Bankr. LEXIS 744 (Bankr. M.D.N.C. Mar. 4, 2008).

§ 55-14-06. Known claims against dissolved corporation.

(a) A dissolved corporation may dispose of the known claims against it by following the procedure described in this section.

(b) The dissolved corporation shall notify its known claimants in writing of the dissolution at any time after its effective date. The written notice must:

(1) Describe information that must be included in a claim;

(2) Provide a mailing address where a claim may be sent;

(3) State the deadline, which may not be fewer than 120 days from the effective date of the written notice, by which the dissolved corporation must receive the claim; and

(4) State that the claim will be barred if not received by the deadline.

(c) A claim against the dissolved corporation is barred:

(1) If the corporation does not receive the claim by the deadline from a claimant who received written notice under subsection (b); or

(2) If a claimant whose claim was rejected by written notice from the dissolved corporation does not commence a proceeding to enforce the claim within 90 days from the date of receipt of the rejection notice.

(d) For purposes of this section, "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution. (1955, c. 1371, s. 1; 1973, c. 469, ss. 39, 40; c. 476, s. 193; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Sections 14.06 and 14.07 provide a new and simplified system for handling known and unknown claims against a dissolved corporation, including claims based on events that occur after the dissolution of the corporation. Section 14.06 deals solely with known claims while section 14.07 deals with unknown or subsequently arising claims. A claim is a "known" claim even if it is unliquidated (see section 14.06(d)); a claim that is contingent or has not matured so that there is no immediate right to bring suit is not a "known" claim.

Known claims are handled in section 14.06 through a process of written notice to claimants; the written notice must contain the information described in section 14.06(b). Section 14.06(c) then provides fixed deadlines by which claims are barred under various circumstances, as follows:

(1) If a claimant receives written notice satisfying section 14.06(b) but fails to file the claim by the deadline specified by the corporation, the claim is barred by section 14.06(c)(1).

(2) If a claimant receives written notice satisfying section 14.06(b) and files the claim as required:
  (i) but the corporation rejects the claim, the claimant must commence a proceeding to enforce the claim within 90 days of the rejection or the claim is barred by section 14.06(c)(2); or
  (ii) if the corporation does not act on the claim or fails to notify the claimant of the rejection, the claimant is not barred by section 14.06(c) until the corporation notifies the claimant.

(3) If the corporation publishes notice under section 14.07, a claimant who was not notified in writing is barred unless he commences a proceeding within five years after publication of the notice.

(4) If the corporation does not publish notice, a claimant who was not notified in writing is not barred by section 14.06(c) from pursuing his claim.

These principles, it should be emphasized, do not lengthen statutes of limitation applicable under general state law. Thus claims that are not barred under the foregoing rules — for example, if the corporation does not act on a claim — will nevertheless be subject to the general statute of limitations applicable to claims of that type.

Even though the directors are not trustees of the assets of a dissolved corporation (see section 14.05(b)(3)), they must discharge or make provision for discharging all of the corporation's known liabilities before distributing the remaining assets to the shareholders. See sections 14.05(a)(3) and (4). See also sections 6.40 and 8.33.

NORTH CAROLINA COMMENTARY

This section provides a dissolved corporation with a new procedure for dealing expeditiously with "known claims." However, the procedure is permissive and, unlike former G.S. 55-119, notice to creditors and newspaper publication are not mandatory.

The language of the Model Act was modified in subsection (c) for greater clarity. A requirement that claim rejection notices be in writing was also added.

CASE NOTES

Cited in Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993); North Carolina ex rel. Howes v. Peele, 876 F. Supp. 733 (E.D.N.C. 1995).

§ 55-14-07. Unknown and certain other claims against dissolved corporation.

(a) A dissolved corporation may also publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice.

(b) The notice must:
  (1) Be published one time in a newspaper of general circulation in the county where the dissolved corporation's principal office (or, if none in this State, its registered office) is or was last located;
  (2) Describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and
  (3) State that a claim against the corporation will be barred unless a proceeding to enforce the claim is commenced within five years after the publication of the notice.

(c) If the dissolved corporation publishes a newspaper notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within five years after the publication date of the newspaper notice:
  (1) A claimant who did not receive written notice under G.S. 55-14-06;
  (2) A claimant whose claim was timely sent to the dissolved corporation but not acted on;

(3) A claimant whose claim is contingent or based on an event occurring after the effective date of dissolution. (1955, c. 1371, s. 1; 1973, c. 469, ss. 39, 40; c. 476, s. 193; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Earlier versions of the Model Act did not recognize the serious problem created by possible claims that might arise long after the dissolution process was completed and the corporate assets distributed to shareholders. Most of these claims were based on personal injuries occurring after dissolution but caused by allegedly defective products sold before dissolution, but they also involved negligence for which the statute of limitations did not begin to run until the negligence was discovered (e.g., a surgical instrument left inside the patient). The application of the Model Act provision (and of the state dissolution statutes phrased in different terms) to this problem led to confusing and inconsistent results. See generally Friedlander and Gilbert, "Post Dissolution Liabilities of Shareholders and Directors for Claims Against Dissolved Corporations," 31 VAND. L. REV. 1363 (1978). The problems raised by this type of litigation are intractable: on the one hand, the application of a mechanical two-year limitation period to a claim for injury that occurs after the period has expired involves obvious injustice to the plaintiff. On the other hand, to permit these suits generally makes it impossible ever to complete the winding up of the corporation, make suitable provision for creditors, and distribute the balance of the corporate assets to the shareholders.

In some circumstances a tort law concept of transferee liability, sometimes characterized as "de facto merger," has been applied to allow plaintiffs incurring post dissolution injuries to bring suit against the person that acquired the corporate assets. See the Official Comment to section 11.01. Some courts have refused to apply this doctrine, particularly when the purchaser of the corporate assets has not continued the business of the dissolved corporation. In these cases, the remedy of the plaintiff is limited to claims against the dissolved corporation and its shareholders receiving assets pursuant to the dissolution.

The solution adopted in section 14.07 is to continue the liability of a dissolved corporation for subsequent claims for a period of five years after it publishes notice of dissolution. It is recognized that a five year cut-off is itself arbitrary, but it is believed that the great bulk of post dissolution claims will arise during this period. This provision is therefore believed to be a reasonable compromise between the competing considerations of providing a remedy to injured plaintiffs and providing a period of repose after which dissolved corporations may distribute remaining assets free of all claims and shareholders may receive them secure in the knowledge that they may not be reclaimed.

Directors must generally discharge or make provision for discharging all of the corporation's liabilities before distributing the remaining assets to the shareholders. See the Official Comment to section 14.06. But section 14.07 does not contemplate that liquidating distributions to shareholders will be deferred until all possible claims are barred under section 14.07. Many claims covered by this section are of a type for which provision may be made by the purchase of insurance or by the setting aside of a portion of the assets, thereby permitting prompt distributions in liquidation. Claimants, of course, may always have recourse to the remaining assets of the dissolved corporation. See section 14.07(d)(1). Further, where unexpected claims arise after distributions have been made to shareholders in liquidation, section 14.07(d)(2) authorizes recovery against the shareholders receiving the earlier distributions. The recovery, however, is limited to the smaller of the recipient shareholder's pro rata share of the claim or the total amount of assets received as liquidating distributions by the shareholder from the corporation. The provision ensures that claimants seeking to recover distributions from shareholders will try to recover from the entire class of shareholders rather than concentrating only on the larger shareholders and protects the limited liability of shareholders.

NORTH CAROLINA COMMENTARY

This section is new to North Carolina law and operates as a statute of repose for claims asserted against a dissolved corporation that elects to comply with its procedural requirements. The section applies primarily to contingent and unknown liabilities of a corporation, but may also apply to known claims with respect to which notice is not given pursuant to G.S. 55-14-06.

Subsection 14.07(d) of the Model Act is not included in this section but is incorporated in substance into G.S. 55-14-08.

CASE NOTES

Applied in Becker v. Graber Bldrs., Inc., 149 N.C. App. 787, 561 S.E.2d 905, 2002 N.C. App. LEXIS 308 (2002).

Cited in North Carolina ex rel. Howes v. Peele, 876 F. Supp. 733 (E.D.N.C. 1995).

§ 55-14-08. Enforcement of claims.

(a) A claim under G.S. 55-14-06 or G.S. 55-14-07 may be enforced:

(1) Against the dissolved corporation, to the extent of its undistributed assets, including coverage under any applicable insurance policy, or

(2) Except as provided in G.S. 55-14-09(d), if the assets have been distributed in liquidation, against a shareholder of the dissolved corporation to the extent of the shareholder's pro rata share of the claim or the corporate assets distributed to the shareholder in liquidation, whichever is less, but a shareholder's total liability for all claims under this section may not exceed the total amount of assets distributed to the shareholder.

(b) Nothing in G.S. 55-14-06 or G.S. 55-14-07 shall extend any applicable period of limitation. (1955, c. 1371, s. 1; 1973, c. 469, ss. 39, 40; 1989, c. 265, s. 1; 2005-268, s. 32.)

NORTH CAROLINA COMMENTARY

This section contains the substance of subsection 14.07(d) of the Model Act and was added for the purpose of setting forth provisions applicable to claims covered by either G.S. 55-14-06 or G.S. 55-14-07. The language of the Model Act was modified in subdivision (a)(1) to make clear that undistributed assets of a dissolved corporation include coverage under any applicable insurance policy.

Under subdivision (a)(2), a claim may be enforced against a shareholder to the extent of the lesser of his pro rata share thereof or the corporate assets distributed to him in liquidation. In no event may a shareholder's total liability under this section exceed the total amount of assets distributed to him in liquidation. This subdivision, unlike former G.S. 55-54, makes a shareholder liable regardless of whether the distribution to him was made at a time when the corporation was unable to meet its obligations and regardless of whether he knew that the distribution violated this Act.

This section does not bring forward the provision in former G.S. 55-32(1) allowing creditors to enforce certain specified statutory liabilities in direct actions against directors. However, substantially the same relief should be available to creditors in insolvency proceedings and through attachment or similar procedures.

SUPPLEMENTAL NORTH CAROLINA COMMENTARY (2005)

Effective October 1, 2005, this section is amended to reflect that the liability of shareholders of a dissolved corporation may be limited by G.S. 55-14-09, which is added to the North Carolina Business Corporation Act effective October 1, 2005.

CASE NOTES

Enforcement Under Subdivision (a)(2). — If the corporation does not avail itself of protection against claims, a claim may be enforced under subdivision (a)(2); this enforcement provision makes a shareholder liable regardless of whether the distribution was made at a time when the corporation was unable to meet its obligations and regardless of whether shareholder knew that the distribution violated this Act. North Carolina ex rel. Howes v. Peele, 876 F. Supp. 733 (E.D.N.C. 1995).

Because shareholder distributee liability contemplates a monetary claim, as it provides for enforcement to the extent of assets received in liquidation, this form of enforcement is not possible when the claim is for injunctive relief; because an order to abate a nuisance is a form of injunctive relief, shareholder distributee liability is not an appropriate basis upon which to order president of company to abate the nuisance. North Carolina ex rel. Howes v. Peele, 876 F. Supp. 733 (E.D.N.C. 1995).

Cited in BNT Co. v. Baker Precythe Dev. Co., 151 N.C. App. 52, 564 S.E.2d 891, 2002 N.C. App. LEXIS 677 (2002).

§ 55-14-09. Court proceedings.

(a) A dissolved corporation that has published a notice under G.S. 55-14-07 may file an application with the superior court of the county where the dissolved corporation's principal office, or its registered office if the corporation does not have a principal office in this State, is located for a determination of the amount and form of security to be provided for payments of claims that are contingent or have not been made known to the dissolved corporation or that are based on an event occurring after the effective date of dissolution but that, based on the facts known to the dissolved corporation, are reasonably estimated to arise after the effective date of dissolution. Provisions need not be made for any claim that is or is reasonably anticipated to be barred under G.S. 55-14-07(c).

(b) Within 10 days after the filing of the application, notice of the proceeding shall be given by the dissolved corporation to each claimant holding a contingent claim whose contingent claim is shown on the records of the dissolved corporation.

(c) The court may appoint a guardian ad litem to represent all claimants whose identities are unknown in any proceeding brought under this section. The reasonable fees and expenses of the guardian, including all reasonable expert witness fees, shall be paid by the dissolved corporation.

(d) Provision by the dissolved corporation for security in the amount and the form ordered by the court under subsection (a) of this section shall satisfy the dissolved corporation's obligations with respect to claims that are contingent, have not been made known to the dissolved corporation, or are based on an event occurring after the effective date of dissolution, and the claims shall not be enforced against a shareholder who received assets in liquidation. (2005-268, s. 33.)

§§ 55-14-10 through 55-14-19: Reserved for future codification purposes.

Part 2. Administrative Dissolution.

§ 55-14-20. Grounds for administrative dissolution.

The Secretary of State may commence a proceeding under G.S. 55-14-21 to dissolve administratively a corporation if:

(1) The corporation does not pay within 60 days after they are due any penalties, fees, or other payments due under this Chapter;
(2) The corporation is delinquent in delivering its annual report;
(3) The corporation is without a registered agent or registered office in this State for 60 days or more;
(4) The corporation does not notify the Secretary of State within 60 days that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued;
(5) The corporation's period of duration stated in its articles of incorporation expires; or

(6) The corporation knowingly fails or refuses to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter. (1989, c. 265, s. 1; 1993, c. 552, s. 15; 1997-475, s. 6.4.)

OFFICIAL COMMENT

Involuntary dissolution in earlier versions of the Model Act required judicial order upon suit filed by the state attorney general. In the comment to section 95 of the 1969 Model Act, this decision was explained on the basis that the Model Act "provides for judicial review in protection of rights that might otherwise be lost." This position, however, was not generally accepted — in 1982 only three jurisdictions limited involuntary dissolution to judicial action — with all other jurisdictions permitting administrative dissolution for a variety of reasons, usually including a failure to pay franchise taxes and often including failure to file annual reports or otherwise comply with similar requirements of the corporation statutes. Some of these administrative dissolution statutes appear in the tax statutes rather than the corporation statutes of the states.

The experience in most states has been that administrative dissolution, or the threat thereof, is an effective enforcement mechanism for a variety of statutory obligations. Judicial dissolution is inappropriate for many of these violations because of its cost and the diversion of limited legal resources, particularly since most violations reflect the abandonment of the corporation by its owners.

The advantages of administrative dissolution in these circumstances are compelling: it not only reduces the number of records maintained by the secretary of state, but also avoids further wasteful attempts to compel compliance by the abandoned corporations and returns the corporate name promptly to the status of available names. Therefore, the revised Model Act includes, in sections 14.20 through 14.23, a model provision for the administrative dissolution of corporations in certain limited circumstances. These circumstances are set forth in section 14.20 and closely parallel provisions found in most state statutes on this subject.

NORTH CAROLINA COMMENTARY

Administrative dissolution by the Secretary of State, which is new to the corporate law of North Carolina, provides the Secretary of State with a simple, inexpensive method of enforcing this Act.

The Model Act provides in subdivision 14.20(1) for administrative dissolution by the Secretary of State upon nonpayment of any taxes or penalties imposed by law, including franchise taxes. This provision conflicts with the provisions of G.S. 105-230 through 105-232, which empower the Secretary of Revenue to cancel a corporate franchise for nonpayment of taxes. Accordingly the scope of subdivision (1) of this Act is restricted to failure to pay penalties, fees, or other payments due under this Act.

Subdivision (5) provides for administrative dissolution upon expiration of the period of duration stated in the corporation's articles of incorporation. Under former G.S. 55-115, a corporation that continued to conduct business after the expiration of its period of duration could at any time amend its charter to extend or perpetuate its period of existence. This provision was not brought forward.

§ 55-14-21. Procedure for and effect of administrative dissolution.

(a) If the Secretary of State determines that one or more grounds exist under G.S. 55-14-20 for dissolving a corporation, he shall mail the corporation written notice of his determination.

(b) If the corporation does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within 60 days after notice is mailed, the Secretary of State shall administratively dissolve the corporation by signing a certificate of dissolution that recites the ground or grounds for dissolution and its effective date. The Secretary of State shall file the original of the certificate and mail a copy to the corporation.

(c) The provisions of G.S. 55-14-05, 55-14-06, and 55-14-07 apply to a corporation administratively dissolved.

(d) The administrative dissolution of a corporation does not terminate the authority of its registered agent. (1989, c. 265, s. 1.)

OFFICIAL COMMENT

Many failures to comply with statutory requirements that may give rise to administrative dissolution under section 14.20 occur because of oversight or inadvertence by responsible corporate officers of corporations that are continuing in business. Such failures are usually corrected promptly when brought to the corporation's attention. Sections 14.21(a) and (b) therefore provide a mandatory notice by the secretary of state to each corporation subject to administrative dissolution and a 60-day grace period following the notice before the certificate of administrative dissolution may be filed.

In most instances, the issue whether the corporation is subject to administrative dissolution will not be controverted. If a corporation is administratively dissolved, it may petition the secretary of state for reinstatement under section 14.22 and, if this is denied, it may appeal to the courts under section 14.23.

NORTH CAROLINA COMMENTARY

The provisions of the Model Act were modified in subsections (a) and (b) by providing that all notices by the Secretary of State under the administrative dissolution provisions shall be given by mail. Subsection (c) was altered to clarify that the general provisions of G.S. 55-14-05, 55-14-06, and 55-14-07 apply to a corporation that is administratively dissolved.

CASE NOTES

Cited in Compton v. Kirby, 157 N.C. App. 1, 577 S.E.2d 905, 2003 N.C. App. LEXIS 369 (2003).

§ 55-14-22. Reinstatement following administrative dissolution.

(a) A corporation administratively dissolved under G.S. 55-14-21 may apply to the Secretary of State for reinstatement. The application must:

(1) Recite the name of the corporation and the effective date of its administrative dissolution; and

(2) State that the ground or grounds for dissolution either did not exist or have been eliminated.

(3) Reserved.

(4) Repealed by Session Laws 1995, c. 539, s. 6.

(a1) If, at the time the corporation applies for reinstatement, the name of the corporation is not distinguishable from the name of another entity authorized to be used under G.S. 55D-21, then the corporation must change its name to a name that is distinguishable upon the records of the Secretary of State from the name of the other entity before the Secretary of State may prepare a certificate of reinstatement.

(b) If the Secretary of State determines that the application contains the information required by subsection (a) of this section, that the information is correct, and that the name of the corporation complies with G.S. 55D-21 and any other applicable section, the Secretary of State shall cancel the certificate of dissolution and prepare a certificate of reinstatement that recites the Secretary of State's determination and the effective date of reinstatement, file the original of the certificate, and mail a copy to the corporation.

(c) When the reinstatement is effective, it relates back to and takes effect as of the date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred, subject to the rights of any person who reasonably relied to his prejudice upon the certificate of dissolution. (1989, c. 265, s. 1; 1995, c. 539, ss. 6, 7; 1996, 2nd Ex. Sess., c. 17, s. 15.1(b); 1997-200, ss. 1, 2(b); 1997-485, s. 1; 2001-390, s. 7; 2001-413, ss. 7, 7.1.)

OFFICIAL COMMENT

Section 14.22 provides a two-year period during which a corporation may seek reinstatement following administrative dissolution. This section may apply when a corporation through inadvertence or a failure to maintain a registered agent fails to receive or respond to the predissolution notice of default required by section 14.21. A corporation that is reinstated pursuant to this section resumes carrying on its business as before dissolution.

In order to be eligible for reinstatement, a corporation must comply with all statutory requirements at the time it seeks reinstatement. It must establish, for example, that all taxes have been paid and that its name is available when it files the application for reinstatement.

NORTH CAROLINA COMMENTARY

Subdivision 14.22(a)(3) of the Model Act requires applications under this section to state that the corporation's name meets the requirements of G.S. 55-4-01. The addition of subsection (g) to G.S. 55-4-01, however, rendered this requirement unnecessary, and it was omitted.

Subsection (b) modifies the corresponding provision of the Model Act to allow the Secretary of State simply to mail a copy of the certificate of reinstatement to the corporation.

Subsection (c) provides that the reinstatement, upon becoming effective, relates back to the effective date of the administrative dissolution as if dissolution had never occurred. The Model Act was modified, however, so that the relation back rule is subject to the rights of any person who reasonably relied to his prejudice on the administrative dissolution. *Cf.* G.S. 105-230 and 105-231 (any act performed or attempted during suspension of a corporation's charter is invalid and of no effect).

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 389.

§ 55-14-23. Appeal from denial of reinstatement.

(a) If the Secretary of State denies a corporation's application for reinstatement following administrative dissolution, he shall serve the corporation under G.S. 55D-33 with a written notice that explains the reason or reasons for denial.

(b) The corporation may appeal the denial of reinstatement to the Superior Court of Wake County within 30 days after service of the notice of denial is perfected. The appeal is commenced by filing a petition with the court and with the Secretary of State requesting the court to set aside the dissolution. The petition shall have attached to it copies of the Secretary of State's certificate of dissolution, the corporation's application for reinstatement, and the Secretary of State's notice of denial. No service of process on the Secretary of State is required except for the filing of the petition as set forth in this subsection. The appeal to the superior court shall be determined by a judge of the superior court upon such further evidence, notice and opportunity to be heard, if any, as the court may deem appropriate under the circumstances. The corporation shall have the burden of establishing that it is entitled to reinstatement.

(c) Upon consideration of the petition and any response made by the Secretary of State, the court may, prior to entering final judgment, order the Secretary of State to reinstate the dissolved corporation or may take other action the court considers appropriate.

(d) The court's final decision may be appealed as in other civil proceedings. (1989, c. 265, s. 1; 2001-358, ss. 5A(a), 47(d); 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

OFFICIAL COMMENT

Section 14.23 provides for an appeal from a decision by the secretary of state denying a petition for reinstatement. The court with jurisdiction over an appeal should be specified, and states adopting this section of the Model Act should specify who has the burden of proof on appeal and the standard for judicial review. See the Official Comment to section 1.26.

NORTH CAROLINA COMMENTARY

This section modifies the Model Act to clarify the procedures for appealing from a denial by the Secretary of State of a corporation's application for reinstatement following administrative dissolution. Under subsection (b) the corporation has the burden of establishing that it is entitled to reinstatement.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§ 55-14-24. Inapplicability of Administrative Procedure Act.

The Administrative Procedure Act shall not apply to any proceeding or appeal provided for in G.S. 55-14-20 through 55-14-23. (1989, c. 265, s. 1.)

NORTH CAROLINA COMMENTARY

This section does not appear in the Model Act.

§§ 55-14-25 through 55-14-29: Reserved for future codification purposes.

Part 3. Judicial Dissolution.

§ 55-14-30. Grounds for judicial dissolution.

The superior court may dissolve a corporation:

(1) In a proceeding by the Attorney General if it is established that (i) the corporation obtained its articles of incorporation through fraud; or (ii) the corporation has, after written notice by the Attorney General given at least 20 days prior thereto, continued to exceed or abuse the authority conferred upon it by law;

(2) In a proceeding by a shareholder if it is established that (i) the directors or those in control of the corporation are deadlocked in the management of the corporate affairs, the shareholders are unable to

break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock; (ii) liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder; (iii) the shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired; (iv) the corporate assets are being misapplied or wasted; or (v) a written agreement, whether embodied in the articles of incorporation or separate therefrom, entitles the complaining shareholder to liquidation or dissolution of the corporation at will or upon the occurrence of some event which has subsequently occurred, and all present shareholders, and all subscribers and transferees of shares, either are parties to such agreement or became a shareholder, subscriber or transferee with actual notice thereof;

(3) In a proceeding by a creditor if it is established that (i) the creditor's claim has been reduced to judgment and the execution on the judgment returned unsatisfied; or (ii) the corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent; or

(4) In a proceeding by the corporation to have its voluntary dissolution continued under court supervision. (Code, ss. 604, 605, 619, 668, 669, 694; 1889, c. 533; 1901, c. 2, ss. 61, 62, 73; Rev., ss. 1196, 1198, 1203, 1204; C.S., ss. 1185, 1187, 1195; G.S., ss. 55-124, 55-126, 55-134; 1955, c. 1371, s. 1; 1959, c. 1316, s. 26; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 14.30 provides grounds for the judicial dissolution of corporations at the request of the state, a shareholder, a creditor, or a corporation which has commenced voluntary dissolution. This section states that a court "may" order dissolution if a ground for dissolution exists. Thus there is discretion on the part of the court as to whether dissolution is appropriate even though grounds exist under the specific circumstances.

1. INVOLUNTARY DISSOLUTION BY STATE

Section 14.30(1) preserves longstanding and traditional provisions authorizing the state to seek to dissolve involuntarily a corporation by judicial decree. While this power has been exercised only rarely in recent years, this right of the state involves a policing action that provides a means by which the state may ensure compliance with, and nonabuse of, the fundamentals of corporate existence. Section 14.30(1) limits the power of the state in this regard to grounds that are reasonably related to this objective.

The legality of proposed corporations or of proposed actions has sometimes been tested by the secretary of state's refusal to accept documents for filing. The role of the secretary of state in reviewing documents for filing has been restricted by the Model Act (see section 1.25 and its Official Comment). It is intended that suits under this subchapter will replace those actions.

2. INVOLUNTARY DISSOLUTION BY SHAREHOLDERS

Section 14.31(2) provides for involuntary dissolution at the suit of a shareholder under circumstances involving deadlock or significant abuse of power by controlling shareholders or directors.

a. Deadlock

Dissolution because of deadlock is available if there is a deadlock at the directors' level but only if (1) the shareholders are unable to break the deadlock and (2) either "irreparable injury" to the corporation is being threatened or suffered or the business and affairs "can no longer be conducted to the advantage of" the shareholders. This language closely follows the earlier versions of the Model Act except that the requirement of "irreparable injury" has been relaxed to some extent. Dissolution because of deadlock at the directors' level is not dependent on the lapse of time during which the deadlock continues.

Dissolution is also available because of deadlock at the shareholders' level if the shareholders are unable to elect directors over a two-year period. This remedy is particularly important in small or family-held corporations in which share ownership may be divided on a 50-50 basis or a super majority provision (including possibly a requirement of unanimity) may effectively prevent the election of any directors. Dissolution under section 14.30(2)(iii) is not dependent on irreparable injury or misconduct by the directors then in office; if injury or misconduct is present, a deadlocked shareholder may proceed under another clause of section 14.30(2).

b. Abuse of power

A shareholder may sue for involuntary dissolution upon proof either that those in control of the corporation are acting illegally, oppressively, or fraudulently (section 14.30(2)(ii)) or that the corporate assets are being misapplied or wasted (section 14.30(2)(iv)). The application of these grounds for dissolution to specific circumstances obviously involves judicial discretion in the application of a general standard to concrete circumstances. The court should be cautious in the application of these grounds so as to limit them to genuine abuse rather than instances of acceptable tactics in a power struggle for control of a corporation.

3. Dissolution by creditors

Creditors may obtain involuntary dissolution only when the corporation is insolvent and only in the limited circumstances set forth in section 14.30(3). Typically, a proceeding under the federal Bankruptcy Act is an alternative in these situations.

4. Dissolution by corporation

A corporation that has commenced voluntary dissolution may petition a court to supervise its dissolution. Such an action may be appropriate to permit the orderly liquidation of the corporate assets and to protect the corporation from a multitude of creditors' suits or suits by dissatisfied shareholders.

NORTH CAROLINA COMMENTARY

Subdivision (1) brings forward the 20-day notice requirement of former G.S. 55-122 for proceedings by the Attorney General.

Under former G.S. 55-125(a)(2), a deadlock resulting from special provisions or arrangements designed to create veto power among shareholders was not grounds for judicial dissolution. Under subdivision (2) of this section, deadlock is grounds for dissolution, even if it results from special provisions or arrangements.

Clause (ii) of subdivision (2), brought forward from former G.S. 55-125(a)(4), is substituted for the Model Act's standard of "illegal, oppressive, or fraudulent" conduct.

Clause (v) of subdivision (2), brought forward from former G.S. 55-125(a)(3), is added to the Model Act's provisions to make agreements to liquidate specifically enforceable.

The Model Act requirement that a creditor must show that the corporation is insolvent in order to be entitled to judicial dissolution is omitted.

Legal Periodicals. — For comment discussing alternative remedies to dissolution for the deadlocked corporation, see 51 N.C.L. Rev. 815 (1973).

For note discussing rights of minority shareholders in closed corporations in light of Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983), see 62 N.C.L. Rev. 999 (1984).

For note discussing fulfillment of shareholders' expectations in close corporations in light of Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983), see 20 Wake Forest L. Rev. 505 (1984).

For article, "Close Corporation Shareholder Reasonable Expectations: The Larger Context," see 22 Wake Forest L. Rev. 41 (1987).

For article, "The Statutory Protection Of Minority Shareholders In The United Kingdom," see 22 Wake Forest L. Rev. 81 (1987).

For note, "Minority Shareholders' Rights in the Close Corporation Under the New North Carolina Business Corporation Act," see 68 N.C.L. Rev. 1109 (1990).

CASE NOTES

Editor's Note. — *Most of the cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

For historical background of former § 55-125, relating to power of courts to liquidate and decree involuntary dissolution, see Meiselman v. Meiselman, 58 N.C. App. 758, 295 S.E.2d 249 (1982), modified and aff'd, 309 N.C. 279, 307 S.E.2d 551 (1983).

Statute vests broad equitable powers in the trial court in determining whether a corporation should be involuntarily dissolved. W &

H Graphics, Inc. v. Hamby, 48 N.C. App. 82, 268 S.E.2d 567 (1980).

Power of Court Absent Statute. — As a general rule, the court would have no power, absent statutory direction, to order the dissolution of a corporation simply on the grounds that there was deadlock or dissension among the directors or stockholders. Ellis v. Civic Imp., Inc., 24 N.C. App. 42, 209 S.E.2d 873 (1974), cert. denied, 286 N.C. 413, 211 S.E.2d 794 (1975).

Power of Court to Protect Rights of Complaining Shareholder. — Former G.S. 55-125(a)(4) and 55-125.1 give the trial court plenary power to frame whatever order it sees fit to protect the rights of a complaining shareholder. Meiselman v. Meiselman, 58 N.C. App. 758, 295 S.E.2d 249 (1982), modified and aff'd, 309 N.C. 279, 307 S.E.2d 551 (1983).

Finding Required Under Former § 55-125(a)(1). — Under former G.S. 55-125(a)(1), irreconcilable deadlock of the directorate or shareholders was not sufficient basis for an order of liquidation without a supported finding or conclusion that the shareholders were so deadlocked that its business could no longer be conducted with advantage to all the shareholders. Ellis v. Civic Imp., Inc., 24 N.C. App. 42, 209 S.E.2d 873 (1974), cert. denied, 286 N.C. 413, 211 S.E.2d 794 (1975).

Deadlock in Management of Corporate Affairs. — Where plaintiff and defendant were the only directors, because they could not agree when the corporation should borrow money, the corporation could not borrow money at all; therefore, there was sufficient evidence to support a finding of deadlock in the management of the corporation's affairs. Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

No Limitation Regarding Duration of Effects of Deadlock. — Subsection (2) allows the court to order an involuntary corporate dissolution due to director deadlock, without limitation as to the duration or specific effects of the deadlock. Benchmark Carolina Aggregates, Inc. v. Martin Marietta Materials, Inc., 125 N.C. App. 666, 482 S.E.2d 27 (1997), cert. denied, 346 N.C. 275, 487 S.E.2d 538 (1997).

Showing Required Under Former § 55-125(a)(4). — When the power of the court in the exercise of its equitable jurisdiction was invoked to liquidate and decree involuntary dissolution under former G.S. 55-125(a)(4), there had to be a showing that the liquidation was reasonably necessary for the protection of the rights or interests of the complaining shareholder. Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

Sufficient Allegations Under Former § 55-125(a)(4). — The superior court had authority, in the exercise of its discretion, under former G.S. 55-125(a)(4), to order the liquidation of a corporation upon application of a stockholder alleging that the corporation had been operating at a loss and that to allow it to continue operations would deplete its assets and seriously damage the stockholders. Royall v. Carr Lumber Co., 248 N.C. 735, 105 S.E.2d 65 (1958).

Showing Required for Relief Under Former § 55-125.1(b). — Former G.S. 55-125.1(b), relating to relief as an alternative to dissolution, did not require a complaining shareholder to show bad faith, mismanagement or wrongful conduct, but only real harm. Meiselman v. Meiselman, 58 N.C. App. 758, 295 S.E.2d 249 (1982), modified and aff'd, 309 N.C. 279, 307 S.E.2d 551 (1983).

Mandatory Buy-Out Rights. — Mandatory buy-out rights under subsection (d) of G.S. 55-14-31 apply only to dissolutions granted under subdivision (2)(ii) of this section. Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

Corporation Is the Necessary Defendant. — The necessary defendant in an action for involuntary dissolution of a corporation under the statute is the corporation itself; shareholders and directors may, but need not be, made parties defendant unless relief is sought against them personally. W & H Graphics, Inc. v. Hamby, 48 N.C. App. 82, 268 S.E.2d 567 (1980).

Directors Are Proper Parties to Shareholder's Suit. — Directors are proper parties to a suit to dissolve the corporation upon the complaint of one shareholder, even though no relief is sought against them personally. Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

They May Be Joined or Become Parties on Own Application. — The implication in the statute is that directors and other interested shareholders may be made, or, on their own application, may become parties to a complaining shareholder's action to liquidate and dissolve the corporation. Certainly, the directors are not improper parties. Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

Joinder of Suit for Failure to Declare Dividends with Cause of Action for Liquidation. — A stockholder in a corporation may sue the corporation, and join its directors as defendants, for failure to declare adequate dividends from the corporation's earnings, and may join therewith a second cause of action for liquidation and involuntary dissolution of the corporation based upon bad faith management in suppressing dividends and in deflating the value of the corporation's assets, thus precluding the plaintiff stockholder from obtaining either a fair dividend or a fair market for his stock. Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

Discretion in Grant of Relief. — When a shareholder brought suit seeking relief under former G.S. 55-125(a)(4) and 55-125.1, he had the burden of proving that his "rights or interests" as a shareholder were being contravened. However, once the shareholder had established this, the trial court, in deciding whether to grant relief, had to exercise its equitable discretion, and consider the actual benefit and injury to all of the shareholders resulting from dissolution or other possible relief. To hold otherwise would allow a plaintiff to demand at-will dissolution of a corporation or a forced buy-out of his shares or other relief at the expense of the corporation and without regard to the rights and interests of the other shareholders. Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1982).

The determination of relief, liquidation or otherwise, is within the superior court's equitable discretion. Lowder v. All Star Mills, Inc., 75 N.C. App. 233, 330 S.E.2d 649, cert. denied, 314 N.C. 541, 335 S.E.2d 19 (1985).

Involuntary dissolution under former § 55-125 was not the exclusive remedy in this State, because under former G.S. 55-125.1 the court had broad discretion to grant any kind of relief it deemed appropriate as an alternative to dissolving a corporation. Meiselman v. Meiselman, 58 N.C. App. 758, 295 S.E.2d 249 (1982), modified and aff'd, 309 N.C. 279, 307 S.E.2d 551 (1983).

Need for Judicial Intervention Determined Case-by-Case. — The circumstances which give rise to relief under the involuntary dissolution statutes are so infinitely varied that courts must determine if judicial intervention is necessary on a case-by-case basis. Meiselman v. Meiselman, 58 N.C. App. 758, 295 S.E.2d 249 (1982), modified and aff'd, 309 N.C. 279, 307 S.E.2d 551 (1983).

It is the trial court's duty to review all the evidence to determine whether fairness and the equities warrant judicial intervention. Meiselman v. Meiselman, 58 N.C. App. 758, 295 S.E.2d 249 (1982), modified and aff'd, 309 N.C. 279, 307 S.E.2d 551 (1983).

For analysis a trial court to be applied in resolving suits brought under former G.S. 55-125(a)(4) and 55-125.1, see Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983).

In a determination of whether to order dissolution or other relief under former G.S. 55-125(a)(4), the complaining shareholder had to show that: (1) He had one or more substantial reasonable expectations known or assumed by the other participants; (2) the expectation has been frustrated; (3) the frustration was not the shareholder's fault and was in large part beyond his control; and (4) under all of the circumstances of the case, the shareholder was entitled to some form of equitable relief. Lowder v. All Star Mills, Inc., 75 N.C. App. 233, 330 S.E.2d 649, cert. denied, 314 N.C. 541, 335 S.E.2d 19 (1985).

Order of Dissolution Upheld. — The trial court did not abuse its discretion in ordering dissolution of a closely-held corporation where the reasonable expectations of a minority shareholder and former vice-president with 38% of the shares, that he would receive fair market value for his shares after his company compensation was cut off, and of his grandson, that he would have a share in the management of the company after he was elected director, were frustrated by the majority shareholders, did not result from any fault of their own, and only judicial dissolution could safeguard those expectations. Royals v. Piedmont Elec. Repair Co., 137 N.C. App. 700, 529 S.E.2d 515, 2000 N.C. App. LEXIS 497 (2000).

Insufficient Grounds for Dissolution. — Where the trial court failed to make any of the findings required under Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983), but simply found that liquidation was reasonably necessary for the protection of the interests of the complaining shareholder, the trial court's findings of fact were not sufficient to support its conclusion that grounds for dissolution existed. Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

Shareholder Need Only Show That "Fairness" Compels Dissolution. — Subdivision (a)(4) of former G.S. 55-125, which authorized liquidation, not when there was "oppression," but when it was reasonably necessary for the protection of the complaining shareholder, required the complaining shareholder only to show that basic "fairness" compelled dissolution. Meiselman v. Meiselman, 58 N.C. App. 758, 295 S.E.2d 249 (1982), modified and aff'd, 309 N.C. 279, 307 S.E.2d 551 (1983).

Order of Liquidation and Dissolution Upheld. — It was reasonable for the court to conclude that the complaining shareholder, who began working for corporation in 1955 and worked continuously until he was abruptly fired in 1978, had a reasonable expectation that his employment would continue. Since the controlling officer-director misappropriated corporate opportunities, and since the majority of the stockholders aligned themselves with this officer-director, the court did not abuse its discretion in ordering liquidation and dissolution. Lowder v. All Star Mills, Inc., 75 N.C. App. 233, 330 S.E.2d 649, cert. denied, 314 N.C. 541, 335 S.E.2d 19 (1985).

As to involuntary liquidation under former statutes, see also Asheville Div. No. 15 v. Aston, 92 N.C. 578 (1885); Simmons v. Norfolk & Baltimore Steamboat Co., 113 N.C. 147, 18 S.E. 117 (1893); Greenleaf v. Land & Lumber Co., 146 N.C. 505, 60 S.E. 424 (1908); Bank of Andrews v. Gudger, 212 F. 49 (4th Cir. 1914);

Lasley v. Walnut Cove Mercantile Co., 179 N.C. 575, 103 S.E. 213 (1920); Jones v. A. & W.R.R., 193 N.C. 590, 137 S.E. 706 (1927).

As to necessity for service on shareholders in suit under former statute for dissolution of corporation, see Glod v. Castle Hayne Growers & Shippers, Inc., 239 N.C. 304, 79 S.E.2d 396 (1954).

Applied in Edwards v. Edwards, 110 N.C. App. 1, 428 S.E.2d 834 (1993).

Cited in Clark v. B.H. Holland Co., 852 F. Supp. 1268 (E.D.N.C. 1994); Norman v. Nash Johnson & Sons' Farms, Inc., 140 N.C. App. 390, 537 S.E.2d 248, 2000 N.C. App. LEXIS 1207 (2000).

§ 55-14-31. Procedure for judicial dissolution.

(a) Venue for a proceeding to dissolve a corporation lies in the county where a corporation's principal office (or, if none in this State, its registered office) is or was last located.

(b) It is not necessary to make shareholders parties to a proceeding to dissolve a corporation unless relief is sought against them individually.

(c) A court in a proceeding brought to dissolve a corporation may issue injunctions, appoint a receiver with all powers and duties the court directs, take other action required to preserve the corporate assets wherever located, and carry on the business of the corporation.

(d) In any proceeding brought by a shareholder under G.S. 55-14-30(2)(ii) in which the court determines that dissolution would be appropriate, the court shall not order dissolution if, after such determination, the corporation elects to purchase the shares of the complaining shareholder at their fair value, as determined in accordance with such procedures as the court may provide. (1955, c. 1371, s. 1; 1959, c. 1316, s. 26; 1973, c. 469, s. 41; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 14.31 designates the attorney general as the officer to bring suits for involuntary dissolution by the state. The county or counties where these suits must be commenced should be specified; it typically is either the state capital or the county in which the corporation's principal office is located. See the Official Comment to section 1.26. Suits brought for judicial dissolution under other subdivisions of section 14.30 must be brought where the corporation's principal office is located or, if not located in this state, where its registered office is or was last located.

NORTH CAROLINA COMMENTARY

Subsection (a) of this section was rewritten to provide a uniform venue for dissolution proceedings, whether instituted by the Attorney General, by a shareholder, or by a creditor.

Legal Periodicals. — For note, "Minority Shareholders' Rights in the Close Corporation Under the New North Carolina Business Corporation Act," see 68 N.C.L. Rev. 1109 (1990).

CASE NOTES

Mandatory buy-out rights under subsection (d) of this section apply only to dissolutions granted under subdivision (2)(ii) of G.S. 55-14-30. Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

Applied in Royals v. Piedmont Elec. Repair Co., 137 N.C. App. 700, 529 S.E.2d 515, 2000 N.C. App. LEXIS 497 (2000).

§ 55-14-32. Receivership.

(a) A court in a judicial proceeding brought to dissolve a corporation may appoint one or more receivers to wind up and liquidate, or to manage, the business and affairs of the corporation. The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver. The court appointing a receiver has exclusive jurisdiction over the corporation and all of its property wherever located.

(b) The court may appoint an individual or a domestic or foreign corporation (authorized to transact business in this State) as a receiver. The court may require the receiver to post bond, with or without sureties, in an amount the court directs.

(c) The court shall describe the powers and duties of the receiver in its appointing order, which may be amended from time to time. Such powers may include without limitation the power:

(1) To dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court;

(1a) To sue and defend in his own name as receiver of the corporation in all courts of this State; and

(2) To exercise all of the powers of the corporation, through or in place of its board of directors or officers, to the extent necessary to manage the affairs of the corporation in the best interests of its shareholders and creditors.

(d) Reserved for future codification purposes.

(e) The court from time to time during the receivership may order compensation paid and expense disbursements or reimbursements made to the receiver and his counsel from the assets of the corporation or proceeds from the sale of the assets. (1955, c. 1371, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 14.32 preserves provisions from earlier versions of the Model Act authorizing the appointment of a receiver, and adds authority to appoint a custodian as an alternative, for a corporation in a judicial dissolution proceeding. In many states, general statutes or rules of court regulate the appointment of receivers or custodians and define their duties. Section 14.32 is designed to supplement these general provisions and grant the court power to take the steps it considers necessary to resolve the internal corporate problem or to effect liquidation of the corporation in an efficient manner.

NORTH CAROLINA COMMENTARY

Because there is no established body of law in North Carolina on appointment of custodians in these circumstances, this section and G.S. 55-14-31 differ from the Model Act in omitting all references to custodians and custodianship. The provisions of subsection (c) describing the powers that may be given to a receiver were rewritten to provide greater clarity.

Legal Periodicals. — For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

§ 55-14-33. Decree of dissolution.

(a) If after a hearing the court determines that one or more grounds for judicial dissolution described in G.S. 55-14-30 exist, it may enter a decree dissolving the corporation and specifying the effective date of the dissolution, and the clerk of the court shall deliver a certified copy of the decree to the Secretary of State, who shall file it.

(b) After entering the decree of dissolution, the court shall direct the winding up and liquidation of the corporation's business and affairs in accordance with G.S. 55-14-05 and the notification of claimants in accordance with G.S. 55-14-06 and G.S. 55-14-07. The corporation's name becomes available for use by another entity as provided in G.S. 55D-21. (1955, c. 1371, s. 1; 1959, c. 1316, s. 26; 1967, c. 823, s. 19; 1969, c. 965, s. 1; 1973, c. 469, s. 42; 1989, c. 265, s. 1; 2001-358, s. 19; 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

OFFICIAL COMMENT

A court decree ordering that a corporation be dissolved involuntarily has the same legal effect as articles of dissolution. Section 14.33 requires that the secretary of state receive and file a copy of the decree. Thereafter the corporation's business and affairs are to be wound up as provided in sections 14.05, 14.06, and 14.07.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

CASE NOTES

Trial court was not required to hold hearing on valuation of the corporation's stocks and assets prior to entering its dissolution order as any specific problems regarding implementation of the dissolution order, including valuation of the corporation's assets, can be brought to the attention of the trial court by motion as the problems arise. Foster v. Foster Farms, Inc., 112 N.C. App. 700, 436 S.E.2d 843 (1993).

§§ 55-14-34 through 55-14-39: Reserved for future codification purposes.

Part 4. Miscellaneous.

§ 55-14-40. Disposition of amounts due to unavailable shareholders and creditors.

Upon liquidation of a corporation, the portion of the assets distributable to a creditor or shareholder who is unknown or cannot be found shall be disposed of in accordance with Chapter 116B. (1947, c. 613; c. 621, s. 1; G.S., s. 55-132; 1955, c. 1371, s. 1; 1971, c. 1135, s. 4; 1979, 2nd Sess., c. 1311, s. 6; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 14.40 is a deposit provision, not an escheat provision. It does not provide for ultimate disposition of unclaimed funds. Rather, it permits a corporation that has dissolved to pay over for safekeeping to the state treasurer (or other appropriate state official with statutory authority to receive such funds) funds belonging to a creditor, claimant, or shareholder who cannot be found.

The handling and ultimate disposition of unclaimed funds by the state treasurer or other appropriate state official is to be determined by state law other than the Model Act.

NORTH CAROLINA COMMENTARY

This section brings forward former G.S. 55-130 and incorporates the provisions of Chapter 116B of the General Statutes (Escheats and Abandoned Property).

Legal Periodicals. — For comment on escheat of intangible property, see 2 Wake Forest Intra. L. Rev. 100 (1966).

ARTICLE 14A.

Reorganization.

§ 55-14A-01. Fundamental changes in reorganization proceedings.

(a) Whenever a plan of reorganization of a corporation is confirmed by decree or order of a court of competent jurisdiction in proceedings for the reorganization of such corporation pursuant to the provisions of any applicable statute of the United States relating to reorganization of corporations, the corporation may put into effect and carry out such plan and the decrees and orders of the court relative thereto and may take any action provided in such plan or directed by such decrees and orders without further action by its directors or shareholders. Such action may be taken, as may be directed by such decrees or orders, by the trustee or trustees of such corporation appointed in the reorganization proceedings, or by designated officers of the corporation, or by a master or other representative appointed by the court, with like effect as if taken by unanimous action of the directors and shareholders of the corporation. In particular and without limiting the generality or effect of the foregoing, such corporation may:

(1) Amend its articles of incorporation or bylaws, or both, so long as the articles of incorporation and bylaws as amended contain only such provisions as might be lawfully contained therein at the time of making such amendment;

(2) Constitute or reconstitute and classify or reclassify its board of directors, and name, constitute or appoint directors and officers in place of or in addition to all or any of the directors or officers then in office;

(3) Make any change in its capital accounts or in any or all of its outstanding shares or other securities, or cancel any or all of such outstanding shares or other securities;

(4) Dissolve and liquidate;

(5) Effect a merger or share exchange;

(6) Transfer all or part of its assets;

(7) Change its registered office or registered agent, or both;

(8) Authorize the issuance of bonds, debentures or other obligations of the corporation, whether or not convertible into shares of any class or bearing warrants or other evidences of optional rights to purchase or subscribe for shares of any class, and fix the terms and conditions thereof.

(b) Any articles of amendment, statement of change of registered office or registered agent, articles of restatement, articles of merger or share exchange, articles of conversion, articles of dissolution, or any other document appropriate to complete any action permitted by this section shall be executed and filed in accordance with the provisions of this Chapter on behalf of the corporation by such person or persons as may be authorized to take such action pursuant to subsection (a) of this section. The document shall set forth the statements required by this Chapter to be included in the document, except any statement that the action taken by the document was adopted by the incorporators or board of directors or was approved by the shareholders, and also shall set forth:

(1) The date of the court's order or decree approving the action.

(2) The title of the reorganization proceeding in which the order or decree was entered.

(3) A statement that the court had jurisdiction of the proceeding under a federal statute of the United States.

(c) No action taken under this section shall give rise to any dissenters' rights, except as provided in the plan of reorganization.

(d) This section does not apply after entry of a final decree in the reorganization proceeding even though the court retains jurisdiction of the proceeding for limited purposes unrelated to consummation of the reorganization plan. (1973, c. 469, s. 38; 1989, c. 265, s. 1; 2005-268, s. 34.)

NORTH CAROLINA COMMENTARY

This section brings forward, with minor conforming changes, former G.S. 55-113.1. Its provisions are more complete than those of the corresponding section of the Model Act, section 10.08. Subsection 10.08(d) of the Model Act, however, was substituted for subsection (d) of the former statute.

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

CASE NOTES

Cited in Lee v. Scarborough, 162 N.C. App. 674, 592 S.E.2d 43, 2004 N.C. App. LEXIS 259 (2004); Lee v. Scarborough, 164 N.C. App. 357, 595 S.E.2d 729, 2004 N.C. App. LEXIS 812 (2004).

ARTICLE 15.

Foreign Corporations.

Part 1. Certificate of Authority.

§ 55-15-01. Authority to transact business required.

(a) A foreign corporation may not transact business in this State until it obtains a certificate of authority from the Secretary of State.

(b) Without excluding other activities which may not constitute transacting business in this State, a foreign corporation shall not be considered to be transacting business in this State solely for the purposes of this Chapter, by reason of carrying on in this State any one or more of the following activities:

(1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes;

(2) Holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs;

(3) Maintaining bank accounts or borrowing money in this State, with or without security, even if such borrowings are repeated and continuous transactions;

(4) Maintaining offices or agencies for the transfer, exchange, and registration of its securities, or appointing and maintaining trustees or depositories with relation to its securities;

(5) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this State before becoming binding contracts;

(6) Making or investing in loans with or without security including servicing of mortgages or deeds of trust through independent agencies within the State, the conducting of foreclosure proceedings and sale, the acquiring of property at foreclosure sale and the management and rental of such property for a reasonable time while liquidating its investment, provided no office or agency therefor is maintained in this State;

(7) Taking security for or collecting debts due to it or enforcing any rights in property securing the same;

(8) Transacting business in interstate commerce;

(9) Conducting an isolated transaction completed within a period of six months and not in the course of a number of repeated transactions of like nature;

(10) Selling through independent contractors;

(11) Owning, without more, real or personal property.

(c) Reserved for future codification purposes.

(d) Foreign insurance companies that are licensed by the Commissioner of Insurance are not required to obtain a certificate of authority from the Secretary of State. (1901, c. 2, s. 93; Rev., s. 1193; 1915, c. 196, s. 1; C.S., s. 1180; G.S., s. 55-117; 1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.20; 1993, c. 552, s. 16.)

OFFICIAL COMMENT

A state may prescribe the terms and conditions upon which a foreign corporation is permitted to transact business within the state, subject, of course, to the restrictions of the United States Constitution. Chapter 15 requires that a foreign corporation seeking to transact business within the state must (1) obtain a certificate of authority from the secretary of state and (2) maintain a registered office and appoint a registered agent within the state.

Section 15.01(a) states the basic requirement that a foreign corporation must obtain a certificate of authority before it transacts business within the state. Section 15.05 describes the scope of the privilege obtained by a certificate of authority while section 15.02 describes the consequences of transacting business in the state without first obtaining the certificate of authority.

The Model Act does not attempt to formulate an inclusive definition of what constitutes the transaction of business. Rather, the concept is defined in a negative fashion by section 15.01(b), which states that certain activities do *not* constitute the transaction of business. In general terms, any conduct more regular, systematic, or extensive than that described in section 15.01(b) constitutes the transaction of business and requires the corporation to obtain a certificate of authority. Typical conduct requiring a certificate of authority includes maintaining an office to conduct local intrastate business, selling personal property not in interstate commerce, entering into contracts relating to the local business or sales, and owning or using real estate for general corporate purposes. But the passive owning of real estate for investment purposes does not constitute transacting business. See section 15.01(b)(9).

The test of "transacting business" defined in a negative way in section 15.01(b) applies only to the question whether the corporation's contacts with the state are such that it must obtain a certificate of authority. It is not applicable to other questions such as whether the corporation is amenable to service of process under state "long-arm" statutes or liable for state or local taxes. A corporation that has obtained (or is required to obtain) a certificate of authority to transact business under chapter 15 will generally be subject to suit and state taxation in the state, while a corporation that is subject to service of process or state taxation in a state will not necessarily be required to obtain a certificate of authority under chapter 15.

The list of activities set forth in section 15.01(b) is not exhaustive. See section 15.01(c). The list excludes several different types of activities from the definition of "transacting business," which are discussed below.

1. Engaging in litigation

Section 15.01(b)(1) excludes "maintaining, defending or settling any proceeding." The word "proceeding" is defined in section 1.40 to include all civil, criminal, administrative, or investigative suits or actions. Thus, a corporation is not "transacting business" solely because it resorts to the courts of the state to recover an indebtedness, enforce an obligation, recover possession of personal property, obtain the appointment of a receiver, intervene in a pending proceeding, bring a petition to compel arbitration, file an appeal bond, or pursue appellate remedies. Similarly, a foreign corporation is not required to obtain a certificate of authority merely because it files a complaint with the state securities commission or other governmental agency or participates in an administrative proceeding within the state.

2. Internal affairs of the corporation

A corporation does not "transact business" within a state under section 15.01 merely because some of its internal affairs occur within a state. Thus, a corporation may hold meetings of its board of directors or shareholders within a state without first obtaining a certificate of authority (section 15.01(b)(2)). It also may maintain offices or agencies within a state relating solely to the transfer, registration, or exchange of its shares without obtaining a certificate of authority (section 15.01(b)(4)). Other activities relating to the internal affairs of the corporation that do not constitute the transaction of business under section 15.01(b) include having officers or representatives of a corporation who reside within or are physically present in the state; while there, the officers or representatives may make executive decisions relating to the affairs of the corporation without imposing on the corporation the requirement that it obtain a certificate of authority in the state, provided these activities are not so regular and systematic as to cause the residence to be viewed as a business office.

3. Maintaining bank accounts

A foreign corporation may maintain a bank account with a bank within the state, make deposits and write checks on the account without obtaining a certificate of authority (section 15.01(b)(3)).

4. Interstate transactions

A corporation is not "transacting business" within the meaning of section 15.01(a) if it is transacting business in interstate commerce (section 15.01(b)(10)) or soliciting or obtaining orders that must be accepted outside the state before they become contracts (section 15.01(b)(6)). These limitations reflect the provisions of the United States Constitution that grant to the United States Congress exclusive power over interstate commerce, and preclude states from imposing restrictions or conditions upon this commerce. These sections should be construed in a manner consistent with judicial decisions under the United States Constitution. Under these decisions, a foreign corporation is not required to obtain a certificate of authority even though it sells goods within the state if they are shipped to the purchasers in interstate commerce. A corporation need not obtain a certificate of authority even if it also does work and performs acts within the state incidental to the interstate business, e.g., if it takes or enforces a security interest incidental to these transactions. Nor is it required to obtain a certificate of authority merely because it sends traveling salesmen or solicitors into a state so long as contracts are not made within the state. Similarly, an office may be maintained by a corporation in a state without obtaining a certificate of authority if the office's functions relate solely to interstate commerce.

Purchases of goods may of course be in interstate commerce as readily as sales. Thus, the purchase of personal property by a foreign corporation for shipment in interstate commerce out of the state does not require the corporation to obtain a certificate of authority.

5. Sales through independent contractors

A foreign corporation does not need to obtain a certificate of authority if it sells goods in the state through independent contractors (section 15.01(b)(5)). These transactions are viewed as transactions by the independent contractors, not by the corporation itself, even though the corporation sets some limits or ground rules for its contractors. If these controls are sufficiently pervasive, however, the corporation may be deemed to be selling for itself in intrastate commerce, and not through the independent contractors, and therefore engaged in the transaction of business in the state.

6. Creating, acquiring, or collecting debts

The mere act of making a loan by a foreign corporation that is not in the business of making loans does not constitute transacting business in the state in which the loan is made. On the same theory a foreign corporation may obtain security for the repayment of a loan, and foreclose or enforce the lien or security interest to collect the loan, without being deemed to be transacting business. See section 15.01(b)(7) and (8). Similarly, a refunding or "roll over" of a loan or its adjustment or compromise does not involve the transaction of business.

7. Isolated transactions

The concept of "transacting business" involves regular, repeated, and continuing business contacts of a local nature. A single agreement or isolated transaction within a state does not constitute the transaction of business if there is no intention to repeat the transaction or engage in similar transactions. Since the question is entirely one of fact, section 15.01(b)(10) retains the partially objective test from earlier versions of the Model Act that a transaction completed within 30 days does not constitute "transacting business" if it is not one in the course of "repeated transactions of a like nature." A continuing transaction that is not completed within 30 days will likely require obtaining a certificate of authority, whether or not it is one of a number of repeated transactions, but that issue is not addressed by the Model Act. The 30-day provision is, in other words, a "safe harbor" for not requiring a certificate of authority.

8. OTHER TRANSACTIONS

Section 15.01(c) makes clear that the list of transactions in section 15.01(b) is not exhaustive. Among the large number of other transactions which do not give rise to the requirement that a certificate of authority be obtained are the ownership of all the shares of stock in a corporation that is engaged in local business within the state or as a limited partner in a limited partnership engaged in local business, or taking ministerial actions such as filing financing statements or registering trademarks.

AMENDED NORTH CAROLINA COMMENTARY

The Model Act was modified in subsection (a) by adding the words "under this Chapter or under Chapter 55A of the General Statutes."

The activities listed in the Model Act as not constituting the transaction of business appear to be narrower in certain respects than the activities listed in former G.S. 55-131(b). Subsection (b), which applies solely for purposes of this Act and not for purposes of determining whether there is *in personam* jurisdiction over a foreign corporation, brings forward former G.S. 55-131(b) with the addition of subdivisions 15.01(b)(5) and (9) from the Model Act as subdivisions (b)(10) and (11). The substitution rendered the Model Act's text in subsection 15.01(c) unnecessary, and it was omitted.

Subsection (d) was added to bring forward the provisions of former G.S. 55-131(c) in a revised, clarified version.

Legal Periodicals. — For comment on the duty to register the transfer of investment securities, see 44 N.C.L. Rev. 854 (1966).

For article, "Foreign Corporation Laws: The Loss of Reason," see 47 N.C.L. Rev. 1 (1968).

For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971).

For article, "Foreign Corporations in North Carolina: The 'Doing Business' Standards of Qualification, Taxation, and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

For article, "State Anti-Takeover Legislation: The Second and Third Generations," see 23 Wake Forest L. Rev. 77 (1988).

For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

CASE NOTES

I. General Consideration.
II. Transacting or Doing Business Within State.
  A. In General.
  B. Activity Constituting Business Within State.
  C. Activity Not Constituting Business Within State.
III. Interstate Commerce.
IV. Effect of Domestication.

I. GENERAL CONSIDERATION.

Editor's Note. *— The cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Matter of Comity Only. — A corporation of one state may do business in another only by comity of the latter state, when not so permitted by a valid federal statute, as in matters of interstate commerce, and may be prohibited from doing business therein entirely, or may be restricted with conditions made a prerequisite by statute. Lunceford v. Commercial Travelers Mut. Accident Ass'n, 190 N.C. 314, 129 S.E. 805 (1925). See Wrought Iron Range Co. v. Carver, 118 N.C. 328, 24 S.E. 352 (1896); Blackwell's

Durham Tobacco Co. v. American Tobacco Co., 145 N.C. 367, 59 S.E. 123 (1907).

Power to Acquire and Sell Land. — Foreign corporations, having a right under their charters to acquire and sell land, can exercise such right in this State to the same extent that corporations of this State can do so. Barcello v. Hapgood, 118 N.C. 712, 24 S.E. 124 (1896).

Substituted Service Proper Against Domesticated Foreign Corporation Wherever Cause of Action Arose. — A foreign corporation which has been duly authorized to do business in this State may be sued in this State by substituted service on the Secretary of State on a cause of action arising either inside or outside the State. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

Applied in Ben Johnson Homes, Inc. v. Watkins, 142 N.C. App. 162, 541 S.E.2d 769, 2001 N.C. App. LEXIS 32 (2001).

II. TRANSACTING OR DOING BUSINESS WITHIN STATE.

A. In General.

Editor's Note. — *Most of the cases below were decided under former G.S. 55-144 and corresponding prior provisions making the Secretary of State an agent of foreign corporations transacting business without procuring a certificate of authority or after withdrawal, etc., of such certificate, upon whom process in a suit upon a cause of action arising out of such business could be served.*

What Constitutes Transacting or Doing Business. — Transacting business within the State is defined as the transaction within the State of some substantial part of a party's ordinary business, which must be continuous in the sense that it is distinguished from merely casual or occasional transactions, and must be of such a character as will give rise to some form of legal obligations. Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

In Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965), "transacting business" was construed as activities in North Carolina which are substantial, continuous and systematic, and regular, as distinguished from casual, single or isolated acts Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

The expression "doing business in this State" means engaging in, carrying on or exercising, in this State, some of the things, or some of the functions, for which the corporation was created. Radio Station WMFR, Inc. v. Eitel-McCullough, Inc., 232 N.C. 287, 59 S.E.2d 779 (1950); Troy Lumber Co. v. State Sewing Mach. Corp., 233 N.C. 407, 64 S.E.2d 415 (1951); Harrington v. Croft Steel Prods., Inc., 244 N.C. 675, 94 S.E.2d 803 (1956); Worley's Beverages, Inc. v. Bubble Up Corp., 167 F. Supp. 498 (E.D.N.C. 1958); Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

The phrase "doing business in this State" is not susceptible of an all embracing definition, and each case must be decided upon the particular facts therein appearing, the general criteria being that a foreign corporation is doing business in this State if it transacts in this State the business it was created and authorized to do, through representatives in this State, and thus is present in this State through the person of its representatives. Parris v. H.G. Fischer & Co., 219 N.C. 292, 13 S.E.2d 540 (1941).

Doing business in this State means doing some of the things or exercising some of the functions in this State for which the corporation was created. Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 140 S.E.2d 3 (1965); Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

The business done by the corporation in this State must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is, by its duly authorized officers and agents, present within the State. Canterbury v. Monroe Lange Hardwood Imports, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

Activities Must Be Substantial and Regular. — The activities carried on by the corporation in North Carolina must be substantial, continuous, systematic and regular to constitute "transacting business in this State." Canterbury v. Monroe Lange Hardwood Imports, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

Mere soliciting or procuring orders through employees or agents, where such orders require acceptance without this State before becoming binding contracts, does not constitute "transacting business" in this State. Schnur & Cohan, Inc. v. McDonald, 220 F. Supp. 9 (M.D.N.C. 1963), appeal dismissed, 328 F.2d 103 (4th Cir. 1964).

For case in which facts were held to constitute more than "soliciting or procuring orders" requiring acceptance without the State, see Dumas v. Chesapeake & O. Ry., 253 N.C. 501, 117 S.E.2d 426 (1960).

What Constitutes Within the State. — A foreign corporation cannot be held to be doing business in a state, and therefore subject to its laws, unless it shall be found as a fact that such corporation has entered the state in which it is alleged to be doing business and there transacted, by its officers, agents or other persons authorized to act for it, the business in which it is authorized to engage by the state under whose laws it was created and organized. The presence within the state of such officers, agents or other persons, engaged in the transaction of the corporation's business with citizens of the state, is generally held as determinative of the question as to whether the corporation is doing business in the state. Radio Station WMFR, Inc. v. Eitel-McCullough, Inc., 232 N.C. 287, 59 S.E.2d 779 (1950).

B. Activity Constituting Business Within State.

Transacting Business of Domestic Subsidiary in State. — Where a foreign corporation acquires and holds controlling stock interest in a domestic corporation, and comes into the state where the domestic corporation is created and doing business, and there itself by its officer or officers transacts business of the domestic corporation and manages and controls its internal affairs, then such foreign corporation is doing business within the domestic state and is subject to the jurisdiction of its courts. Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

Foreign Corporation with Licensees in State. — A foreign corporation which received substantial royalties from 14 of 23 licensees located in this State and which adopted a program of sending auditors into the State to examine the books and records of its licensees was engaged in the transaction of business in North Carolina. Throwing Corp. of Am. v. Deering Milliken Research Corp., 302 F. Supp. 487 (M.D.N.C. 1969).

Foreign Banking Corporation. — A foreign banking corporation which sends its agents here for the purpose of investigating and looking after properties in its capacity as trustee, does business in the State, "doing business in this State" meaning engaging in, carrying on or exercising in this State some of the functions for which the corporation was created. Ruark v. Virginia Trust Co., 206 N.C. 564, 174 S.E. 441 (1934).

Insurance Business. — A foreign company acquiring membership of persons in North Carolina for life insurance, without soliciting agents to whom policies are issued, upon a mutual benefit plan and kept in force by the payments of dues, is doing a life insurance business here. Lunceford v. Commercial Travelers Mut. Accident Ass'n of Am., 190 N.C. 314, 129 S.E. 805 (1925).

The issuance of one or more policies of fire insurance, by a corporation created and existing under the laws of another state, and not authorized to do business in this State, insuring citizens of this State against loss or damage by fire to property situate in this State, the contracts for such policies having been made, and the premiums having been paid in the state in which the foreign corporation had its principal office and place of business, not by or through any agent of such corporation or person authorized to act for it in this State, did not constitute "doing business" in this State of North Carolina within the meaning of these words in the former statute. Ivy River Land & Timber Co. v. National Fire & Marine Ins. Co., 192 N.C. 115, 133 S.E. 424 (1926).

Appraisal Business. — Where defendant was in the appraisal business and was soliciting and performing appraisal work in North Carolina, it was thus transacting and performing in this State the business for which it was created. Crabtree v. Coats & Burchard Co., 7 N.C. App. 624, 173 S.E.2d 473 (1970).

Lessor of Airports. — Where defendant foreign corporation leased airports to individual defendant and by terms of agreement lessor was to furnish planes, parts, repairs, etc., to provide insurance for airports to be operated in name of corporate defendant, with right to demand that lessee devote full time to business, and to furnish forms for keeping records, that corporation was doing business in this State. Harrison v. Corley, 226 N.C. 184, 37 S.E.2d 489 (1946).

Sale and Consignment of Jewelry. — Trial court properly dismissed, pursuant to G.S. 1A-1, N.C. R. Civ. P. 12, plaintiff's action seeking to recover money allegedly owed to plaintiff by defendants from the sale and consignment of jewelry; pursuant to G.S. 55-15-02, a foreign corporation that transacted business in North Carolina was barred from maintaining an action in any state court unless it had obtained a certificate of authority to transact business prior to trial, plaintiff's actions of selling and consigning jewelry to North Carolina jewelers constituted transaction of business pursuant to G.S. § 55-15-01(b), the trial court acted within its discretion when it addressed this issue pursuant to G.S. 1A-1, N.C. R. Civ. P. 16 prior to trial because the issue was dispositive of the action, and the trial court was not required by G.S. 55-15-02 to continue the case to allow plaintiff to obtain a certificate of authority. Harold Lang Jewelers, Inc. v. Johnson, 156 N.C. App. 187, 576 S.E.2d 360, 2003 N.C. App. LEXIS 73 (2003), cert. denied, 357 N.C. 458, 585 S.E.2d 765 (2003).

C. Activity Not Constituting Business Within State.

Taking Orders and Delivering Goods in State. — A foreign corporation which merely takes orders in this State to be transmitted to its home office for acceptance and shipment of its goods into this State by common carrier is not doing business here, but if it transports its goods to this State in its own trucks and thus completes the transaction by making deliveries here, it performs here one of its essential purposes and is doing business here. Harrington v.

Croft Steel Prods., Inc., 244 N.C. 675, 94 S.E.2d 803 (1956).

Mere Incidental Services. — Mere incidental services not substantially of the character of the business carried on by a foreign corporation are not of such nature as to subject it to the control and regulation of the state law or to invoke state law for its protection. Radio Station WMFR, Inc. v. Eitel-McCullough, Inc., 232 N.C. 287, 59 S.E.2d 779 (1950); Worley's Beverages, Inc. v. Bubble Up Corp., 167 F. Supp. 498 (E.D.N.C. 1958).

Ownership or Control of Subsidiary Doing Business in State. — Generally, it has been held or recognized that the mere ownership or control by a foreign corporation through a majority stock ownership of the stock of another corporation which is doing business within a state, either resident or domesticated, does not, in and of itself, constitute doing business within the state by the foreign corporation for the service of process so as to subject it to the State's jurisdiction, where the foreign corporation is not created for the very purpose of holding such stock and the two corporations remain distinct entities. Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

Employment of Soliciting Agent. — Where nonresident defendant corporation employed a soliciting agent who took orders and forwarded them to the home office in another state, and the contract in suit was entered into in the state where the home office was situated, the defendant was not doing business in this State. Plott v. Michael, 214 N.C. 665, 200 S.E. 429 (1939).

While company salesmen did some promotional work, and attempted to create goodwill for their company, and perhaps on occasions rendered engineering service or advice to customers, where their principal and significant duties consisted of soliciting orders for acceptance at the home office, this did not constitute transacting business. Schnur & Cohan, Inc. v. McDonald, 220 F. Supp. 9 (M.D.N.C. 1963), appeal dismissed, 328 F.2d 103 (4th Cir. 1964).

Sales Representative with Limited Authority. — Findings that a foreign corporation, engaged in the business of manufacturing certain goods and selling them direct to retail distributors in this State, maintained a sales representative here to aid in promotion of sales to dealer representatives and facilitate sales directly to customers in company with dealer representatives, and an agent to investigate complaints by purchasers, who was without authority to compromise or adjust them, its established procedure being for the customer to return defective merchandise directly to the corporation, and also an agent here to facilitate the collection of delinquent or slow accounts owed by dealer representatives, without evidence that such agent had authority to collect or receive money on behalf of the corporation, were insufficient to support the conclusion that it was doing business in this State. Radio Station WMFR, Inc. v. Eitel-McCullough, Inc., 232 N.C. 287, 59 S.E.2d 779 (1950).

Foreign Publishing Company Shipping Magazines into State. — A foreign publishing company which delivers to a common carrier in another state magazines for shipment to a wholesale dealer in this State for resale in this State by the dealer, with provision for credit to the dealer for unsold magazines, and which employs sales promotion representatives who make occasional visits in this State, is not doing business in this State. Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

Maintaining Lawsuit. — Trial court did not err in denying the general contractor's motion to dismiss based on its argument that the judgment creditor had failed to obtain a certificate of authority to do business in North Carolina; the judgment creditor was not required to have obtained a certificate of authority to maintain its lawsuit to collect money it believed it was owed. Quantum Corp. Funding, Ltd. v. B.H. Bryan Bldg. Co., 175 N.C. App. 483, 623 S.E.2d 793, 2006 N.C. App. LEXIS 187 (2006).

Illustrative Cases. — Trial court erred in concluding that a foreign corporation transacted business in North Carolina and was required to obtain a certificate of authority under G.S. 55-15-01 and G.S. 55-15-02 to bring a lawsuit because the corporation's interactions with North Carolina consultants and an attorney concerned interstate commerce or the corporation's internal affairs. Thus, the corporation was not transacting business in North Carolina. Harbin Yinhai Tech. v. Greentree Fin. Group, Inc., — N.C. App. —, 677 S.E.2d 854, 2009 N.C. App. LEXIS 525 (2009).

III. INTERSTATE COMMERCE.

Editor's Note. *— The cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Test of Interstate Commerce. — Importation into one State from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons or information, is a transaction of interstate commerce. Snelling & Snelling, Inc. v. Watson, 41 N.C. App. 193, 254 S.E.2d 785 (1979).

Not all interstate commerce is sales of goods. Snelling & Snelling, Inc. v. Watson, 41 N.C. App. 193, 254 S.E.2d 785 (1979).

Sale of services can constitute interstate

commerce. Snelling & Snelling, Inc. v. Watson, 41 N.C. App. 193, 254 S.E.2d 785 (1979).

Franchisor of Employment Agencies Engaged in Interstate Commerce. — Where plaintiff foreign corporation, a franchisor of employment agencies, maintained no offices in this State, and had no officers or employees residing in this State, and where its activities in this State consisted of: (1) soliciting franchise agreements and promoting sales of its business forms, (2) training and instructing its franchisees and inspecting the premises, books and records of its franchisees, and (3) controlling the business methods of its franchisees to protect its service mark and to ensure an accurate accounting of profits by its franchisees, plaintiff was transacting business in interstate commerce and was not required to obtain a certificate of authority from the Secretary of State as a prerequisite to bringing suit in this State, since plaintiff's activities were incidental to its interstate franchise contracts and were, therefore, interstate in nature. Snelling & Snelling, Inc. v. Watson, 41 N.C. App. 193, 254 S.E.2d 785 (1979).

IV. EFFECT OF DOMESTICATION.

Editor's Note. — *The cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Right to Sue and Be Sued. — Where a foreign corporation has submitted to domestication in this State by filing its certificate of incorporation with the Secretary of State and by otherwise complying with the provisions of the statute, it thereby acquires the right to sue and be sued in the courts of this State as a domestic corporation. Smith-Douglass Co. v. Honeycutt, 204 N.C. 219, 167 S.E. 810 (1933).

When a foreign corporation complies with the provisions of the statute as to "domestication," it subjects itself to the laws of this State and acquires in return certain compensating rights and privileges. Among these is the right to sue and be sued in the State courts under the rules and regulations which apply to domestic corporations. Hill v. Atlantic Greyhound Corp., 229 N.C. 728, 51 S.E.2d 183 (1949).

Section 1-80 Does Not Apply. — A foreign corporation domesticated under the statute may sue and be sued under the rules and regulations which apply to domestic corporations, and is entitled to have an action against it, instituted by a nonresident, removed to the county of its main place of business in this State. In such case G.S. 1-80 does not apply. Hill v. Atlantic Greyhound Corp., 229 N.C. 728, 51 S.E.2d 183 (1949).

Power to Maintain Action Notwithstanding Charter. — A corporation incorporated in another state with authority to conduct business in North Carolina, which has complied with the statutes of this State, can maintain an action in the courts of this State although its charter may not authorize it to do business in the state of its incorporation. Troy & N.C. Gold Mining Co. v. Snow Lumber Co., 173 N.C. 593, 92 S.E. 494 (1917).

Right to Remove to Federal Courts. — A foreign corporation, by compliance with the statute as to "domestication," does not lose its right to remove to the federal courts on the ground of diverse citizenship. Southern Ry. v. Allison, 190 U.S. 326, 23 S. Ct. 713, 47 L. Ed. 1078 (1903).

For purposes of venue, domesticated foreign corporations are residents of the State. Hill v. Atlantic Greyhound Corp., 229 N.C. 728, 51 S.E.2d 183 (1949).

Venue of Action Against Domesticated Foreign Corporation. — Where it was found that defendant was a domesticated foreign corporation doing extensive business in the middle district of North Carolina and maintained warehouses in Salisbury, High Point, Asheboro, Greensboro and Durham from which it distributed in the middle district its products, under both the State law and federal rules of procedure venue was properly placed in the middle district of North Carolina. Graham v. Taylor Biscuit Co., 157 F. Supp. 496 (M.D.N.C. 1957).

A foreign corporation which duly domesticates in this State is to be treated like a domestic corporation for venue purposes. Moore Golf, Inc. v. Shambley Wrecking Contractors, Inc., 22 N.C. App. 449, 206 S.E.2d 789 (1974).

Neither Property Nor Situs of Debts Removed to State. — The statute requiring "domestication" enables a plaintiff to get personal service upon a foreign corporation, but does not remove its property to the State nor the situs of its debts created elsewhere. Strause Bros. v. Aetna Fire Ins. Co., 126 N.C. 223, 35 S.E. 471 (1900).

How Charter Proven. — The charter of a foreign corporation may be proven in this State by exhibiting a copy duly certified by the Secretary of State of the state in which the corporation was created. Barcello v. Hapgood, 118 N.C. 712, 24 S.E. 124 (1896).

Regulation of Securities Issued by Foreign Corporation. — The mere fact that a public utility otherwise subject to the jurisdiction of this State is a foreign corporation does not deprive this State of all supervisory and regulatory powers over securities issued by such a corporation. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 22 N.C. App. 714, 207 S.E.2d 771 (1974), aff'd, 288 N.C. 201, 217 S.E.2d 543 (1975).

As to effect of domestication of insurance company, see Occidental Life Ins. Co. v. Lawrence, 204 N.C. 707, 169 S.E. 636 (1933).

§ 55-15-02. Consequences of transacting business without authority.

(a) No foreign corporation transacting business in this State without permission obtained through a certificate of authority under this Chapter or through domestication under prior acts shall be permitted to maintain any action or proceeding in any court of this State unless the foreign corporation has obtained a certificate of authority prior to trial.

An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial.

(b) Reserved for future codification purposes.

(c) Reserved for future codification purposes.

(d) A foreign corporation failing to obtain a certificate of authority as required by this Chapter or by prior acts then applicable shall be liable to the State for the years or parts thereof during which it transacted business in this State without a certificate of authority in an amount equal to all fees and taxes which would have been imposed by law upon such corporation had it duly applied for and received such permission, plus interest and all penalties imposed by law for failure to pay such fees and taxes. In addition, the foreign corporation shall be liable for a civil penalty of ten dollars ($10.00) for each day, but not to exceed a total of one thousand dollars ($1,000) for each year or part thereof, it transacts business in this State without a certificate of authority. The Attorney General may bring actions to recover all amounts due the State under the provisions of this subsection.

The clear proceeds of civil penalties provided for in this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(e) Notwithstanding subsection (a), the failure of a foreign corporation to obtain a certificate of authority does not impair the validity of its corporate acts or prevent it from defending any proceeding in this State.

(f) The Secretary of State is hereby directed to require that every foreign corporation transacting business in this State comply with the provisions of this Chapter. The Secretary of State is authorized to employ such assistants as shall be deemed necessary in his office for the purpose of enforcing the provisions of this Article and for making such investigations as shall be necessary to ascertain foreign corporations now transacting business in this State which may have failed to comply with the provisions of this Chapter. (1901, c. 2, s. 57; 1903, c. 766; Rev., s. 1194; 1915, c. 263; C.S., s. 1181; 1935, c. 44; 1937, c. 343; 1939, c. 57; G.S., ss. 55-118, 55-120; 1953, c. 1152; 1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1998-215, s. 117; 1999-151, s. 1.)

OFFICIAL COMMENT

The purpose of section 15.02 is to induce corporations that are required to obtain a certificate of authority but have not to qualify promptly, without imposing harsh or erratic sanctions. The Model Act rejects the provisions adopted in a few states that make unenforceable intrastate transactions by unqualified corporations or that impose punitive sanctions or forfeitures on nonqualifying corporations. Often the failure to qualify is a result of inadvertance or bona fide disagreement as to the scope of the provisions of section 15.01, which are necessarily imprecise; the imposition of harsh sanctions in these situations is inappropriate. Further, as a matter of state policy it is generally preferable to encourage qualification in case of doubt rather than to impose severe sanctions that may cause corporations to resist obtaining a certificate of authority in doubtful situations.

Section 15.02 closes the courts of the state to suits maintained by corporations which should have but which have not obtained a certificate of authority. However, this sanction is not a punitive one: section 15.02(e) states that the failure of the corporation to qualify does not affect the validity of corporate acts, including contracts. Thus, a contract made by a nonqualified corporation may be enforced by the corporation simply by obtaining a certificate. Further, section 15.02(c) authorizes a court to stay a proceeding to determine whether a corporation should have qualified to transact business and, if it concludes that qualification is necessary, it may grant a further stay to permit the corporation to do so. Thus, the corporation will not be compelled to refile a suit if the corporation qualifies to transact business within a reasonable period. The purpose of these provisions is to encourage corporations to obtain certificates of authority and to eliminate the temptation to raise section 15.02 defenses only after applicable statutes of limitation have run.

Section 15.02(e) does not prevent a foreign corporation that has failed to obtain a certificate of authority from "defending any proceeding." The distinction between "maintaining" a proceeding under section 15.02(a) and "defending any proceeding" under section 15.02(e) is determined on the basis of whether affirmative relief is sought. A nonqualified corporation may interpose any defense or permissive or mandatory counterclaim to defeat a claimed recovery, but may not obtain an affirmative judgment or decree based on the counterclaim unless it has obtained a certificate of authority.

In addition to closing the courts of the state to a nonqualified foreign corporation, many states impose a penalty equal to all fees and franchise taxes that the foreign corporation would have been liable for if it had qualified to transact business when it was first required to do so. This penalty is usually defined to equal the sum of fees and franchise taxes for each year or part thereof the corporation transacted business in the state without a certificate of authority. Similar provisions appeared in earlier versions of the Model Act, but were modified in the present revision in favor of a specific dollar amount (which each state adopting the revised Model Act should insert in section 15.02(d) for each day and year the foreign corporation fails to qualify. The revised Model Act does not treat liability for taxes.

Section 15.02(b) prevents evasion of section 15.02(a) by an assignment of a claim on which the foreign corporation is barred from bringing suit under section 15.02(a). If the successor has acquired all or substantially all of the assets of the foreign corporation, the successor may maintain suit after it has qualified. In the case of all other assignments, the foreign corporation itself must obtain a certificate of authority before the assignee may maintain suit on the claim. The phrase "all or substantially all" has the meaning set forth in the Official Comment to section 12.01.

NORTH CAROLINA COMMENTARY

This section substitutes former G.S. 55-154 for the corresponding provisions of the Model Act and adds the Model Act's scheme of cumulative penalties ($10 per day up to $1,000 per year) for failure to qualify instead of the former statute's one-time $500 penalty.

Legal Periodicals. — For note on jurisdiction over foreign corporations, see 35 N.C.L. Rev. 546 (1957).

For note on jurisdiction over foreign corporations not qualified to transact business in North Carolina, see 44 N.C.L. Rev. 449 (1966).

For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971).

For article, "Foreign Corporations in North Carolina: The 'Doing Business' Standards of Qualification, Taxation, and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

CASE NOTES

Editor's Note. — *Most of the cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Constitutionality. — Nothing in the United States or North Carolina Constitutions prohibits the State, in the exercise of its police power, from making the transaction of business by a foreign corporation prior to procuring a license an indictable offense. State v. Agey, 171 N.C. 831, 88 S.E. 726 (1916).

The only restriction of the Constitution is that the license tax must not interfere with interstate commerce or be otherwise invalid. Pittsburg Life & Trust Co. v. Young, 172 N.C. 470, 90 S.E. 568 (1916).

Contracts Not Avoided by Noncompliance. — The contracts of a foreign corporation doing business in this State without compliance with the statute as to domestication are not avoided; the penalty alone is enforceable by action as the statute prescribes. Miller v. Howell, 184 N.C. 119, 113 S.E. 621 (1922). See also G. Ober & Sons Co. v. Katzenstein, 160 N.C. 439, 76 S.E. 476 (1912).

As to action by state for penalty, see Blackwell's Durham Tobacco Co. v. American Tobacco Co., 144 N.C. 352, 57 S.E. 5 (1907); G. Ober & Sons Co. v. Katzenstein, 160 N.C. 439, 76 S.E. 476 (1912).

Effect of Suspension of Certificate of Authority on Corporation's Capacity to Sue. — Construction company, which entered into a contract with defendant-homeowner and performed that contract at a time when its certificate of authority was in a state of suspension, could not assert or enforce its rights under the contract, including claims based in equity (i.e., claims based on quantum meruit). Ben Johnson Homes, Inc. v. Watkins, 142 N.C. App. 162, 541 S.E.2d 769, 2001 N.C. App. LEXIS 32 (2001), aff'd, 354 N.C. 563, 555 S.E.2d 608 (2001).

Attorney General as Party to Declaratory Judgment Action. — In a proceeding for a declaratory judgment against the Attorney General and the Secretary of State relative to the application of registration provisions to plaintiff, a foreign corporation, the Attorney General was not a real party defendant, but, being charged with the enforcement of the statute, he should be retained as a nominal defendant along with the Secretary of State where the constitutionality of the statute was being challenged. NAACP v. Eure, 245 N.C. 331, 95 S.E.2d 893 (1957).

A nonqualifying corporation, against which an action is brought in this State, may bring a compulsory counterclaim in that action. E & E Indus., Inc. v. Crown Textiles, Inc., 80 N.C. App. 508, 342 S.E.2d 397 (1986).

By suing, in a forum of this State, a foreign corporation which has not obtained a certificate of authority before the commencement of the action, a North Carolina corporation effectively waives any protection this section affords it from compulsory counterclaims asserted by the party sued. E & E Indus., Inc. v. Crown Textiles, Inc., 80 N.C. App. 508, 342 S.E.2d 397 (1986).

Summary Judgment Unavailable. — Summary judgment for plaintiff was inappropriate where plaintiff lacked authority to maintain an action in North Carolina to enforce the foreign judgment. Leasecomm Corp. v. Renaissance Auto Care, Inc., 122 N.C. App. 119, 468 S.E.2d 562 (1996).

Failure to Raise Issue in Pre-Trial Motion. — Where the evidence showed that defendants were not misled by plaintiff about its possession of a certificate of authority to transact business in North Carolina, defendants' failure to raise the issue of plaintiff's authority to transact business in North Carolina in a motion prior to trial, as required by subsection (a), precluded it from doing so in a motion after trial. Spivey & Self, Inc. v. Highview Farms, Inc., 110 N.C. App. 719, 431 S.E.2d 535, cert. denied, 334 N.C. 623, 435 S.E.2d 342 (1993).

Action Barred by Failure to Obtain Certificate of Authority. — Trial court properly dismissed, pursuant to G.S. 1A-1, N.C. R. Civ. P. 12, plaintiff's action seeking to recover money allegedly owed to plaintiff by defendants from the sale and consignment of jewelry; pursuant to G.S. 55-15-02, a foreign corporation that transacted business in North Carolina was barred from maintaining an action in any state court unless it had obtained a certificate of authority to transact business prior to trial, plaintiff's actions of selling and consigning jewelry to North Carolina jewelers constituted transaction of business pursuant to G.S. 55-15-01(b), the trial court acted within its discretion when it addressed this issue pursuant to G.S. 1A-1, N.C. R. Civ. P. 16 prior to trial because the issue was dispositive of the action, and the trial court was not required by G.S. 55-15-02 to continue the case to allow plaintiff to obtain a certificate of authority. Harold Lang Jewelers, Inc. v. Johnson, 156 N.C. App. 187, 576 S.E.2d 360, 2003 N.C. App. LEXIS 73 (2003), cert. denied, 357 N.C. 458, 585 S.E.2d 765 (2003).

Action Permitted Where Corporation Obtained Certificate of Authority Prior to Hearing. — Foreign corporation could enforce a foreign judgment obtained in a South Carolina court against the individuals where the corporation obtained its certificate of authority before the hearing in North Carolina; it was not necessary to obtain the certificate of authority prior to commencing trial in South Carolina. Kyle & Assocs. v. Mahan, 161 N.C. App. 341, 587 S.E.2d 914, 2003 N.C. App. LEXIS 2057 (2003), aff'd, 359 N.C. 176, 605 S.E.2d 142 (N.C. 2004).

Action by Foreign Judgement Creditor Not Barred. — Trial court did not err in denying the general contractor's motion to dismiss based on its argument that the judgment creditor had failed to obtain a certificate of authority to do business in North Carolina; the judgment creditor was not required to have obtained a certificate of authority to maintain its lawsuit to collect money it believed it was owed. Quantum Corp. Funding, Ltd. v. B.H. Bryan Bldg. Co., 175 N.C. App. 483, 623 S.E.2d 793, 2006 N.C. App. LEXIS 187 (2006).

Trial court erred in concluding that a foreign corporation transacted business in North Carolina and was required to obtain a certificate of authority under G.S. 55-15-01 and G.S. 55-15-02 to bring a lawsuit because the corporation's interactions with North Carolina consultants and an attorney concerned interstate commerce or the corporation's internal affairs. Thus, the corporation was not transacting business in North Carolina. Harbin Yinhai Tech. v. Greentree Fin.

Group, Inc., — N.C. App. —, 677 S.E.2d 854, 2009 N.C. App. LEXIS 525 (2009).

§ 55-15-03. Application for certificate of authority.

(a) A foreign corporation may apply for a certificate of authority to transact business in this State by delivering an application to the Secretary of State for filing. The application must set forth:

(1) The name of the foreign corporation or, if its name is unavailable for use in this State, a corporate name that satisfies the requirements of Article 3 of Chapter 55D of the General Statutes;

(2) The name of the state or country under whose law it is incorporated;

(3) Its date of incorporation and period of duration;

(4) The street address, and the mailing address if different from the street address, of its principal office if any, and the county in which the principal office, if any, is located;

(5) The street address, and the mailing address if different from the street address, of its registered office in this State, the county in which the registered office is located, and the name of its registered agent at that office; and

(6) The names and usual business addresses of its current officers.

(b) The foreign corporation shall deliver with the completed application a certificate of existence (or a document of similar import) duly authenticated by the secretary of state or other official having custody of corporate records in the state or country under whose law it is incorporated.

(c) If the Secretary of State finds that the application conforms to law he shall, when all fees have been tendered as prescribed in this Chapter:

(1) Endorse on the application and an exact or conformed copy thereof the word "filed" and the hour, day, month, and year of the filing thereof;

(2) File in his office the application and the certificate of existence (or document of similar import as described in subsection (b) of this section);

(3) Issue a certificate of authority to transact business in this State to which he shall affix the exact or conformed copy of the application; and

(4) Send to the foreign corporation or its representative the certificate of authority, together with the exact or conformed copy of the application affixed thereto. (1901, c. 2, s. 57; 1903, c. 766; Rev., s. 1194; 1915, c. 263; C.S., s. 1181; 1935, c. 44; 1939, c. 57; G.S., s. 55-118; 1953, c. 1152; 1955, c. 1371, s. 1; 1957, c. 979, s. 8; 1969, c. 751, s. 41; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, ss. 12.1(b), 12.21; 2001-358, s. 17; 2001-387, ss. 27A, 169(a), 173, 175(a); 2001-413, s. 6.)

OFFICIAL COMMENT

1. Disclosure requirements in general

Section 15.03 provides that a foreign corporation seeking a certificate of authority to transact business in the state must file an application that contains the information set forth in this section. These disclosure requirements are supplemented by the requirements of other sections in this chapter—15.04, 15.06, and 15.07—which require amended or supplemental filings in certain circumstances, and by section 16.22, which requires every qualified foreign corporation to file annual reports containing specified information. Generally, the revised Model Act eliminates repetitious filings, so that information need be submitted to the secretary of state in only one document.

The purposes of these disclosure requirements are: (1) to ensure that citizens of the state have adequate information about foreign corporations in their transactions with them; (2) to put them in a status of equality with domestic corporations with respect to information required to be furnished; (3) to facilitate their subjection to the jurisdiction of the state's courts, thereby removing any disadvantage citizens of the state may have when dealing with them; and (4) to provide readily accessible evidence of their existence. Other statutes relating to franchise taxes and regulatory matters may require a qualified foreign corporation to provide additional information.

2. THE APPLICATION FOR A CERTIFICATE OF AUTHORITY

The information required to be included in the application for a certificate of authority by section 15.03 is the minimum needed to administer the filing requirements of the Model Act. The application must also be accompanied by a certificate of existence and the filing fee required by section 1.22. A corporation that qualifies to transact business in a state must comply with the requirements of other statutes, including franchise tax and similar statutes. See section 15.05.

AMENDED NORTH CAROLINA COMMENTARY

This Act does not bring forward the requirement of former G.S. 55-138(a) that a foreign corporation include in its application the purposes it desires to pursue in this State and information with respect to its capital structure. In addition, the application under this Act is submitted with a certificate of existence or good standing rather than the certified charter documents required under former G.S. 55-138.

Subsection (a) was modified to conform to changes from the Model Act in the address requirement made in G.S. 55-2-02 and G.S. 55-5-02.

Subsection (c) brings forward former G.S. 55-139(b) because the Model Act contains no express requirement that the Secretary of State issue a certificate of authority.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

CASE NOTES

***Editor's Note.** — Some of the cases below were decided under prior law.*

Instrument Merely Notice of Facts Contained in It. — The instrument a foreign domesticated corporation is required to file in the office of the Secretary of State is merely notice of facts set forth in it. It is not required for the benefit of the corporation but for the information of the public. And it does not, in and of itself, fix the location of the place of business of the corporation which files the same. Noland Co. v. Laxton Constr. Co., 244 N.C. 50, 92 S.E.2d 398 (1956).

Effect of Suspension of Certificate of Authority on Corporation's Capacity to Sue. — Construction company, which entered into a contract with defendant-homeowner and performed that contract at a time when its certificate of authority was in a state of suspension, could not assert or enforce its rights under the contract, including claims based in equity (i.e., claims based on quantum meruit). Ben Johnson Homes, Inc. v. Watkins, 142 N.C. App. 162, 541 S.E.2d 769, 2001 N.C. App. LEXIS 32 (2001), aff'd, 354 N.C. 563, 555 S.E.2d 608 (2001).

§ 55-15-04. Amended certificate of authority.

(a) A foreign corporation authorized to transact business in this State must obtain an amended certificate of authority from the Secretary of State if it changes:

(1) Its corporate name;
(2) The period of its duration; or

(3) The state or country of its incorporation.

(b) A foreign corporation may apply for an amended certificate of authority by delivering an application to the Secretary of State for filing that sets forth:

(1) The name of the foreign corporation and the name in which the corporation is authorized to transact business in North Carolina if different;
(2) The name of the state or country under whose law it is incorporated;
(3) The date it was originally authorized to transact business in this State;
(4) A statement of the change or changes being made.

Except for the content of the application, the requirements of G.S. 55-15-03 for obtaining an original certificate of authority apply to obtaining an amended certificate under this section. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.22.)

OFFICIAL COMMENT

Section 15.04 requires a foreign corporation to obtain an amended certificate of authority if it changes its corporate name, its duration, or the state or country of its incorporation. An amendment is not necessary to reflect changes in its principal office address or in its current officers or directors since that information is supplied in the annual report. In addition, section 15.07 requires an immediate filing if the foreign corporation changes its registered office or registered agent within the state.

Other fundamental changes by a foreign corporation do not require amendments to the certificate of authority. The secretary of state will be advised of most of these changes through the annual report. See section 16.22. Thus, a person seeking to obtain current information about a foreign corporation should examine the annual reports of the corporation as well as the application for certificate of authority and amendments to it. This procedure of requiring most changes to be reported in the annual reports rather than as amendments to the certificate of authority should eliminate many unnecessary filings with the secretary of state without reducing the information available through the secretary of state's office.

§ 55-15-05. Effect of certificate of authority.

(a) A certificate of authority authorizes the foreign corporation to which it is issued to transact business in this State subject, however, to the right of the State to revoke the certificate as provided in this Chapter. A foreign corporation may qualify in this State as executor, administrator, or guardian, or as trustee under the will of any person domiciled in this State at the time of that person's death only in accordance with applicable provisions of Article 24 of Chapter 53.

A foreign corporation qualifying as testamentary trustee or executor under the provisions of this section shall appoint a process agent and file such appointment with the court as required by G.S. 28A-4-2(4).

(b) Except as otherwise provided by this Chapter, a foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

(c) Reserved for future codification purposes. (1901, c. 2, s. 93; Rev., s. 1193; 1915, c. 196, s. 1; C.S., s. 1180; G.S., s. 55-117; 1955, c. 1371, s. 1; 1969, c. 839; 1985, c. 689, s. 25; 1989, c. 265, s. 1; 2001-263, s. 4.)

OFFICIAL COMMENT

A certificate of authority authorizes a foreign corporation to transact business in the state subject to the right of the state to revoke the certificate. The privileges of this status are defined in section 15.05(b): a qualified foreign corporation has the same (but no greater) privileges as a domestic corporation.

Section 15.05(b), by granting to qualified foreign corporations all of the rights and privileges enjoyed by a domestic corporation, avoids discrimination that might otherwise be subject to constitutional challenge. On the other hand, section 15.05(b) also contains a restriction or limitation: a qualified foreign corporation is subject to the same restrictions as a domestic corporation, including the same duties, penalties, and liabilities. This latter aspect of section 15.05(b) has declined in importance as states have eliminated unnecessary or outdated restrictions on domestic corporations and, as a consequence of section 15.05(b), on qualified foreign corporations as well. In particular, section 15.05(b) makes section 3.01 (corporate purposes) applicable to a qualified foreign corporation, and grants substantially the same powers to it as are possessed by a domestic corporation.

Section 15.05(c) preserves the judicially developed doctrine that internal corporate affairs are governed by the state of incorporation even when the corporation's business and assets are located primarily in other states.

NORTH CAROLINA COMMENTARY

This section brings forward the provisions of former G.S. 55-132(b) relating to the eligibility of a foreign corporation to serve in certain fiduciary capacities.

The Model Act was modified in subsection (b) to clarify that the phrase "Except as otherwise provided in the act" applies to the entire subsection.

This section omits the Model Act's prohibition in subsection 15.05(c) against regulation by this State of the organizational or internal affairs of a foreign corporation. The extent, if any, to which such regulation is permitted will be determined by the courts on a case-by-case basis.

§ 55-15-06: Repealed by Session Laws 2001-358, s. 18, effective January 1, 2002.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which repealed this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the repeal of this section by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§ 55-15-07. Registered office and registered agent of foreign corporation.

Each foreign corporation authorized to transact business in this State must maintain a registered office and registered agent as required by Article 4 of Chapter 55D of the General Statutes and is subject to service on the Secretary of State under that Article. (1901, c. 5; Rev., s. 1243; C.S., s. 1137; G.S., s. 55-38; 1955, c. 1371, s. 1; 1989, c. 265, s. 1; 2000-140, s. 101(c); 2001-358, s. 47(b); 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

OFFICIAL COMMENT

A foreign corporation that obtains a certificate of authority in a state thereby agrees that it is amenable to suit in the state. Section 15.07 requires every such corporation continuously to maintain a registered office and registered agent within the state upon whom service of process may be made. As is the case with a domestic corporation, the registered office may, but need not be, a business office of the foreign corporation.

Section 15.07 is patterned after section 5.01, relating to the registered office and registered agent of a domestic corporation. For a fuller description of the policies underlying section 15.07, see the Official Comment to section 5.01.

NORTH CAROLINA COMMENTARY

The Model Act was modified to conform the corresponding provisions in G.S. 55-5-01.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Legal Periodicals. — For civil procedure note, "North Carolina Adopts the Stream of Commerce Theory of Jurisdiction: A Step in the Right Direction," see 20 Wake Forest L. Rev. 737 (1984).

§§ 55-15-08 through 55-15-10: Repealed by Session Laws 2001-358, s. 47(c), effective January 1, 2002.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which repealed these sections, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the repeal of these sections by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 28, had amended G.S. 55-15-10. However, s. 155 of c. 387 repealed s. 28, contingent upon the enactment of Session Laws 2001-358. Session Laws 2001-358 was enacted on August 10, 2001.

§§ 55-15-11 through 55-15-19: Reserved for future codification purposes.

Part 2. Withdrawal.

§ 55-15-20. Withdrawal of foreign corporation.

(a) A foreign corporation authorized to transact business in this State may not withdraw from this State until it obtains a certificate of withdrawal from the Secretary of State.

(b) A foreign corporation authorized to transact business in this State may apply for a certificate of withdrawal by delivering an application to the Secretary of State for filing. The application must set forth:

(1) The name of the foreign corporation and the name of the state or country under whose law it is incorporated;

(2) That it is not transacting business in this State and that it surrenders its authority to transact business in this State;

(3) That the corporation revokes the authority of its registered agent to accept service of process and consents that service of process in any action or proceeding based upon any cause of action arising in this State, or arising out of business transacted in this State, during the time the corporation was authorized to transact business in this State may thereafter be made on such corporation by service thereof on the Secretary of State;

(4) A mailing address to which the Secretary of State may mail a copy of any process served on the Secretary of State under subdivision (3); and

(5) A commitment to file with the Secretary of State a statement of any subsequent change in its mailing address.

(b1) If the Secretary of State finds that such application conforms to law, he shall:

(1) Endorse on the application and an exact or conformed copy thereof the word "filed", and the hour, day, month and year of the filing thereof;

(2) File the application in his office;

(3) Issue a certificate of withdrawal to which he shall affix the exact or conformed copy of the application; and

(4) Send to the foreign corporation or its representative the certificate of withdrawal together with the exact or conformed copy of the application affixed thereto.

(c) After the withdrawal of the foreign corporation is effective, service of process on the Secretary of State in accordance with subsection (b) of this section shall be made by delivering to and leaving with the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process and the fee required by G.S. 55-1-22(b). Upon receipt of process in the manner provided in this subsection, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the foreign corporation at the mailing address designated pursuant to subsection (b) of this section. (1955, c. 1371, s. 1; 1973, c. 476, s. 193; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.23; 2001-387, ss. 29, 30.)

OFFICIAL COMMENT

A foreign corporation that ceases to transact business within a state may withdraw from the state only by obtaining a certificate of withdrawal. A foreign corporation that ceases to transact business in the state but fails to obtain a certificate of withdrawal will continue to be (1) subject to service of process on its registered agent or on its secretary pursuant to section 15.10 and (2) liable for franchise and other taxes under other statutes.

The certificate of withdrawal provided by this section is recognition by the state that the foreign corporation has ceased to transact business in the state.

The application for certificate of withdrawal must appoint the secretary of state as the withdrawing corporation's agent for service of process in any proceeding based on a cause of action which arose during the time it was authorized to transact business in the state. The application must also set forth a mailing address to which the secretary of state may forward any process received, and the corporation must agree to notify the secretary of state of any change in that address. There is no time limit on the obligation to advise the secretary of state of changes of mailing address. To ensure that the appointment of the secretary of state is unqualified and meets the precise requirements of this section, the secretary of state may require that an application for certificate of withdrawal be on a form prescribed by him. See section 1.21.

Service of process on the secretary of state pursuant to the statements in the application for certificate of withdrawal effects service on the corporation under section 15.20(c). The secretary of state must then mail the process to the corporation at the mailing address specified in the application or in a subsequent communication to the secretary of state advising him of a change in mailing address.

AMENDED NORTH CAROLINA COMMENTARY

This section modifies the Model Act in subdivision (b)(3) to clarify and limit the circumstances under which service of process on the Secretary of State is effective with respect to a foreign corporation that has withdrawn from this State. In addition, former G.S. 55-150(d), modified to conform to G.S. 55-15-03(c), was added as subsection (b1), because the Model Act contains no express requirement that the Secretary of State issue a certificate of withdrawal or send the certificate to the foreign corporation or its representative.

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 55-15-21. Withdrawal of foreign corporation by reason of a merger, consolidation, or conversion.

(a) Whenever a foreign corporation authorized to transact business in this State ceases its separate existence as a result of a statutory merger or consolidation permitted by the laws of the state or country under which it was incorporated, or converts into another entity as permitted by those laws, the surviving or resulting entity shall apply for a certificate of withdrawal for the foreign corporation by delivering to the Secretary of State for filing a copy of the articles of merger, consolidation, or conversion or a certificate reciting the facts of the merger, consolidation, or conversion, duly authenticated by the Secretary of State or other official having custody of corporate records in the state or country under the laws of which such foreign corporation was incorporated. If the surviving or resulting entity is not authorized to transact business or conduct affairs in this State the articles or certificate must be accompanied by an application that sets forth:

(1) The name of the foreign corporation authorized to transact business in this State, the type of entity and name of the surviving or resulting entity, and a statement that the surviving or resulting entity is not authorized to transact business or conduct affairs in this State;

(2) A statement that the surviving or resulting entity consents that service of process based upon any cause of action arising in this State, or arising out of business transacted in this State, during the time the foreign corporation was authorized to transact business in this State may thereafter be made by service thereof on the Secretary of State;

(3) A mailing address to which the Secretary of State may mail a copy of any process served on the Secretary of State under subdivision (a)(2) of this section; and

(4) A commitment to file with the Secretary of State a statement of any subsequent change in its mailing address.

(b) If the Secretary of State finds that the articles or certificate and the application for withdrawal, if required, conform to law the Secretary of State shall:

(1) Endorse on the articles or certificate and the application for withdrawal, if required, the word "filed" and the hour, day, month and year of the filing thereof;

(2) File the articles or certificate and the application, if required;

(3) Issue a certificate of withdrawal; and

(4) Send to the surviving or resulting entity or its representative the certificate of withdrawal, together with the exact or conformed copy of the application, if required, affixed thereto.

(c) After the withdrawal of the foreign corporation is effective, service of process on the Secretary of State in accordance with subsection (a) of this section shall be made by delivering to and leaving with the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process and the fee required by G.S. 55-1-22(b). Upon receipt of process in the manner provided in this subsection, the

Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the surviving or resulting entity at the mailing address designated pursuant to subsection (a) of this section. (1991, c. 645, s. 13; 1999-369, s. 1.9; 2001-387, s. 31.)

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§§ 55-15-22 through 55-15-29: Reserved for future codification purposes.

Part 3. Revocation of Certificate of Authority.

§ 55-15-30. Grounds for revocation.

(a) The Secretary of State may commence a proceeding under G.S. 55-15-31 to revoke the certificate of authority of a foreign corporation authorized to transact business in this State if:

(1) The foreign corporation is delinquent in delivering its annual report;

(2) The foreign corporation does not pay within 60 days after they are due any penalties, fees, or other payments due under this Chapter;

(3) The foreign corporation is without a registered agent or registered office in this State for 60 days or more;

(4) The foreign corporation does not inform the Secretary of State under G.S. 55D-31 or G.S. 55D-32 that its registered agent or registered office has changed, that its registered agent has resigned, or that its registered office has been discontinued within 60 days of the change, resignation, or discontinuance;

(5) An incorporator, director, officer, or agent of the foreign corporation signed a document he knew was false in any material respect with intent that the document be delivered to the Secretary of State for filing;

(6) The Secretary of State receives a duly authenticated certificate from the secretary of state or other official having custody of corporate records in the state or country under whose law the foreign corporation is incorporated stating that it has been dissolved or disappeared as the result of a merger;

(7) The corporation is exceeding the authority conferred upon it by this Chapter; or

(8) The corporation knowingly fails or refuses to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter.

(b) Nothing herein shall be deemed to repeal or modify any provision of the Revenue Act relating to the suspension of the certificate of authority of foreign corporations for failure to comply with the provisions thereof. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1993, c. 552, s. 18; 1997-475, s. 6.5; 2001-358, s. 47(e); 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

OFFICIAL COMMENT

Section 15.30 authorizes the administrative revocation of the certificate of authority of a foreign corporation on the grounds specified. Administrative revocation is effective only upon compliance with the procedure specified in section 15.31. A foreign corporation that believes the administrative revocation is unwarranted may obtain judicial review of the secretary of state's determination pursuant to section 15.32.

If a qualified foreign corporation has dissolved or merged into another corporation, the secretary of state may proceed to revoke its certificate of authority to transact business solely on the basis of a certificate from the secretary of state or other official of the state of incorporation. Section 15.30(6). This subdivision provides a simple and inexpensive method to eliminate the names of corporations that are no longer in existence from the records of the secretary of state, thereby making available the corporate names for use by other entities.

Section 15.30 is patterned after section 14.20, relating to the administrative dissolution of domestic corporations. See the Official Comment to section 14.20 for a fuller description of the policies underlying section 15.30.

NORTH CAROLINA COMMENTARY

Subdivision (a)(7) was added to the Model Act's provisions to bring forward the provisions of former G.S. 55-151(a)(7). Subsection (b) was added to avoid any conflict with the procedures set forth in the Revenue Act relating to suspension of the certificate of authority of a foreign corporation.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§ 55-15-31. Procedure for and effect of revocation.

(a) If the Secretary of State determines that one or more grounds exist under G.S. 55-15-30 for revocation of a certificate of authority, he shall mail to the foreign corporation written notice of his determination.

(b) If the foreign corporation does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within 60 days after notice is mailed, the Secretary of State may revoke the foreign corporation's certificate of authority by signing a certificate of revocation that recites the ground or grounds for revocation and its effective date. The Secretary of State shall file the original of the certificate and mail a copy to the foreign corporation.

(c) The authority of a foreign corporation to transact business in this State ceases on the date shown on the certificate revoking its certificate of authority.

(d) The Secretary of State's revocation of a foreign corporation's certificate of authority appoints the Secretary of State the foreign corporation's agent for service of process in any proceeding based on a cause of action arising in this State or arising out of business transacted in this State during the time the foreign corporation was authorized to transact business in this State. The Secretary of State shall then proceed in accordance with G.S. 55D-33.

(e) Revocation of a foreign corporation's certificate of authority does not terminate the authority of the registered agent of the corporation.

(f) The corporation shall not be granted a new certificate of authority until each ground for revocation has been substantially corrected to the reasonable satisfaction of the Secretary of State. (1955, c. 1371, s. 1; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.24; 1991, c. 645, s. 14; 2001-358, s. 47(f); 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

OFFICIAL COMMENT

The procedure for revocation of a certificate of authority in section 15.31 establishes a simple method of completing the revocation while at the same time ensuring that the foreign corporation is advised of the contemplated action and has an opportunity to contest it in appropriate situations. In most situations, revocation by the secretary of state will not be contested.

After revocation, the secretary of state is appointed the foreign corporation's agent for service of process; upon receipt of service, the secretary of state must forward the process to the foreign corporation's principal address, as last reflected in his records. Revocation, however, does not of itself terminate the authority of the foreign corporation's registered agent, so that process served on that agent by a third person who was unaware of the revocation may be effective.

Section 15.31 is patterned after section 14.21, relating to the administrative dissolution of a domestic corporation. See the Official Comment to section 14.21 for a fuller statement of the policies underlying section 15.31.

NORTH CAROLINA COMMENTARY

The Model Act was modified to conform to the corresponding provisions in G.S. 55-14-21.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§ 55-15-32. Appeal from revocation.

(a) A foreign corporation may appeal the Secretary of State's revocation of its certificate of authority to the Superior Court of Wake County within 30 days after the certificate of revocation is mailed to the foreign corporation by the Secretary of State. The appeal is commenced by filing a petition with the court and with the Secretary of State requesting the court to set aside the revocation. The petition shall have attached to it copies of the corporation's certificate of authority and the Secretary of State's certificate of revocation. No service of process on the Secretary of State is required except for the filing of the petition as set forth in this subsection. The appeal to the superior court shall be determined by a judge of the superior court upon such further evidence, notice and opportunity to be heard, if any, as the court may deem appropriate under the circumstances. The foreign corporation shall have the burden of establishing that it is entitled to have the revocation set aside.

(b) Upon consideration of the petition and any response made by the Secretary of State, the court may, prior to entering final judgment, order the Secretary of State to set aside the revocation or may take any other action the court considers appropriate.

(c) The court's final decision may be appealed as in other civil proceedings. (1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.25; 2001-358, s. 5A(b); 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

OFFICIAL COMMENT

A corporation whose certificate of authority is revoked may obtain judicial review of the revocation decision. In the review proceeding the court may summarily order the secretary of state to reinstate the corporation or take other action it deems appropriate.

The court with jurisdiction over an appeal should be specified; it is typically either a court in the state capital or a court in the county in which the corporation's principal office is located. Moreover, states adopting this section of the Model Act should specify who has the burden of proof on appeal and the standard for judicial review. See the Official Comment to section 1.26.

NORTH CAROLINA COMMENTARY

The Model Act was modified to conform to the corresponding provisions in G.S. 55-14-22.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§ 55-15-33. Inapplicability of Administrative Procedure Act.

The Administrative Procedure Act shall not apply to any proceeding or appeal provided for in G.S. 55-15-30 through 55-15-32. (1989, c. 265, s. 1.)

NORTH CAROLINA COMMENTARY

This section does not appear in the Model Act.

Editor's Note. — The Administrative Procedure Act, referred to in this section, is codified at Chapter 150B, G.S. 150B-1 et seq.

ARTICLE 16.

Records and Reports.

Part 1. Records.

§ 55-16-01. Corporate records.

(a) A corporation shall keep as permanent records minutes of all meetings of its incorporators, shareholders and board of directors, a record of all actions taken by the shareholders or board of directors without a meeting, and a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation.

(b) A corporation shall maintain appropriate accounting records.

(c) A corporation or its agent shall maintain a record of its shareholders, in a form that permits preparation of a list of the names and addresses of all shareholders, in alphabetical order by class of shares showing the number and class of shares held by each.

(d) A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

(e) A corporation shall keep a copy of the following records at its principal office:

(1) Its articles or restated articles of incorporation and all amendments to them currently in effect;

(2) Its bylaws or restated bylaws and all amendments to them currently in effect;

(3) Resolutions adopted by its board of directors creating one or more classes or series of shares, and fixing their relative rights, preferences, and limitations, if shares issued pursuant to those resolutions are outstanding;

(4) The minutes of all shareholders' meetings, and records of all action taken by shareholders without a meeting, for the past three years;

(5) All written communications to shareholders generally within the past three years and the financial statements required to be made available to the shareholders for the past three years under G.S. 55-16-20;

(6) A list of the names and business addresses of its current directors and officers; and

(7) Its most recent annual report delivered as required by G.S. 55-16-22. (1901, c. 2, ss. 38, 45; Rev., ss. 1180, 1181; C.S., s. 1170; G.S., s. 55-107; 1955, c. 1371, s. 1; 1969, c. 751, s. 14; 1989, c. 265, s. 1; 1997-475, s. 6.6.)

OFFICIAL COMMENT

Section 16.01 describes in general terms the records every corporation must keep or maintain, the form in which they may be maintained, and, to a limited extent, where the records must be kept.

1. MINUTES AND RELATED DOCUMENTS

Section 16.01(a) requires a corporation to "keep" as permanent records the minutes of meetings of its shareholders and board of directors, and a record of actions taken by unanimous consent by its shareholders or board of directors. In addition, each corporation must "keep" a record of all actions taken by a committee of the board of directors when acting on behalf of the board of directors for the corporation; this includes, for example, action taken by an executive committee between meetings of the board and final action of a special litigation committee authorized to act on behalf of the board. Section 16.01(a) does not require a record of actions taken by a committee when the committee is not acting in place of the board of directors, e.g., when the committee is discussing policy and formulating recommendations for action by the board of directors. Also, it does not require either minutes or a record of committee deliberations under any circumstances. Committee meetings are preserved as forums for open and frank discussion and discussion of sensitive corporate data without fear of recordation or disclosure.

Section 16.01 also does not address the amount of detail that should appear in the minutes of meetings of shareholders or the board of directors — the content of minutes is largely fixed by tradition and no inference about their content should be drawn from the section's treatment of the records of committee deliberation and action.

2. SHAREHOLDERS' LISTS AND ACCOUNTING RECORDS

Sections 16.01(b) and (c) require the corporation to "maintain" appropriate accounting and shareholder records. The word "maintain" is used to denote current records only and does not require the corporation to keep on hand as permanent records, data, or information of historical interest only; the periods for which these records, data, or information should be kept is not addressed by the Model Act.

Section 16.01(b) relates to accounting records. The word "appropriate" is used to indicate that the nature of the financial records to be kept is dependent to some extent on the nature of the corporation's business; the phrase "adequate records" is used in some state statutes to convey essentially the same meaning. "Appropriate" records are generally records that permit financial statements to be prepared which fairly present the financial position and transactions of the corporation. In some very small businesses operating on a cash basis, however, "appropriate" accounting records may consist only of a check register, vouchers, and receipts.

Section 16.01(c) requires the corporation to maintain such records of its shareholders as will permit it to compile a list of shareholders when required. These records may consist of stubs from which certificates have been detached in the case of corporations with a few shareholders or of elaborate electronic data retrievable only by modern technology in the case of large, publicly held corporations. The record may be retained by the corporation or an agent, who traditionally is the transfer agent but may be another agent.

3. Form of records

Section 16.01(d) generally authorizes corporations to retain records on microfilm, microfiche, computer memory or disc, or any other method that is convenient or appropriate under the circumstances. The basic requirement is that the method chosen must be capable of reduction to written form within a reasonable time. In addition, in the case of the record of shareholders, the method must permit the development of an alphabetical list of shareholders of record as required by section 16.01(c).

4. Keeping records at principal office

Section 16.01(e) requires certain basic records to be kept at the principal office of the corporation, including minutes of shareholders' meetings for the preceding three years and records of shareholder action taken without a meeting during the same period. This requirement is imposed because these records must be available for inspection by any shareholder at that office. See section 16.02(a). The "principal office" of the corporation is defined in section 1.40 to be the location of the executive offices of the corporation and its address must be set forth by the corporation in its annual report required by section 16.22. The Model Act does not generally specify where records other than those described in section 16.01(e) must be kept. They may be kept in one or more offices within or without the state; indeed, in the case of records kept in nonwritten form, it may be impossible to determine "where" they are located.

NORTH CAROLINA COMMENTARY

This section contains two changes from former G.S. 55-37 and 55-37.1. First, the section requires "appropriate" accounting records whereas prior law required that they be "correct and complete." Second, subsection (e), mandating the retention of certain described records at the corporation's principal office, has no counterpart in prior law. Provision was made in subsection (a) for retaining records of incorporators, and the Model Act was modified in subdivision (e)(5) for clarity.

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

CASE NOTES

Editor's Note. — *Most of the cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Separate Books Not Required for Stockholders and Government. — It is not logical to conclude that the legislature intended to require a corporation to keep two sets of books, one for its stockholders, and the other for the government, if it wished to compute its taxes on a cash receipt basis. Watson v. Watson Seed Farms, Inc., 253 N.C. 238, 116 S.E.2d 716 (1961).

Effect of Chapter on Accepted Methods of Accounting. — Where a corporation has kept its books for a number of years according to an accepted method of accounting, which system is sufficient in computing its capital and surplus for franchise tax purposes and its income for income tax on a cash receipt basis, this Chapter does not make mandatory the abandonment of such system or adoption of a new system of accounting by the corporation. Watson v. Watson Seed Farms, Inc., 253 N.C. 238, 116 S.E.2d 716 (1960).

The provisions of former § 55-37 concerning shareholders' lists are applicable to savings and loan associations. White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962); Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

When Proceedings May Be Proved by Parol Testimony. — When it is shown that no minutes were made of a particular meeting, or that they are incomplete, the proceedings may be proved by parol testimony. S & W Realty & Bonded Com. Agency v. Duckworth & Shelton, Inc., 274 N.C. 243, 162 S.E.2d 486 (1968).

Mandamus to Require Disclosure of Names, Addresses and Holdings of Shareholders. — Shareholders in a building and loan association were entitled to a writ of mandamus, requiring the association and its officers to provide them an opportunity to inspect the records of the association to ascertain the names, addresses, and number of shares held by each shareholder so that they might solicit proxies for use at shareholders' meetings. White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

Whether Stock Actually Issued in Consideration for Covenant-Not-To-Compete and Other Agreements. — In a business dispute involving asserted allegations of breach of a covenant-not-to-compete and other claims, a trial court erred by granting defendants summary judgment on the issue of whether there was consideration offered to defendants in exchange for signing the covenant-not-to-compete, confidentiality and non-solicitation agreement, and shareholders' agreement, as a genuine issue of material fact remained as to whether plaintiff actually issued stock shares promised to defendants, such that they constituted valuable consideration to make the covenant-not-to-compete and confidentiality and non-solicitation agreement valid and enforceable. Kinesis Adver., Inc. v. Hill, 187 N.C. App. 1, 652 S.E.2d 284, 2007 N.C. App. LEXIS 2251 (2007), review denied, appeal dismissed, 362 N.C. 177, 658 S.E.2d 485 (2008).

Lack of Accountability to Other Shareholders. — Generally, a lack of accountability to other shareholders would not, by itself, be sufficient grounds to pierce the corporate veil, as former G.S. 55-37 and 55-38 would provide an adequate remedy at law to enforce accountability. Dorton v. Dorton, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

Use in Evidence of Corporate Computer Records. — Former G.S. 55-37.1 was designed to give broad legislative approval to the use in evidence of corporate computer records. However, in declaring such computer records admissible in evidence, it did not deal with the special problems of reliability created by the use of computers. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Former G.S. 55-37.1 authorized the admission of corporate computer records under appropriate safeguards deemed sufficient to render them trustworthy. But it did not, and was not designed to, preclude judicial development of workable standards for the admission of computerized business records generally. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Conditions Under Which Printouts Are Admissible. — Printout cards or sheets of business records stored on electronic computing equipment are admissible in evidence, if otherwise relevant and material, if: (1) The computerized entries were made in the regular course of business, (2) the entries were made at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources, of information, and the time of preparation render such evidence trustworthy. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973); State v. Stapleton, 29 N.C. App. 363, 224 S.E.2d 204, appeal dismissed, 290 N.C. 554, 226 S.E.2d 513 (1976).

Computer printout evidence may be refuted to the same extent as business records made in books of account. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Failure to Lay Foundation for Admission. — Computer printout referred to in oral testimony is inadmissible where no foundation is laid for its admission and the printout itself is not offered in evidence. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Testimony as to contents of computer printout is inadmissible under the best evidence rule. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Cited in Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992).

§ 55-16-02. Inspection of records by shareholders.

(a) A qualified shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in G.S. 55-16-01(e) if he gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy.

(b) A qualified shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (c) and gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy:

(1) Records of any final action taken with or without a meeting by the board of directors, or by a committee of the board of directors while

acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders and records of action taken by the shareholders without a meeting, to the extent not subject to inspection under G.S. 55-16-02(a);

(2) Accounting records of the corporation; and

(3) The record of shareholders;

provided that a shareholder of a public corporation shall not be entitled to inspect or copy any accounting records of the corporation or any records of the corporation with respect to any matter which the corporation determines in good faith may, if disclosed, adversely affect the corporation in the conduct of its business or may constitute material nonpublic information at the time the shareholder's notice of demand to inspect and copy is received by the corporation.

(c) A qualified shareholder may inspect and copy the records described in subsection (b) only if:

(1) His demand is made in good faith and for a proper purpose;

(2) He describes with reasonable particularity his purpose and the records he desires to inspect; and

(3) The records are directly connected with his purpose.

(d) The right of inspection granted by this section may not be abolished or limited by a corporation's articles of incorporation or bylaws.

(e) This section does not affect:

(1) The right of a shareholder to inspect records under G.S. 55-7-20 or, if the shareholder is in litigation with the corporation, to inspect the records to the same extent as any other litigant;

(2) The power of a court, independently of this Chapter, to compel the production of corporate records for examination.

(f) For purposes of this section, "shareholder" includes a beneficial owner whose shares are held in a voting trust or by a nominee on his behalf and whose beneficial ownership is certified to the corporation by that voting trust or nominee.

(g) For purposes of this section a "qualified shareholder" of a corporation is a person who shall have been a shareholder in the corporation for at least six months immediately preceding his demand or who shall be the holder of at least five percent (5%) of the corporation's outstanding shares of any class.

(h) A qualified shareholder of a corporation that has the power to elect, appoint, or designate a majority of the directors of another domestic or foreign corporation or of a domestic or foreign nonprofit corporation, shall have the inspection rights provided in this section with respect to the records of that other corporation.

(i) Notwithstanding the provisions of this section or any other provisions of this Chapter or interpretations thereof to the contrary, a shareholder of a public corporation shall have no common law rights to inspect or copy any accounting records of the corporation or any other records of the corporation that may not be inspected or copied by a shareholder of a public corporation as provided in G.S. 55-16-02(b). (1901, c. 2, ss. 38, 45, 49; Rev., ss. 1179-1181; C.S., ss. 1170, 1172; G.S., ss. 55-107, 55-109; 1955, c. 1371, s. 1; 1965, c. 609; 1973, c. 469, s. 11; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.26; 1993, c. 552, s. 19.)

OFFICIAL COMMENT

1. SECTION 16.02(a)

Section 16.02(a) provides that every shareholder is entitled to examine upon written request at the principal office of the corporation all documents described in section 16.01(e). These documents all deal with the shareholder's interest as such in the corporation. Whilesome of these documents may also be a matter of public record in the office of secretary of state, a shareholder should not be compelled to go to a public office that may be physically distant to examine the basic documents relating to the corporation of which he is a shareholder.

2. Section 16.02(b)

Section 16.02(b) grants a shareholder who meets the requirements of section 16.02(c) the right to inspect three classes of corporate records:

(1) Excerpts from minutes of meetings of the board of directors, records of action of committees of the board of directors when acting in place of the board on behalf of the corporation, and minutes of meetings of shareholders (to the extent they do not fall within section 16.02(a)). The corporation is required to make available only relevant excerpts of minutes and need not make available minutes of entire meetings merely because a portion of the minutes is directly connected with the shareholder's purpose.

(2) The accounting records of the corporation. The Act does not attempt to define what accounting records must be kept. See the Official Comment to section 16.01.

(3) The record of shareholders, subject to section 16.03(d). If a shareholder makes his demand in good faith and with a proper purpose under section 16.02(c), he is entitled to inspect the shareholders' list under section 16.02(b) without regard to the size or value of his holding. This right is independent of the right to inspect a shareholders' list immediately before a meeting under section 7.20. See section 16.02(e).

3. Section 16.02(c)

Section 16.02(c) follows earlier versions of the Model Act and permits inspection of the records described in section 16.02(b) by a shareholder only if his demand is made in good faith and for a "proper purpose." A "proper purpose" means a purpose that is reasonably relevant to the demanding shareholder's interest as a shareholder. Some statutes do not use the phrase "proper purpose;" the Model Act continues to use it because it is traditional and well-understood language defining the scope of the shareholder's right of inspection and its use ensures that the very substantial case law that has developed under it will continue to be applicable under the revised Act.

As a practical matter, a shareholder who alleges a purpose in general terms, such as a desire to determine the value of his shares, to communicate with fellow shareholders, or to determine whether improper transactions have occurred, has been held to allege a "proper purpose." Section 16.02(c) thus attempts to require more meaningful statements of purpose, if feasible, by requiring that a shareholder designate "with reasonable particularity" his purpose and the records he desires to inspect; the records demanded must also be "directly connected" with that purpose. If disputed by the corporation, the "connection" of the records to the shareholder's purpose may be determined by a court's in camera examination of the records.

4. Sections 16.02(d) and (e)

Section 16.02(d) states that the inspection rights granted by this chapter are inherent rights of shareholders and may not be abolished or limited by the articles of incorporation or bylaws; the subsection is based on CAL. CORP. CODE ANN. § 1600(d) (West 1977). No inference of any kind should be drawn from this subsection as to whether other, unrelated sections of the Model Act may be modified by provisions in the articles of incorporation or bylaws.

Section 16.02(e) provides that the right of inspection granted by section 16.02 is an independent right of inspection that is not a substitute for or in derogation of rights of inspection that may exist (1) under section 7.20, to inspect the shareholders' list following the establishment of a record date for a meeting; (2) as part of a right of discovery that exists in connection with litigation; and (3) as a "common law" right of inspection, if any is found to exist by a court, to examine corporate records. Section 16.02(e) simply preserves whatever independent right of inspection exists under these sources and does not create or recognize any rights, either expressly or by implication.

5. Section 16.02(f)

Section 16.02(f) extends the inspection rights provided by section 16.02 to beneficial owners of shares held by a nominee or in a voting trust. It was added as a technical correction to the Revised Model Business Corporation Act in 1986.

NORTH CAROLINA COMMENTARY

This section differs from prior law in a number of respects:

(i) The absolute right of inspection in subsection (a) extends to all of the records described in G.S. 55-16-01(e), whereas prior law extended such right only to the annual financial statement of shareholders (former G.S. 55-37(a)(4)) and the record of shareholders (former G.S. 55-64(a)).

(ii) Subsection (e) of this section merely preserves any common law inspection right that may exist, whereas former G.S. 55-38(f) created a specific right to seek judicially mandated inspection rights in addition to the absolute statutory right.

(iii) This section does not bring forward the express authorization in former G.S. 55-38(g) for the court to order a corporation to bring records into the state.

(iv) This section does not make it a misdemeanor to misuse information obtained under it, as did former G.S. 55-38(e).

The section also contains several modifications of the Model Act provisions:

(i) Subsection (b) of this section further restricts the inspection rights of shareholders of public corporations in a manner not found in the Model Act, by protecting from inspection the accounting records of such corporations and any other records the disclosure of which the corporation determines in good faith would constitute material nonpublic information.

(ii) Subsection (f) was modified to require that beneficial owners who wish to exercise inspection rights must have their ownership certified to the corporation by the record holder.

(iii) The inspection rights created by the section are limited to "qualified" shareholders as defined in subsection (g), a limitation not found in the Model Act. The concept of "qualified shareholder" is brought forward, with slight modifications, from former G.S. 55-38(a).

CASE NOTES

***Editor's Note.** — Most of the cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Considerations. — To determine whether a shareholder's demand to inspect corporate records meets the requirements of subsection (c) of this section, the trial court must focus upon the demand itself, not upon the shareholder's subsequent pleadings or motions filed in an attempt to compel inspection under G.S. G.S. 55-16-04(b). Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992), aff'd in part and rev'd in part, 333 N.C. 420, 426 S.E.2d 685 (1993).

A beneficial owner of shares is a "shareholder" within the meaning of subdivision (b)(3) when the corporation has obtained a NOBO (non-objecting beneficial owners) list pursuant to 17 C.F.R. § 240.14b-1(c) listing that owner, or when there is a nominee certificate regarding that owner on file with the corporation. Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992), aff'd in part and rev'd in part, 333 N.C. 420, 426 S.E.2d 685 (1993).

Non-objecting beneficial owners who had not filed nominee certificates were not "shareholders" within the meaning of subdivision (b)(3) of this section, and corporation did not have an obligation to obtain and make available to shareholder a list of their names. Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992), aff'd in part and rev'd in part, 333 N.C. 420, 426 S.E.2d 685 (1993).

Common-Law Right of Shareholder to Inspect Records. — At common law stockholders in private corporations have the right to make reasonable inspection of a corporation's books to assure themselves of efficient management. White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

Right Was Not Abridged but Enlarged by Statute. — The right of a shareholder to know his associates and the extent of their holdings was not abridged but enlarged by statute. White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

Right to Information Is Unqualified. — Former G.S. 55-37 contained no qualifying language. The language was absolute: the corporation "shall" mail or otherwise deliver a copy of its statement of assets and liabilities to "any" shareholder upon his written request therefor. The motive of the requesting shareholder was irrelevant. Morgan v. McLeod, 40 N.C. App. 467, 253 S.E.2d 339, cert. denied, 297 N.C. 611, 257 S.E.2d 436 (1979).

Stockholders Have Right to Inspect Books. — Since the stockholders are, in a sense, the beneficial owners of the corporate assets, and thus the persons primarily interested in seeing that the concern is efficiently and profitably managed, they are entitled to inspect the books and records in order to investigate the conduct of the management, determine the financial condition of the corporation, and generally take an account of the stewardship of the officers and directors, at least where there are circumstances justifying some suspicion of mismanagement. Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

The mere possibility that a shareholder may abuse his right to gain access to corporate information will not be held to justify denial of a legal right, if such right exists in the shareholder. Carter v. Wilson Constr. Co., 83 N.C. App. 61, 348 S.E.2d 830 (1986).

But Fishing Expedition Is Not Authorized. — Former G.S. 55-38 did not give a stockholder an absolute right of inspection and examination for a mere fishing expedition, or for a purpose not germane to the protection of his economic interest as a shareholder in the corporation. Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965); Carter v. Wilson Constr. Co., 83 N.C. App. 61, 348 S.E.2d 830 (1986).

Proper Purpose. — Where shareholder demanded to inspect corporate records to determine "any possible mismanagement of the Company or any possible misappropriation, misapplication or improper use of any property or asset of the Company," shareholder's stated purpose was proper under subdivision (c)(1) of this section. Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992), aff'd in part and rev'd in part, 333 N.C. 420, 426 S.E.2d 685 (1993).

"Proper" Motive Required for Actual Visit. — Under former G.S. 55-38(b), the requesting shareholders had to have a "proper purpose" in wanting information. For a shareholder to have the right to actually visit a corporation's office and possibly disrupt its normal operation by inspecting voluminous books and records of account, the legislature correctly decided that his motives must be "proper." Morgan v. McLeod, 40 N.C. App. 467, 253 S.E.2d 339, cert. denied, 297 N.C. 611, 257 S.E.2d 436 (1979); Carter v. Wilson Constr. Co., 83 N.C. App. 61, 348 S.E.2d 830 (1986).

Burden of Proving Improper Purpose. — The burden of proof rests upon the defendants, if they wish to defeat the shareholder's demand, to allege and show by facts, if they can, that the shareholder is motivated by some improper purpose. Carter v. Wilson Constr. Co., 83 N.C. App. 61, 348 S.E.2d 830 (1986).

Applied in Wright v. Krispy Kreme Doughnuts, Inc., 231 F.R.D. 475, 2005 U.S. Dist. LEXIS 25557 (M.D.N.C. 2005).

§ 55-16-03. Scope of inspection right.

(a) A shareholder's agent or attorney has the same inspection and copying rights as the shareholder represented.

(b) The right to copy records under G.S. 55-16-02 includes, if reasonable, the right to receive copies by xerographic or other means, including copies through an electronic transmission if available and so requested by the shareholder.

(c) The corporation may impose a reasonable charge, covering the costs of labor and material, for producing for inspection or copying any records provided to the shareholder. The charge may not exceed the estimated cost of production, reproduction, or transmission of the records.

(d) The corporation may comply with a shareholder's demand to inspect the record of shareholders under G.S. 55-16-02(b)(3) by providing the shareholder with a list of its shareholders that was compiled no earlier than the date of the shareholder's demand. (1901, c. 2, s. 49; Rev., s. 1179; C.S., s. 1172; G.S., s. 55-109; 1955, c. 1371, s. 1; 1965, c. 609; 1973, c. 469, s. 11; 1989, c. 265, s. 1; 2005-268, s. 35.)

OFFICIAL COMMENT

The right of inspection set forth in section 16.02 includes the general right to copy the documents inspected. Section 16.03 follows precedent established under earlier statutes and extends the right of inspection to an agent or attorney of a shareholder as well as the shareholder himself. Further, the section now recognizes that a right to copy means more than a right to copy by longhand and extends to the right to receive, if reasonable, copies made by the modern technology of copying machines with the cost of reproduction being paid by the shareholder.

Many corporations make available to shareholders without charge some or all of the basic documents described in section 16.01(e). Section 16.03(c) authorizes the corporation to charge a reasonable fee based on reproduction costs (including labor and materials) for providing a copy of any document.

Section 16.03(d) is designed to give the corporation the option of providing a reasonably current list of its shareholders instead of granting the right of inspection; a "reasonably current" list is defined in section 16.03(d) as one compiled no earlier than the date of the written demand, which under section 16.02(b) must provide at least five days' notice.

The phrase "estimated cost of production or reproduction of the records" in section 16.03(c) refers to the cost of assembling information and data to meet a demand as well as the cost of reproducing documents that are already in existence.

NORTH CAROLINA COMMENTARY

Former G.S. 55-38 contained no express counterpart to subsections (b), (c) and (d) of this section.

Subsection 16.03 (c) of the Model Act was modified for clarity.

§ 55-16-04. Court-ordered inspection.

(a) If a corporation does not allow a shareholder who complies with G.S. 55-16-02(a) to inspect and copy any records required by that subsection to be available for inspection, the superior court of the county where the corporation's principal office (or, if none in this State, its registered office) is located may, upon application of the shareholder, summarily order inspection and copying of the records demanded at the corporation's expense.

(b) If a corporation does not within a reasonable time allow a shareholder to inspect and copy any other record, the shareholder who complies with G.S. 55-16-02(b) and (c) may apply to the superior court in the county where the corporation's principal office (or, if none in this State, its registered office) is located for an order to permit inspection and copying of the records demanded. The court shall dispose of an application under this subsection on an expedited basis.

(c) If the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the shareholder's costs (including reasonable attorneys' fees) incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded.

(d) If the court orders inspection and copying of the records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding shareholder. (1901, c. 2, s. 49; Rev., s. 1179; C.S., s. 1172; G.S., s. 55-109; 1955, c. 1371, s. 1; 1965, c. 609; 1973, c. 469, s. 11; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 16.04 provides a judicial remedy if a corporation refuses to grant the right of inspection provided by section 16.02.

If the right of inspection under section 16.02(a) is invoked and the corporation refuses to grant inspection, the shareholder may seek a summary order compelling inspection. A summary order is appropriate since the right of inspection under this subsection is either automatic or subject only to a determination that the person is in fact a shareholder of the corporation. By contrast, if inspection is demanded under section 16.02(b), the shareholder's good faith and purpose may be in issue; in this situation section 16.04(b) directs the court to handle the proceeding "on an expedited basis." The purpose of this phrase is to discourage dilatory tactics to avoid or delay inspection without requiring the court to resolve these issues on a summary basis. This language does not mandate any specific procedure by which these issues are to be resolved.

If a court enters a summary order directing inspection under section 16.02(a), the cost of reproducing the records, if any, is placed on the corporation. Section 16.04 does not address who should bear the cost of reproducing other records ordered by the court; this is a matter for the courts to decide in light of the policy of the Model Act that costs of reproduction are generally the responsibility of the requesting shareholder and should be assessed against him.

The principal sanction against unreasonable delay or refusal to grant inspection is provided by section 16.04(c), which imposes on the corporation the plaintiff's costs, including attorneys' fees, unless the corporation can establish that it acted reasonably. The corporation may avoid these costs by showing that the corporation refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded. This normally will involve reasonable doubt whether the shareholder had the necessary good faith and proper purpose or whether the records demanded are directly connected to the shareholder's purpose. The phrase "in good faith because it had a reasonable basis for doubt" establishes a partially objective standard, in that the corporation must be able to point to some objective basis for its doubt that the shareholder was acting in good faith or had a purpose that was proper. For example, a corporation may point to earlier conduct of the shareholder involving improper use of information obtained from the corporation in the past as indicating that reasonable doubt existed as to his present purpose. A corporation may not avoid the imposition of costs under this section merely by showing it had no information one way or the other about the issues in controversy.

Earlier versions of the Model Act and the statutes of many states imposed a penalty upon the corporation or its officers for refusal to permit inspection of books and records by shareholders who (1) had been shareholders for at least six months or (2) owned five percent or more of the outstanding shares. This provision has been omitted. A penalty unrelated to the costs of securing inspection was arbitrary and, as a result, was seldom actually enforced; further, a qualification based on the size or duration of the shareholder's holding unrelated to his actual purpose was subject to the criticism that it constituted unreasonable discrimination against small shareholders.

NORTH CAROLINA COMMENTARY

The sanction for wrongfully withholding records under this section is the payment of the costs and attorneys' fees of the shareholder, whereas former G.S. 55-38 permitted the court to impose a fine not exceeding $500.

CASE NOTES

Editor's Note. *— Some of the cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Mandamus. — Under former G.S. 55-38, the writ of mandamus would not be granted for speculative purposes, or to gratify idle curiosity, or to aid a blackmailer, but it could not be denied to the stockholder who sought information for legitimate purposes. Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

Banking Corporations. — As to applicability of former G.S. 55-38, relating to examination and production of books, records and information, to banking corporations, see G.S. 55-16-02. Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

Lack of Accountability to Other Shareholders. — Generally, a lack of accountability to other shareholders would not, by itself, be sufficient grounds to pierce the corporate veil, as former G.S. 55-37 and 55-38 provided an adequate remedy at law to enforce accountability. Dorton v. Dorton, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

Attorney's Fees. — Trial court properly denied a member's request for attorney's fees in relation to an action seeking to inspect the business records of a club, as there was no statutory grounds for fees under G.S. 55-16-04, a fee provision of the parties consent order could not authorize fees in the absence of statutory authority, and the trial court was not required by G.S. 1A-1, N.C. R. Civ. P. 52(a)(1) to make findings of fact regarding the fee award. Carswell v. Hendersonville Country Club, Inc., 169 N.C. App. 227, 609 S.E.2d 460, 2005 N.C. App. LEXIS 538 (2005).

Cited in In re Summons Issued to Ernst & Young, LLP, 191 N.C. App. 668, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (2008).

§ 55-16-05. Inspection of records by directors.

(a) A director of a corporation is entitled to inspect and copy the books, records, and documents of the corporation at any reasonable time to the extent reasonably related to the performance of the director's duties as a director, including duties as a member of a committee, but not for any other purpose or in any manner that would violate any duty to the corporation.

(b) The superior court of the county where the corporation's principal office, or its registered office if the corporation does not have a principal office in this State, is located may order inspection and copying of the books, records, and documents at the corporation's expense, upon application of a director who has been refused inspection rights, unless the corporation establishes that the director is not entitled to inspection rights. The court shall dispose of an application under this subsection on an expedited basis.

(c) If an order is issued, the court may include provisions protecting the corporation from undue burden or expense, and prohibiting the director from using information obtained upon exercise of the inspection rights in a manner that would violate a duty to the corporation, and may also order the corporation to reimburse the director for the director's costs, including reasonable counsel fees, incurred in connection with the application. (2005-268, s. 36.)

§ 55-16-06. Exception to notice requirements.

(a) Whenever notice is required to be given under any provision of this Chapter to a shareholder, the notice shall not be required to be given if either of the following applies:

(1) Notice of two consecutive annual meetings, and all notices of meetings during the period between those two consecutive annual meetings, have been sent to the shareholder at the shareholder's address as shown on the records of the corporation and have been returned undeliverable.

(2) All, but not less than two, payments of dividends on securities during a 12-month period, or two consecutive payments of dividends on securities during a period of more than 12 months, have been sent to the shareholder at the shareholder's address as shown on the records of the corporation and have been returned undeliverable.

(b) If a shareholder delivers to the corporation a written notice setting forth that shareholder's current address, the requirement that notice be given to the shareholder shall be reinstated. (2005-268, s. 36.)

§§ 55-16-07 through 55-16-19: Reserved for future codification purposes.

Part 2. Reports.

§ 55-16-20. Financial statements for shareholders.

(a) A corporation shall make available to its shareholders annual financial statements, which may be consolidated or combined statements of the corporation and one or more of its subsidiaries, as appropriate, that include a balance sheet as of the end of the fiscal year, an income statement for that year, and a statement of cash flows for the year unless that information appears elsewhere in the financial statements. If financial statements are prepared for the corporation on the basis of generally accepted accounting principles, the annual financial statements must also be prepared on that basis.

(b) If the annual financial statements are reported upon by a public accountant, his report must accompany them. If not, the statements must be accompanied by a statement of the president or the person responsible for the corporation's accounting records:

(1) Stating his reasonable belief whether the statements were prepared on the basis of generally accepted accounting principles and, if not, describing the basis of preparation; and

(2) Describing any respects in which the statements were not prepared on a basis of accounting consistent with the statements prepared for the preceding year.

(c) A corporation shall mail the annual financial statements, or a written notice of their availability, to each shareholder within 120 days after the close of each fiscal year; provided that the failure of the corporation to comply with this requirement shall not constitute the basis for any claim of damages by any shareholder unless such failure was in bad faith. Thereafter, on written request from a shareholder who was not mailed the statements, the corporation shall mail him the latest financial statements. (1901, c. 2, ss. 38, 45, 49; Rev., ss. 1179-1181; C.S., ss. 1170, 1172; G.S., ss. 55-107, 55-109; 1955, c. 1371, s. 1; 1965, c. 609; 1973, c. 469, s. 11; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

The requirement that a corporation regularly submit some financial information to shareholders is appropriate considering the relationship between corporate management and the shareholders as the ultimate owners of the enterprise. This requirement was first added as an amendment in 1979 to the 1969 Model Act.

Section 16.20 has its principal impact on small, closely held corporations, since enterprises whose securities are registered under federal statutes are required to supply audited financial statements to shareholders. The securities of the vast majority of corporations in the United States are not registered under federal law. It is these corporations that section 16.20 principally affects.

Section 16.20 requires every corporation to prepare and submit to shareholders annual financial statements consisting of a balance sheet as of the end of the fiscal year, an income statement for the year, and a statement of changes in shareholders' equity for the year. The last statement may be omitted if the data that normally appears in that statement appears in the other financial statements or in the notes thereto. Consolidated statements of the corporation and any subsidiary, or subsidiaries, or combined statements for corporations under common control, may be used. But section 16.20 does not require financial statements to be prepared on the basis of generally accepted accounting principles ("GAAP"). Many small corporations have never prepared financial statements on the basis of GAAP. "Cash basis" financial statements (often used in preparing the tax returns of small corporations) do not comply with GAAP. Even closely held corporations that keep accrual basis records, and file their federal income tax returns on that basis, frequently do not make the adjustments that may be required to present their financial statements on a GAAP basis. In light of these considerations, it would be too burdensome on some small and closely held corporations to require GAAP statements. If a corporation does prepare financial statements on a GAAP basis for any purpose for the particular year, however, it must send those statements to the shareholders as provided by the last sentence of section 16.20(a).

Section 16.20(b) requires an accompanying report or statement in one of two forms: (1) if the financial statements have been reported upon by a public accountant, his report must be furnished; or (2) in other cases, a statement of the president or the person responsible for the corporation's accounting records must be furnished (i) stating his reasonable belief as to whether the financial statements were prepared on the basis of generally accepted accounting principles, and, if not, describing the basis on which they were prepared, and (ii) describing any respects in which the financial statements were not prepared on a basis of accounting consistent with those prepared for the previous year.

Section 16.20 refers to a "public accountant." The same terminology is used in section 8.30 (standards of conduct for directors) of the Model Act. In various states different terms are employed to identify those persons who are permitted under the state licensing requirements to act as professional accountants. Phrases like "independent public accountant," "certified public accountant," "public accountant," and others may be used. In adopting the term "public accountant," the Model Act uses the words in a general sense to refer to any class or classes of persons who, under the applicable requirements of a particular jurisdiction, are professionally entitled to practice accountancy.

In requiring a statement by the president or person responsible for the corporation's financial affairs, it is recognized that in many cases this person will not be a professionally trained accountant and that he should not be held to the standard required of a professional. To emphasize this difference, section 16.20 requires a "statement" (rather than a "report" or "certificate") and calls for the person to express his "reasonable belief" (rather than "opinion") about whether or not the statements are prepared on the basis of GAAP or, if not, to describe the basis of presentation and any inconsistencies in the basis of the presentation as compared with the previous year. He is not required to describe any inconsistencies between the basis of presentation and GAAP. If the statements are not prepared on a GAAP basis, the description would normally follow guidelines of the accounting profession as to the reporting format considered appropriate for a presentation which departs from GAAP. (See, e.g., "Statement on Auditing Standards No. 14" of the American Institute of Certified Public Accountants.) For example, the description might state, with respect to a cash basis statement of receipts and disbursements, that the statement was prepared on that basis and that it presents the cash receipts and disbursements of the entity for the period but does not purport to present the results of operations on the accrual basis of accounting.

Section 16.20(c) specifies that annual financial statements are to be mailed to each shareholder within 120 days after the close of each fiscal year, further emphasizing that the statements required to be delivered are annual statements and not interim statements. In addition, if a shareholder was not mailed the corporation's latest annual financial statements, he may obtain them on written request. See also section 16.01(e)(5).

Failure to comply with the requirements of section 16.20 does not adversely affect the existence or good standing of the corporation. Rather, failure to comply gives an aggrieved shareholder rights to compel compliance or to obtain damages, if they can be established, under general principles of law.

NORTH CAROLINA COMMENTARY

The financial statements required by this section are more extensive than those required by former G.S. 55-37(a)(4). Also, prior law did not require that the financial statements, or written notice of their availability, be mailed annually to shareholders.

This section differs from the Model Act in several respects. Subsection (a) was modified to refer to a "statement of cash flows" instead of a "statement of changes in shareholders' equity," in accordance with the provisions of FASB-95. Subsection (c) was modified to permit the corporation to mail either the annual financial statements "or a written notice of their availability" and to provide that in the absence of bad faith mere failure to comply with this section will not expose the directors to personal liability.

CASE NOTES

Cited in McClerin v. R-M Indus., Inc., 118 N.C. App. 640, 456 S.E.2d 352 (1995).

§ 55-16-21: Repealed by Session Laws 2005-268, s. 37, effective October 1, 2005.

§ 55-16-22. Annual report.

(a) Except as provided in subsections (a1) and (a2) of this section, each domestic corporation and each foreign corporation authorized to transact business in this State shall deliver an annual report to the Secretary of Revenue in paper form or, in the alternative, directly to the Secretary of State in electronic form as prescribed by the Secretary of State under this section.

(a1) Each insurance company subject to the provisions of Chapter 58 of the General Statutes shall deliver an annual report to the Secretary of State.

(a2) A domestic corporation governed by Chapter 55B of the General Statutes is exempt from this section.

(a3) The annual report required by this section shall be in a form jointly prescribed by the Secretary of Revenue and the Secretary of State. The Secretary of Revenue shall provide the form needed to file an annual report. The Secretary of State shall prescribe the form needed to file an annual report electronically and shall provide this form by electronic means. The annual report shall set forth all of the following:

(1) The name of the corporation and the state or country under whose law it is incorporated.
(2) The street address, and the mailing address if different from the street address, of the registered office, the county in which its registered office is located, and the name of its registered agent at that office in this State, and a statement of any change of such registered office or registered agent, or both.
(3) The address and telephone number of its principal office.
(4) The names, titles, and business addresses of its principal officers.
(4a) Repealed by Session Laws 1997-475, s. 6.1, effective January 1, 1998.
(5) A brief description of the nature of its business.

If the information contained in the most recently filed annual report has not changed, a certification to that effect may be made instead of setting forth the information required by subdivisions (2) through (5) of this subsection.

(b) Information in the annual report must be current as of the date the annual report is executed on behalf of the corporation.

(c) An annual report eligible to be delivered to the Secretary of Revenue is due by the due date for filing the corporation's income and franchise tax returns. An extension of time to file a return is an extension of time to file an annual report. At the option of the filer, an annual report may be filed directly with the Secretary of State in electronic form. An annual report required to be delivered to the Secretary of State is due by the fifteenth day of the third month following the close of the corporation's fiscal year.

(d) If an annual report does not contain the information required by this section, the Secretary of State shall promptly notify the reporting domestic or foreign corporation in writing and return the report to it for correction. If the report is corrected to contain the information required by this section and delivered to the Secretary of State within 30 days after the effective date of notice, it is deemed to be timely filed.

(e) Amendments to any previously filed annual report may be filed with the Secretary of State at any time for the purpose of correcting, updating, or augmenting the information contained in the annual report.

(f) Expired.

(g) When a statement of change of registered office or registered agent is filed in the annual report, the change shall become effective when the statement is received by the Secretary of State.

(h) If the Secretary of State does not receive an annual report within 120 days of the date the return is due, the Secretary of State may presume that the annual report is delinquent. This presumption may be rebutted by receipt of the annual report from the Secretary of Revenue or by evidence of delivery presented by the filing corporation. (1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1066, s. 32(a); 1993, c. 218, s. 2; 1997-475, s. 6.1; 2003-233, s. 3.)

OFFICIAL COMMENT

The requirement relating to the annual report that each corporation must submit to the secretary of state has been modified in section 16.22 in an effort to make it a limited information document for use by the secretary of state, members of the general public, and shareholders. The purpose of the annual report is to show the location of the principal office of the corporation, the names and business addresses of its directors and principal officers, the general nature of the corporation's business, and its capital structure. It permits members of the general public to ascertain the identity of the corporation and communicate directly with it. It also establishes the alternative to the registered office for service of process and related matters. The "principal office" of the corporation is defined as the location of its executive office in section 1.40.

The reference to "principal officers" in section 16.22(a)(4) is intended to simplify reporting requirements of corporations with very large numbers of employees who have some managerial responsibility and who, for business reasons, are designated as officers. The "principal officers" of a corporation include at least the chairman of the board of directors, the chief executive officer, and the officers performing the traditional functions performed by the corporate secretary and treasurer, no matter what their designation.

The annual report is required of both domestic corporations and foreign corporations qualified to transact business in the state. The failure to file the annual report, like the failure to satisfy other mandatory requirements of the Act, is a ground for administrative dissolution or revocation of the certificate of authority to transact business.

NORTH CAROLINA COMMENTARY

This section requires an annual report to the Secretary of State. The prior North Carolina law contained no such requirement.

This section differs from the Model Act by expressly providing that it will not apply to professional corporations (notwithstanding G.S. 55B-3) and by not requiring disclosure of a corporation's authorized shares or its outstanding shares. Subdivision (a)(4) adds a requirement that the titles of officers be included in the annual report, so the Model Act requirement for listing directors' names and business addresses was placed in a separate subdivision (a)(4a). Also, subsection (c) is slightly different from the Model Act in the filing deadlines and in requiring the Secretary of State to distribute forms for the annual report each year. Subsection (e), which is not in the Model Act, allows the filing of amendments to any previously filed annual reports.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 389.

For 1997 legislative survey, see 20 Campbell L. Rev. 481.

CASE NOTES

Applied in Ben Johnson Homes, Inc. v. Watkins, 142 N.C. App. 162, 541 S.E.2d 769, 2001 N.C. App. LEXIS 32 (2001).

§ 55-16-22.1: Repealed by Session Laws 1998-228, s. 17, effective December 1, 1999.

ARTICLE 17.

Transition and Curative Provisions.

§ 55-17-01. Applicability of act.

(a) The provisions of this Chapter shall apply to every corporation for profit, and, so far as appropriate, to every corporation not for profit having a capital stock, now existing or hereafter formed, and to the outstanding and future securities thereof, except to the extent the corporation is expressly excepted by this Chapter from its operation or except to the extent that there is other specific statutory provision particularly applicable to the corporation or inconsistent with some provisions of this Chapter, in which case that other provision prevails.

(b) Notwithstanding the provisions of subsection (a) of this section, no corporation not for profit having a capital stock and formed for religious, charitable, nonprofit, social, or literary purposes shall hereafter be formed under this Chapter. (1955, c. 1371, s. 1; 1957, c. 550, s. 1; 1973, c. 469, s. 1; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

The fundamental principle underlying section 17.01 is that the revised Model Act should ultimately be made fully applicable to all existing business corporations as well as to all new business corporations formed after the effective date of the new statute. It is undesirable to "grandfather" existing corporations under earlier statutes since that results in the permanent coexistence of two different and overlapping systems of corporation law, with resulting confusion. This is particularly true of the revised Model Act, which builds directly on the experience of many years with existing corporation statutes and contains few major substantive changes.

Section 17.01 applies this basic principle in its broadest sense by making the revised Act applicable as of its "effective date" (prescribed in section 17.06) to all domestic corporations formed under general statutes for corporations for profit. This includes all prior general business corporation acts, but not statutes providing for not-for-profit corporations or associations, or corporations formed for the purpose of engaging in a business for which the state has provided a separate incorporation procedure.

Section 17.01 applies the revised Model Act to all corporations to which that application is constitutionally permissible. In view of the universal adoption of "reservation of power" clauses in all states for more than a century, there are very few active business corporations to which this Act will not be applicable under this section.

NORTH CAROLINA COMMENTARY

The provisions of former G.S. 55-3(a) and (b) were brought forward with modifications as subsections (a) and (b) of this section in lieu of the Model Act's provisions. In subsection (a) the words "except to the extent the corporation is expressly excepted by this act from its operation" were substituted for the words "unless the corporation is expressly excepted from the operation hereof" in former G.S. 55-3(a) to provide for partial exceptions and to make it clear that the referenced exceptions are only those in the North Carolina Business Corporation Act itself. In subsection (b) the words "not for profit" were inserted after "corporation" to limit the prohibition only to corporations not formed for profit. The term "not for profit" is broader than "nonprofit" and was used in subsection (a) in order to "grandfather" those not for profit corporations having capital stock that were formed prior to the enactment of the Business Corporation Act in 1955.

Legal Periodicals. — For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

For article on the evolution of corporate combination law, see 76 N.C.L. Rev. 687 (1998).

For article, "Silencing the Shareholder's Voice," see 80 N.C.L. Rev. 1897 (2002).

CASE NOTES

Editor's Note. *— Most of the cases below were decided under the Business Corporation Act adopted in 1955 or under prior law.*

Pre-existing Corporations. — The current North Carolina Business Corporation Act applies to corporations existing prior to its enactment. North Carolina ex rel. Howes v. Peele, 876 F. Supp. 733 (E.D.N.C. 1995).

Building and Loan Associations. — Under former G.S. 55-3, relating to the applicability of Chapter 55, the right to know the names of their associates for the purpose of conducting an effective campaign in preparation for a stockholders' meeting, was extended to the shareholders of a building and loan association. White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

Domestic Banks. — The provisions of this Chapter are applicable to domestic banks operating in North Carolina. Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

Domestic banking corporations are not expressly excepted from the operation of this Chapter, and there is no "specific statutory provision particularly applicable" to domestic banks operating in North Carolina or inconsistent with some provisions of this Chapter, so as to make such provision prevail. Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 55-17-02. Application to qualified foreign corporations.

A foreign corporation authorized to transact business in this State on July 1, 1990 is subject to this Chapter but is not required to obtain a new certificate of authority to transact business under this Chapter. (1955, c. 1371, s. 1; 1957, c. 979, ss. 18, 19; 1989, c. 265, s. 1.)

OFFICIAL COMMENT

Section 17.02 makes the revised Model Act applicable on its effective date to all foreign corporations that are qualified to transact business in the state on that date. But these corporations need not refile and obtain new certificates of authority under the Act. While chapter 15 of the revised Model Act may change the rules applicable to foreign corporations in some states, these changes are not of a type that require a transition period. It is therefore recommended that only a single effective date be provided for the application of the Act to foreign corporations and that delayed effective dates for specific provisions in this regard are unnecessary.

§ 55-17-03. Saving provisions.

(a) The existence of corporations formed before July 1, 1990, shall not be impaired by the enactment of this Chapter nor by any change made by this Chapter in the requirements for the formation of corporations nor by any amendment or repeal by this Chapter of the laws under which they were formed or created, and, except as otherwise expressly provided in this Chapter, the repeal of a prior act by this Chapter shall not affect any liability or penalty incurred, under the provisions of such act, prior to the repeal thereof.

(b) Any proceeding or corporate action commenced before July 1, 1990, may be completed in accordance with the law then in effect.

(c) A corporation dissolved by operation of law before July 1, 1990, may wind up and liquidate its business and affairs pursuant to the provisions of Article 14 of this Chapter. (1955, c. 1371, s. 1; 1957, c. 550, s. 1; 1973, c. 469, s. 1; 1989, c. 265, s. 1; 1993, c. 218, s. 1.)

OFFICIAL COMMENT

The saving provisions of section 17.03 are derived from section 25 of the UNIFORM STATUTORY CONSTRUCTION ACT, which was promulgated by the National Conference of Commissioners on Uniform State Laws in 1965.

NORTH CAROLINA COMMENTARY

Former G.S. 55-3(c) was brought forward with minor clarifications as subsection (a) in lieu of the Model Act's provisions, except that subdivision 17.03(a)(4) of the Model Act was rewritten as subsection (b). The broad term "corporate action" was substituted for the words "reorganization, or dissolution" used in the Model Act in order to be sure that it covers all fundamental changes, including mergers.

CASE NOTES

Applied in Barclays Leasing, Inc. v. National Bus. Sys., 750 F. Supp. 184 (W.D.N.C. 1990).

Cited in United States v. Vanguard Inv. Co., 6 F.3d 222 (4th Cir. 1993).

§ 55-17-04. Severability.

If any provision of this Chapter or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions or applications of the Chapter that can be given effect without the invalid provision or application, and to this end the provisions of the Chapter are severable. (1989, c. 265, s. 1.)

§ 55-17-05. Curative statute.

All deeds, conveyances and other instruments executed prior to the effective date of this Chapter and validated by the curative provisions of former G.S. 55-36.1 and former Article 12 of Chapter 55 as they were immediately prior to such effective date shall be valid and effective to the same extent as if those provisions had not been amended or repealed. The provisions of former G.S. 55-36 shall continue to apply to all instruments executed before July 1, 1990, to which that section applied. (1905, c. 316; Rev., s. 1248; 1939, c. 23; 1941, c.

294; 1943, c. 219, s. 11/2; 1947, c. 504, ss. 1, 2; 1949, c. 436; c. 825; 1951, c. 395; C.S., s. 1134; G.S., ss. 55-35, 55-41, 55-41.1, 55-41.2, 55-42, 55-164.1, 55-164.2; 1955, c. 1371, s. 2; 1957, c. 500, s. 2; 1969, c. 953, s. 1; 1971, c. 60; 1977, c. 40, s. 1; 1979, c. 364; 1989, c. 265, s. 1; 1991, c. 647, s. 1.)

OFFICIAL COMMENT

The Model Act is intended to be a complete substitute for earlier statutes of general applicability to business corporations and it is contemplated that all these statutes should normally be repealed when the revised Model Act is enacted. A few states in the past have retained portions of earlier statutes while enacting integrated codifications of business corporation law. This practice is generally undesirable since it tends to cause unnecessary confusion in determining the applicable law as well as creating possible internal statutory conflicts.

Many states have enacted statutes providing special incorporation and regulatory provisions for corporations engaged in specific businesses, like banking and insurance. These specialized statutes should not be included in the list of statutes repealed by section 17.05. Many of these specialized statutes expressly "borrow" provisions from the general corporation act to fill in gaps or to provide applicable rules when the specialized statute is silent. As a general matter, it would be desirable to ensure that these statutes are amended to refer specifically to the present Act rather than to an earlier statute; an appropriate provision would apply this Act to all these corporations except to the extent the specialized statute expressly provides that a different principle should be applicable.

NORTH CAROLINA COMMENTARY

This section is a consolidation of the curative provisions in former G.S. 55-36.1 and G.S. 55-157 through 55-164.2.

Editor's Note. — Former G.S. 55-36.1, relating to certain prior conveyances, provided as follows:

55-36.1. Declaring certain corporate conveyances prior to January 1, 1969, valid.

Any deed, deed of trust, or other conveyance for land in this State made on behalf of a corporation prior to January 1, 1969, where the president or vice-president has appeared before a notary public and the secretary or assistant secretary has attested and placed the corporate seal of such corporation upon the instrument and the instrument was executed by the president or vice-president on behalf of such corporation by its authority duly given and said certificate recites that the secretary or assistant secretary acknowledges the instrument to be the act and deed of the corporation, in the absence of an acknowledgment of the president or vice-president, the instrument and acknowledgment being otherwise regular, is hereby declared to be a good and valid deed or conveyance by such corporation for all purposes, and shall be admitted to probate and registration, and shall pass title to the property therein conveyed to the grantee as fully as if said deed, deed of trust, or other conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of said deed, deed of trust or other conveyance. (1969, c. 953, s. 1.)

Former Article 12 of Chapter 55, containing various curative provisions, provided as follows:

Article 12.

Curative Provisions.

55-157. Curative act; amendments prior to 1901.

All amendments to the plan of incorporation of any corporation organized under the provisions of the general laws of North Carolina prior to the passage of the act entitled "An Act to Revise the Corporation Law of North Carolina," being Chapter 2, Public Laws of 1901, are declared to be valid in all respects, whether such amendments were made in accordance with the provisions of Chapter 380 of the Public Laws of 1893, or in accordance with the provisions of Chapter 2 of the Public Laws of 1901, but no amendment shall be validated by this section unless it is an amendment of such nature as is authorized to be made under the provisions of Chapter 2 of the Public Laws of 1901. (1905, c. 316; Rev., s. 1248; C.S., s. 1134; G.S., s. 55-35; 1955, c. 1371, s. 2.)

55-158. Certain corporate conveyances validated.

All deeds and conveyances of land in this State, made by any corporation of this State prior to January 1, 1971, executed in its corporate name and signed and attested by its proper officers, from which the corporate seal was omitted, shall be good and valid, notwithstanding the failure to attach said corporate seal. (1939, c. 23; 1949, c. 436; G.S., s. 55-41; 1955, c. 1371, s. 2; 1957, c. 500, s. 2; 1971, c. 60.)

55-159. Certain deeds executed by banks validated.

All deeds heretofore executed by banks and attested by the cashier, assistant cashier, secretary or assistant secretary thereof, which deeds are otherwise regular and valid, are hereby validated. (1943, c. 219, s. 11/2; G.S., s. 55-41.1; 1955, c. 1371, s. 2.)

55-160. Certain conveyances of corporations now dissolved validated.

All deeds and conveyances of land in this State, made by any corporation of this State prior to January 1, 1969, executed in its corporate name and signed by either its president, vice-president or secretary, and sealed with the common seal of the corporation, where said corporation has been dissolved for at least seven years, and said deed or conveyance has been on record for at least seven years, shall be good and valid, notwithstanding the failure of one of such officers to sign such instrument. (1949, c. 825; G.S., s. 55-41.2; 1955, c. 1371, s. 2; 1979, c. 364.)

55-161. Conveyances by corporations owned by the United States government.

The Home Owners Loan Corporation and any corporation, the majority of whose stock is owned by the United States government, may convey lands, and/or other property which is transferable by deed which is duly executed by either an officer, manager, or agent of said corporation, sealed with the common seal and has attached thereto a signed and attested resolution under seal of the board of directors of said corporation authorizing the said officer, manager or agent to execute, sign, seal and attest deeds, conveyances and/or other instruments. This section shall be deemed to have been complied with if an attested resolution is recorded separately in the office of the register of deeds in the county where the land lies, which said resolution shall be applicable to all deeds executed subsequently thereto and pursuant to its authority.

All deeds, conveyances or other instruments which have been executed prior to March 15, 1951, in the manner prescribed above, if otherwise sufficient, shall be valid, and shall have the effect to pass the title to the real and/or personal property described therein. (1941, c. 294; 1951, c. 395; G.S., s. 55-42; 1955, c. 1371, s. 2.)

55-162. Validation of amendments to corporate charters extending corporate existence.

In every case where a private corporation, chartered under the general laws of the State of North Carolina, has continued to act and do business as a corporation after the expiration of its period of existence as theretofore fixed in its charter, and has thereafter filed in the office of the Secretary of State an amendment to its charter to extend or renew its corporate existence, such amendment is hereby validated and made effective for all intents and purposes to the same extent and with the same effect as if such amendment had been made within the period of such corporation's existence as theretofore fixed in its charter. (1947, c. 504, s. 1; G.S., s. 55-164.1; 1955, c. 1371, s. 2.)

55-163. Limitation of actions attacking validity of corporate action on grounds amendment not filed during corporate existence.

No action or proceeding shall be brought or defense or counterclaim pleaded later than one year after the ratification of this Article in which either the continued existence of such corporation or the validity of any of the contracts, acts, deeds, rights, privileges, powers, franchises and titles of such corporation is attacked or otherwise questioned on the grounds that such amendment was not filed within the period of such corporation's existence as theretofore fixed in its charter. (1947, c. 504, s. 2; G.S., s. 55-164.2; 1955, c. 1371, s. 2.)

55-164. Clarification of intent of G.S. 55-163.

In no event shall the limitation provided in G.S. 55-163 bar any action, proceeding, defense or counterclaim based upon grounds other than those mentioned in G.S. 55-163, unless the grounds set out in G.S. 55-163 are an essential part thereof. (1947, c. 504, s. 3; G.S., s. 55-164.3; 1955, c. 1371, s. 2.)

55-164.1. New corporations organized to succeed to rights in corporate charter forfeited.

Whenever the charter of a corporation created under the laws of the State of North Carolina has, on account of failure to make any report or return or to pay any tax or fee for such length of time as to lose its charter, and where thereafter, under the laws of the State of North Carolina, a new charter is issued, in the same name as the original corporation, and on behalf of the same corporation, such new corporation shall succeed to the same properties, to the same rights as the original corporation before losing its charter on account of neglect hereinbefore mentioned.

Whenever such new corporation shall have been created, under the laws of this State, all the title, rights and emoluments to the property held by the original corporation shall inure to the benefit of the newer corporation and the new corporation shall issue its stock to the stockholders in the defunct corporation, in the same number and with the same par value held by the stockholders of the defunct corporation.

Such new corporation shall have the rights and privileges of maintaining any action or cause of action which the defunct corporation might maintain, bring or defend and to all intents and purposes the new corporation shall take the place of the defunct corporation to the same intent and purposes as if the defunct corporation has never expired by reason of its failure to make the reports hereinbefore referred to. (1959, c. 1316, s. 281/2; 1973, c. 469, s. 45.)

55-164.2. Certain corporate documents acknowledged and recorded before January 1, 1977, validated.

In all cases where a deed, deed of trust or other document executed by a corporation is permitted or required by law to be recorded and said deed, deed of trust or document was properly executed, acknowledged and recorded before January 1, 1977, except the acknowledgment of the officer or officers of the corporation was taken in their individual capacity rather than in their capacity as officers of said corporation, said deed, deed of trust or other document shall be construed to be a deed, deed of trust or other document of the same force and effect as if said acknowledgment was in every way proper. (1977, c. 40, s. 1.)

TABLES OF COMPARABLE SECTIONS FOR CHAPTER 55

Former to Present

Editor's Note. — The following table shows G.S. sections from former Chapter 55 and their comparable, new Chapter 55 numbers. Where there is no comparable, new number, the term "None" has been inserted.

Former Section	Present Section
55-1	55-1-01
55-2	55-1-40
55-3	55-17-01, 55-17-03
55-3.1	55-2-03(c)
55-4	55-1-20, 55-1-23, 55-1-25
55-5	55-3-01
55-6	55-2-01
55-7	55-2-02
55-8	55-2-03
55-9	None
55-10	55-3-05
55-11	55-2-05
55-12	55-4-01 to 55-4-04
55-13	55-5-01
55-14	55-5-02 55-5-03
55-15	55-5-04
55-16	55-2-06, 55-7-27, 55-10-20, 55-10-22
55-17	55-3-02
55-18	55-3-04
55-19	55-8-57 55-8-53
55-20	55-8-50 to 55-8-52, 55-8-54 to 55-8-56
55-21	55-8-52 to 55-8-54
55-22	55-8-32
55-23	None
55-24	55-8-01 55-8-02
55-25	55-8-03, 55-8-04, 55-8-05
55-26	55-8-06
55-27	55-8-07 to 55-8-10
55-28	55-8-20 to 55-8-24
55-29	55-8-21, 55-8-20(b)
55-30	55-8-11, 55-8-31
55-31	55-8-25
55-32	55-8-33, 55-8-24(d), 55-6-40(d)

Former Section	Present Section
55-33	None
55-34	55-8-40, 55-8-41, 55-8-43(b), 55-8-44(b)
55-35	55-8-30, 55-8-42
55-36	None
55-36.1	55-17-05
55-37	55-16-01, 55-16-02, 55-16-20
55-37.1	55-16-01
55-38	55-16-02, 55-16-03, 55-16-04, 55-16-20
55-39	None
55-40	55-6-01, 55-6-03
55-40.1	55-6-21
55-41	55-6-01
55-42	55-6-02
55-43	55-6-20
55-44	55-6-24
55-44.1	55-7-21.1
55-45	None
55-46	55-6-21
55-47	None
55-48	None
55-49	55-6-40(d)
55-50	55-6-40
55-51	55-6-23
55-52	55-6-31, 55-6-40
55-53	55-6-22
55-54	55-8-33(b)(2), 55-14-08
55-55	55-7-40
55-56	55-6-30
55-57	55-6-25
55-58	55-6-04
55-59	55-7-24
55-60	55-7-07
55-61	55-7-01, 55-7-02, 55-7-03
55-62	55-7-05
55-63	55-7-04
55-64	55-7-20
55-65	55-7-25
55-66	55-7-25, 55-7-27
55-67	55-7-21
55-67(c)	55-7-28
55-68	55-7-22
55-69	55-7-24(b)

Former Section	Present Section
55-70, 55-71	None
55-72	55-7-30
55-73	55-7-31
55-74	None
55-75	55-9-01
55-76	55-9-02
55-77	55-9-03
55-78	55-9-04
55-79	55-9-05
55-79.1 to 55-89	None
55-90	55-9A-01
55-91	55-9A-02
55-92	55-9A-03
55-93	55-9A-04
55-94	55-9A-05
55-95	55-9A-06
55-96	None
55-97	55-9A-07
55-98	None
55-98.1	55-9A-09
55-99	55-10-01
55-100	55-10-02, 55-10-03, 55-10-05
55-101	55-10-04 to 55-13-02
55-102	None
55-103	55-10-06
55-104	55-10-09
55-105	55-10-07
55-106	55-11-01
55-107	None
55-108	55-11-03, 55-13-20
55-108.1	55-11-03(g), 55-11-04
55-109	55-11-05
55-110	55-11-06
55-111	55-11-07
55-112	55-12-01, 55-12-02, 55-13-02, 55-13-20
55-113	55-13-1 to 55-13-3, 55-13-20 to 55-13-26, 55-13-28, 55-13-30, 55-13-31
55-113.1	55-14A-01
55-114	55-14-05, 55-14-06, 55-14-07, 55-14-08
55-115	None
55-116	55-14-01 to 55-14-03
55-117	None
55-118	55-14-02, 55-14-03
55-119	55-14-05 to 55-14-07

Former Section	Present Section
55-119(c)	55-13-02
55-120	55-14-04
55-121	None
55-122	55-14-30
55-123	None
55-124	55-14-31
55-125	55-14-30, 55-14-31, 55-14-33
55-125.1	55-14-31
55-126	55-14-30
55-127	55-14-32
55-128	None
55-129	55-14-33
55-130	55-14-40
55-130.1	55-14-01
55-131	55-15-01
55-132	55-15-05
55-133 to 55-136	None
55-137	55-15-06
55-138	55-15-03
55-139	55-15-03
55-140	55-15-05
55-141	55-15-07
55-142	55-15-08
55-143	55-15-10
55-144	55-15-10
55-145	None
55-146	55-15-10
55-146.1 to 55-148	None
55-149	55-15-04
55-150	55-15-20
55-151	55-15-30, 55-15-31
55-152	55-15-31
55-153	55-17-02
55-154	55-15-02
55-155	55-1-22
55-156	55-1-22
55-157 to 55-163	55-17-05
55-164, 55-164.1	None
55-164.2	55-17-05
55-165	55-1-31
55-166	55-1-32
55-167	55-1-33
55-168	55-1-30
55-169	55-1-25(d), 55-1-27, 55-1-28(c)
55-170	55-1-21
55-171	None
55-172	55-7-06 to 55-8-23
55-173	None
55-174	55-1-02
55-175	None

Present to Former

Editor's Note. — The following table shows G.S. sections of current Chapter 55 and their comparable, former Chapter 55 sections numbers. Where there is no comparable, former Chapter 55 number, the term "None" has been inserted.

Present Section	Former Section
55-1-01	55-1
55-1-02	55-174
55-1-20	55-4
55-1-21	55-170
55-1-22	55-155, 55-156
55-1-23	55-4
55-1-24	None
55-1-25	55-4
55-1-25(d)	55-169
55-1-26	None
55-1-27	55-169
55-1-28(c)	55-169
55-1-29	None
55-1-30	55-168
55-1-31	55-165
55-1-32	55-166
55-1-33	55-167
55-1-40	55-2
55-1-41, 55-1-42	None
55-2-01	55-6
55-2-02	55-7
55-2-03	55-8
55-2-03(c)	55-3.1
55-2-05	55-11
55-2-06	55-16
55-2-07	None
55-3-01	55-5
55-3-02	55-17
55-3-03	None
55-3-04	55-18
55-3-05	55-10
55-4-01 to 55-4-04	55-12
55-4-05	None
55-5-01	55-13
55-5-02, 55-5-03	55-14
55-5-04	55-15
55-6-01	55-40, 55-41
55-6-02	55-42
55-6-03	55-40
55-6-04	55-58
55-6-20	55-43
55-6-21	55-40.1, 55-46
55-6-22	55-53
55-6-23	55-51
55-6-24	55-44
55-6-25	55-57
55-6-26 to 55-6-28	None
55-6-30	55-56
55-6-31	55-52
55-6-40	55-50, 55-52

Present Section	Former Section
55-6-40(d)	55-32, 55-49
55-7-01 to 55-7-03	55-61
55-7-04	55-63
55-7-05	55-62
55-7-06	55-172
55-7-07	55-60
55-7-20	55-64
55-7-21	55-67
55-7-21.1	55-44.1
55-7-22	55-68
55-7-23	None
55-7-24	55-59
55-7-24(b)	55-69
55-7-25	55-65, 55-66
55-7-26	None
55-7-27	55-16, 55-66
55-7-28	55-67(c)
55-7-30	55-72
55-7-31	55-73
55-7-40	55-55
55-8-01, 55-8-02	55-24
55-8-03 to 55-8-05	55-25
55-8-06	55-26
55-8-07 to 55-8-10	55-27
55-8-11	55-30
55-8-20	55-28
55-8-20(b)	55-29(c)
55-8-21	55-28, 55-29
55-8-22	55-28(c)
55-8-23	55-28, 55-172
55-8-24	55-28(d)
55-8-24(d)	55-32(h)
55-8-25	55-31
55-8-30	55-35
55-8-31	55-30(b)
55-8-32	55-22
55-8-33	55-32
55-8-33(b)(2)	55-54
55-8-40, 55-8-41	55-34
55-8-42	55-35
55-8-43(b)	55-34(d)
55-8-44(b)	55-34(d)
55-8-50, 55-8-51	55-20
55-8-52	55-20, 55-21
55-8-53	55-19
55-8-54	55-20, 55-21
55-8-55, 55-8-56	55-20

Present Section	Former Section
55-8-57	55-19
55-8-58	None
55-9-01	55-75
55-9-02	55-76
55-9-03	55-77
55-9-04	55-78
55-9-05	55-79
55-9A-01	55-90
55-9A-02	55-91
55-9A-03	55-92
55-9A-04	55-93
55-9A-05	55-94
55-9A-06	55-95
55-9A-07	55-97
55-9A-08	None
55-9A-09	55-98.1
55-10-01	55-99
55-10-02, 55-10-03	55-100
55-10-04	55-101
55-10-05	55-100
55-10-06	55-103
55-10-07	55-105
55-10-09	55-104
55-10-20	55-16(a)
55-10-22	55-16
55-11-01	55-106
55-11-02	None
55-11-03	55-108
55-11-03(g)	55-108.1
55-11-04	55-108.1
55-11-05	55-109
55-11-06	55-110
55-11-07	55-111
55-11-08	None
55-12-01, 55-12-02	55-112
55-12-03	None
55-13-01	55-113
55-13-02	55-101, 55-112, 55-113, 55-119
55-13-03	55-113
55-13-20	55-108, 55-112, 55-113
55-13-21 to 55-13-26, 55-13-28, 55-13-30, 55-13-31	55-113
55-14-01	55-116, 55-130.1
55-14-02	55-118
55-14-03	55-116, 55-118

Present Section	Former Section
55-14-04	55-120
55-14-05 to 55-14-07	55-114, 55-119
55-14-08	55-54, 55-114
55-14-20 to 55-14-24	None
55-14-30	55-122, 55-125, 55-126
55-14-31	55-124 to 55-125.1
55-14-32	55-127
55-14-33	55-125, 55-129
55-14-40	55-130
55-14A-01	55-113.1
55-15-01	55-131
55-15-02	55-154
55-15-03	55-138, 55-139
55-15-04	55-149
55-15-05	55-132, 55-140
55-15-06	55-137
55-15-07	55-141
55-15-08	55-142
55-15-09	None
55-15-10	55-143, 55-144, 55-146
55-15-20	55-150
55-15-30	55-151
55-15-31	55-151, 55-152
55-15-32, 55-15-33	None
55-16-01	55-37
55-16-01(d)	55-37.1
55-16-02	55-37, 55-38
55-16-03, 55-16-04	55-38
55-16-20	55-37, 55-38
55-16-21, 55-16-22	None
55-17-01	55-3
55-17-02	55-153
55-17-03	55-3
55-17-04	None
55-17-05	55-36.1, 55-157 to 55-163, 55-164.2

Chapter 55A.

North Carolina Nonprofit Corporation Act.

Article 1.

General Provisions.

Part 1. Short Title and Reservation of Power.

Sec.
55A-1-01. Short title.
55A-1-02. Reservation of power to amend or repeal.
55A-1-03 through 55A-1-19. [Reserved.]

Part 2. Filing Documents.

55A-1-20. Filing requirements.
55A-1-21. Forms.
55A-1-22. Filing, service, and copying fees.
55A-1-22.1 through 55A-1-27. [Repealed.]
55A-1-28. Certificate of existence.
55A-1-29. [Repealed.]

Part 3. Secretary of State.

55A-1-30. Powers.
55A-1-31. Interrogatories by Secretary of State.
55A-1-32. Penalties imposed upon corporations, officers, and directors for failure to answer interrogatories.
55A-1-33. Information disclosed by interrogatories.
55A-1-34 through 55A-1-39. [Reserved.]

Part 4. Definitions.

55A-1-40. Chapter definitions.
55A-1-41. Notice.
55A-1-42 through 55A-1-49. [Reserved.]

Part 5. Private Foundations.

55A-1-50. Private Foundations.
55A-1-51 through 55A-1-59. [Reserved.]

Part 6. Judicial Relief.

55A-1-60. Judicial relief.

Part 7. Miscellaneous.

55A-1-70. Electronic transactions.

Article 2.

Organization.

55A-2-01. Incorporators.
55A-2-02. Articles of incorporation.
55A-2-03. Incorporation.
55A-2-04. [Reserved.]
55A-2-05. Organization of corporation.
55A-2-06. Bylaws.
55A-2-07. Emergency bylaws.

Article 3.

Purposes and Powers.

Sec.
55A-3-01. Purposes.
55A-3-02. General powers.
55A-3-03. Emergency powers.
55A-3-04. Ultra vires.
55A-3-05. Exercise of corporate franchises not granted.
55A-3-06. Special powers; public parks and drives and certain recreational corporations.
55A-3-07. Certain corporations subject to Public Records Act and Open Meetings Law.

Article 4.

Names.

55A-4-01 through 55A-4-05. [Repealed.]

Article 5.

Office and Agent.

55A-5-01. Registered office and registered agent.
55A-5-02. [Repealed.]
55A-5-02.1. [Transferred.]
55A-5-03 through 55A-5-04. [Repealed.]

Article 6.

Members and Memberships.

Part 1. Admission of Members.

55A-6-01. Members.
55A-6-02 through 55A-6-19. [Reserved.]

Part 2. Members' Rights and Obligations.

55A-6-20. Designations, qualifications, rights, and obligations of members.
55A-6-21. Prohibition of stock.
55A-6-22. Member's liability to third parties.
55A-6-23. Member's liability for dues, assessments, and fees.
55A-6-24. Creditor's action against member.
55A-6-25 through 55A-6-29. [Reserved.]

Part 3. Resignation and Termination.

55A-6-30. Resignation.
55A-6-31. Termination, expulsion, and suspension.
55A-6-32 through 55A-6-39. [Reserved.]

Part 4. Delegates.

55A-6-40. Delegates.

Article 7.
Members' Meetings and Voting; Derivative Proceedings.

Part 1. Meetings and Action Without Meetings.

Sec.
55A-7-01. Annual and regular meetings.
55A-7-02. Special meeting.
55A-7-03. Court-ordered meeting.
55A-7-04. Action by written consent.
55A-7-05. Notice of meeting.
55A-7-06. Waiver of notice.
55A-7-07. Record date.
55A-7-08. Action by written ballot.
55A-7-09 through 55A-7-19. [Reserved.]

Part 2. Voting.

55A-7-20. Members' list for meeting.
55A-7-21. Voting entitlement generally.
55A-7-22. Quorum requirements.
55A-7-23. Voting requirements.
55A-7-24. Proxies.
55A-7-25. Voting for directors; cumulative voting.
55A-7-26. Other methods of electing directors.
55A-7-27. Corporation's acceptance of votes.
55A-7-28, 55A-7-29. [Reserved.]

Part 3. Voting Agreements.

55A-7-30. Voting agreements.
55A-7-31 through 55A-7-39. [Reserved.]

Part 4. Derivative Proceedings.

55A-7-40. Derivative proceedings.

Article 8.
Directors and Officers.

Part 1. Board of Directors.

55A-8-01. Requirement for and duties of board.
55A-8-02. Qualifications of directors.
55A-8-03. Number of directors.
55A-8-04. Election, designation, and appointment of directors.
55A-8-05. Terms of directors generally.
55A-8-06. Staggered terms for directors.
55A-8-07. Resignation of directors.
55A-8-08. Removal of directors elected by members or directors.
55A-8-09. Removal of designated or appointed directors.
55A-8-10. Removal of directors by judicial proceeding.
55A-8-11. Vacancy on board.
55A-8-12. Compensation of directors.
55A-8-13 through 55A-8-19. [Reserved.]

Part 2. Meetings and Action of the Board.

55A-8-20. Regular and special meetings.
55A-8-21. Action without meeting.
Sec.
55A-8-22. Notice of meetings.
55A-8-23. Waiver of notice.
55A-8-24. Quorum and voting.
55A-8-25. Committees of the board.
55A-8-26 through 55A-8-29. [Reserved.]

Part 3. Standards of Conduct.

55A-8-30. General standards for directors.
55A-8-31. Director conflict of interest.
55A-8-32. Loans to or guaranties for directors and officers.
55A-8-33. Liability for unlawful loans or distributions.
55A-8-34 through 55A-8-39. [Reserved.]

Part 4. Officers.

55A-8-40. Officers.
55A-8-41. Duties of officers.
55A-8-42. Standards of conduct for officers.
55A-8-43. Resignation and removal of officers.
55A-8-44. Contract rights of officers.
55A-8-45 through 55A-8-49. [Reserved.]

Part 5. Indemnification.

55A-8-50. Policy statement and definitions.
55A-8-51. Authority to indemnify.
55A-8-52. Mandatory indemnification.
55A-8-53. Advance for expenses.
55A-8-54. Court-ordered indemnification.
55A-8-55. Determination and authorization of indemnification.
55A-8-56. Indemnification of officers, employees, and agents.
55A-8-57. Additional indemnification and insurance.
55A-8-58. Application of Part.
55A-8-59. [Reserved.]

Part 6. Immunity.

55A-8-60. Immunity.

Article 9.
[Reserved.]

Article 10.
Amendment of Articles of Incorporation and Bylaws.

Part 1. Amendment of Articles of Incorporation.

55A-10-01. Authority to amend.
55A-10-02. Amendment by board of directors.
55A-10-03. Amendment by directors and members.
55A-10-04. Class voting by members on amendments.
55A-10-05. Articles of amendment.
55A-10-06. Restated articles of incorporation.
55A-10-07. Effect of amendment.
55A-10-08 through 55A-10-19. [Reserved.]

Part 2. Bylaws.

Sec.
55A-10-20. Amendment by directors.
55A-10-21. Amendment by directors and members.
55A-10-22. Class voting by members on amendments.
55A-10-23 through 55A-10-29. [Reserved.]

Part 3. Articles of Incorporation and Bylaws.

55A-10-30. Approval by third persons.

Article 11.
Merger.

55A-11-01. Approval of plan of merger.
55A-11-02. Limitations on mergers by charitable or religious corporations.
55A-11-03. Action on plan.
55A-11-04. Articles of merger.
55A-11-05. Effect of merger.
55A-11-06. Merger with foreign corporation.
55A-11-07. Bequests, devises, and gifts.
55A-11-08. Merger with business corporation.
55A-11-09. Merger with unincorporated entity.
55A-11-10. Merger with certain charitable or religious corporation or hospital authority.

Article 12.
Transfer of Assets.

55A-12-01. Sale of assets in regular course of activities and mortgage of assets.
55A-12-02. Sale of assets other than in regular course of activities.

Article 13.
Distributions.

55A-13-01. Prohibited distributions.
55A-13-02. Authorized distributions.

Article 14.
Dissolution.

Part 1. Voluntary Dissolution.

55A-14-01. Dissolution by incorporators or directors prior to commencement of activities.
55A-14-02. Dissolution by directors, members, and third persons.
55A-14-03. Plan of dissolution.
55A-14-04. Articles of dissolution.
55A-14-05. Revocation of dissolution.
55A-14-06. Effect of dissolution.
55A-14-07. Known claims against dissolved corporation.
55A-14-08. Unknown and certain other claims against dissolved corporation.
55A-14-09. Enforcement of claims.
55A-14-10 through 55A-14-19. [Reserved.]

Part 2. Administrative Dissolution.

Sec.
55A-14-20. Grounds for administrative dissolution.
55A-14-21. Procedure for and effect of administrative dissolution.
55A-14-22. Reinstatement following administrative dissolution.
55A-14-23. Appeal from denial of reinstatement.
55A-14-24. Inapplicability of Administrative Procedure Act.
55A-14-25 through 55A-14-29. [Reserved.]

Part 3. Judicial Dissolution.

55A-14-30. Grounds for judicial dissolution.
55A-14-31. Procedure for judicial dissolution.
55A-14-32. Receivership.
55A-14-33. Decree of dissolution.
55A-14-34 through 55A-14-39. [Reserved.]

Part 4. Miscellaneous.

55A-14-40. Disposition of amounts due to unavailable members and creditors.

Article 14A.
Reorganization.

55A-14A-01. Fundamental changes in reorganization proceedings.

Article 15.
Foreign Corporations.

Part 1. Certificate of Authority.

55A-15-01. Authority to conduct affairs required.
55A-15-02. Consequences of conducting affairs without authority.
55A-15-03. Application for certificate of authority.
55A-15-04. Amended certificate of authority.
55A-15-05. Effect of certificate of authority.
55A-15-06. [Repealed.]
55A-15-07. Registered office and registered agent of foreign corporation.
55A-15-08 through 55A-15-10. [Repealed.]
55A-15-11 through 55A-15-19. [Reserved.]

Part 2. Withdrawal.

55A-15-20. Withdrawal of foreign corporation.
55A-15-21. Withdrawal of foreign corporation by reason of a merger, consolidation, or conversion.
55A-15-22 through 55A-15-29. [Reserved.]

Part 3. Revocation of Certificate of Authority.

55A-15-30. Grounds for revocation.
55A-15-31. Procedure and effect of revocation.
55A-15-32. Appeal from revocation.
55A-15-33. Inapplicability of Administrative Procedure Act.

Article 16.

Records and Reports.

Part 1. Records.

Sec.
55A-16-01. Corporate records.
55A-16-02. Inspection of records by members.
55A-16-03. Scope of inspection rights.
55A-16-04. Court-ordered inspection.
55A-16-05. Limitations on use of membership list.
55A-16-06 through 55A-16-19. [Reserved.]

Part 2. Reports.

55A-16-20. Financial statements for members.
55A-16-21. Notice of indemnification to members.
Sec.
55A-16-22. [Repealed.]
55A-16-23. Principal office address.

Article 17.

Transition and Curative Provisions.

55A-17-01. Applicability of Chapter.
55A-17-02. Certain religious, etc., associations deemed incorporated.
55A-17-03. Saving provisions.
55A-17-04. Severability.
55A-17-05. Validation of amendments to corporate charters extending corporate existence; limitation of actions; intent.

NORTH CAROLINA COMMENTARY

This revision of the North Carolina Nonprofit Corporation Act (hereinafter the "Act") is based in large part upon the North Carolina Business Corporation Act (hereinafter "BCA"). Accordingly, the Act follows the same general organization and numbering system as the BCA and, where appropriate, incorporates the substance of the BCA. Stylistic or other minor differences in language and form between certain sections of the Act and the sections of the BCA from which they are derived are not intended to imply substantive differences.

Although the drafters reviewed the Revised Model Nonprofit Corporation Act (1987) (hereinafter the "Model Act") and adopted certain of its provisions, the Act is substantially different from the Model Act. For that reason, the Official Comments to the Model Act are not included in this commentary.

The North Carolina comments are designed to note significant substantive changes from prior law, to highlight certain provisions of the Act that had no counterpart in the prior law and to explain certain provisions of the Act. For any section of the Act that is the same or substantially the same as the corresponding section of the BCA, it is appropriate to refer to the comments to the corresponding BCA section.

Editor's Note. — Session Laws 1993, c. 398, s. 1, effective July 1, 1994, rewrote Chapter 55A and entitled it the North Carolina Nonprofit Corporation Act, to replace former Chapter 55A, entitled the Nonprofit Corporation Act, which had been adopted by Session Laws 1955, c. 1230.

For tables of corresponding sections of former and new Chapter 55A, see the tables at the end of this Chapter.

Section 2 of Session Laws 1993, c. 398 provides: "The Revisor of Statutes shall cause to be printed along with this act all explanatory comments of the drafters of this act as the Revisor may deem appropriate."

Where appropriate, the historical citations to sections of former Chapter 55A have been added to corresponding sections in new Chapter 55A.

Some of the case notes appearing under the sections of this Chapter were decided under former Chapter 55A or under prior law.

ARTICLE 1.

General Provisions.

Part 1. Short Title and Reservation of Power.

§ 55A-1-01. Short title.

This Chapter shall be known and may be cited as the "North Carolina Nonprofit Corporation Act". (1955, c. 1230; 1993, c. 398, s. 1.)

Cross References. — As to jurisdiction of the superior court division over proceedings under this Chapter, see G.S. 7A-249. For the North Carolina Community Trust for Persons with Severe Chronic Disabilities Act, see G.S. 36A-59.10 et seq.

Editor's Note. — Session Laws 1955, c. 1230, in enacting the Nonprofit Corporation Act in 1955, repealed all provisions relating to nonprofit corporations in Chapter 55, except as the provisions apply to hospital service corporations regulated by Chapter 57. (See now Articles 65 and 66 of Chapter 58, G.S. 58-65-1 et seq. and G.S. 58-66-1 et seq.)

Legal Periodicals. — For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

CASE NOTES

Resolution of Church Dispute. — Appellate court erred in dismissing the pastor's appeal of the trial court's denial of the pastor's motion to dismiss a matter involving a dispute over the use of church funds; merely because the church was a nonprofit corporation pursuant to the North Carolina Nonprofit Corporation Act, G.S. 55A-1-01 et seq., did not mean it forfeited its fundamental First Amendment rights. Harris v. Matthews, 361 N.C. 265, 643 S.E.2d 566, 2007 N.C. LEXIS 414 (2007).

Applied in Peninsula Prop. Owners Ass'n v. Crescent Res., LLC, 171 N.C. App. 89, 614 S.E.2d 351, 2005 N.C. App. LEXIS 1165 (2005).

OPINIONS OF ATTORNEY GENERAL

Grants And Gifts. — The Secretary of State has the power, without further legislative authorization, to accept federal grants and private gifts to assist her in implementing her duties under the Nonprofit Corporation Act so long as those grants or gifts are not contrary to State law and so long as she complies with the applicable provisions of the Executive Budget Act. See opinion of Attorney General to Sheila Stafford Pope, General Counsel, Secretary of State, N.C. General Assembly, 1999 N.C.A.G. 17 (6/21/99).

§ 55A-1-02. Reservation of power to amend or repeal.

The General Assembly has power to amend or repeal all or part of this Chapter at any time and all domestic and foreign corporations subject to this Chapter are governed by the amendment or repeal. (1955, c. 1230; 1993, c. 398, s. 1.)

§§ 55A-1-03 through 55A-1-19: Reserved for future codification purposes.

Part 2. Filing Documents.

§ 55A-1-20. Filing requirements.

(a) A document required or permitted by this Chapter to be filed by the Secretary of State must be filed under Chapter 55D of the General Statutes.

(b) A document submitted on behalf of a domestic or foreign corporation must be executed:

(1) By the presiding officer of its board of directors, by its president, or by another of its officers;

(2) If directors have not been selected or the corporation has not been formed, by an incorporator; or

(3) If the corporation is in the hands of a receiver, trustee, or other court-appointed fiduciary, by that fiduciary. (1955, c. 1230; 1967, c. 13, s. 2; c. 823, s. 21; 1985 (Reg. Sess., 1986), c. 801, s. 2; 1993, c. 398, s. 1; 1999-369, s. 2.1; 2001-358, s. 7(a); 2001-387, ss. 32, 155, 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 32, amended this section. However, s. 155 of c. 387 repealed s. 32, contingent upon the enactment of Session Laws 2001-358. Session Laws 2001-358 was enacted on August 10, 2001.

§ 55A-1-21. Forms.

(a) The Secretary of State may promulgate and furnish on request forms for:
(1) An application for a certificate of existence;
(2) A foreign corporation's application for a certificate of authority to conduct affairs in this State;
(3) A foreign corporation's application for a certificate of withdrawal;
(4) Designation of Principal Office Address; and
(5) Corporation's Statement of Change of Principal Office.
If the Secretary of State so requires, use of these forms is mandatory.

(b) The Secretary of State may promulgate and furnish on request forms for other documents required or permitted to be filed by this Chapter but their use is not mandatory. (1955, c. 1230; 1993, c. 398, s. 1; 1995, c. 539, s. 9.)

§ 55A-1-22. Filing, service, and copying fees.

(a) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to the Secretary for filing:

	Document	Fee
(1)	Articles of incorporation	$60.00
(2)	Application for reserved name	$10.00
(3)	Notice of transfer of reserved name	$10.00
(4)	Application for registered name	$10.00
(5)	Application for renewal of registered name	$10.00
(6)	Corporation's statement of change of registered agent or registered office or both	$ 5.00
(7)	Agent's statement of change of registered office for each affected corporation	$ 5.00
(8)	Agent's statement of resignation	No fee
(9)	Designation of registered agent or registered office or both	$ 5.00
(10)	Amendment of articles of incorporation	$25.00
(11)	Restated articles of incorporation without amendment of articles	$10.00
(12)	Restated articles of incorporation with amendment of articles	$25.00
(13)	Articles of merger	$25.00
(14)	Articles of dissolution	$15.00
(15)	Articles of revocation of dissolution	$10.00
(16)	Certificate of administrative dissolution	No fee
(17)	Application for reinstatement following administrative dissolution	$100.00
(18)	Certificate of reinstatement	No fee

	Document	Fee
(19)	Certificate of judicial dissolution	No fee
(20)	Application for certificate of authority	$125.00
(21)	Application for amended certificate of authority	$25.00
(22)	Application for certificate of withdrawal	$10.00
(23)	Certificate of revocation of authority to conduct affairs	No fee
(24)	Corporation's Statement of Change of Principal Office	$5.00
(24a)	Designation of Principal Office Address	$5.00
(25)	Articles of correction	$10.00
(26)	Application for certificate of existence or authorization (paper)	$15.00
(26a)	Application for certificate of existence or authorization (electronic)	$10.00
(27)	Any other document required or permitted to be filed by this Chapter	$10.00
(28)	Repealed by Session Laws 2001-358, s. 7(c), effective January 1, 2002.	

(b) The Secretary of State shall collect a fee of ten dollars ($10.00) each time process is served on the Secretary under this Chapter. The party to a proceeding causing service of process is entitled to recover this fee as costs if the party prevails in the proceeding.

(c) The Secretary of State shall collect the following fees for copying, comparing, and certifying a copy of any filed document relating to a domestic or foreign corporation:

(1) One dollar ($1.00) a page for copying or comparing a copy to the original.
(2) Fifteen dollars ($15.00) for a paper certificate.
(3) Ten dollars ($10.00) for an electronic certificate.

(1957, c. 1179; 1967, c. 823, s. 24; 1969, c. 875, s. 10; 1975, 2nd Sess., c. 981, s. 2; 1983, c. 713, ss. 39-42; 1991, c. 574, s. 2; 1993, c. 398, s. 1; 1995, c. 539, s. 10; 1997-456, s. 55.3; 1997-475, s. 5.2; 1997-485, s. 11; 2001-358, s. 7(c); 2001-387, ss. 173, 175(a); 2001-413, s. 6; 2002-126, ss. 29A.27, 29A.28.)

NORTH CAROLINA COMMENTARY

This section contains a new fee schedule covering documents required or permitted to be filed under the Act. The fees shown here combine the fees and taxes that were separately covered in former G.S. 55A-77 and G.S. 55A-78.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section by deleting subdivision (a)(28), was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2008-194, s. 2(a)-(f), provides: "(a) The following definitions apply in this section:

"(1) Department. — The Department of the Secretary of State.

"(2) Filer. — An individual, entity, or corporation that files a single notice pursuant to this section for more than 20,000 entities on file with the Department.

"(3) Notice. — A bulk filing which includes the information required in G.S. 55D-31(a)(2) through (6) and a certification that the filer has complied with the entity notification requirements of G.S. 55D-31(b). For a notice intended to update information for unincorporated nonprofit associations, 'notice' shall also mean a filing which includes the information required by G.S. 59B-11(b)(4). Any notice filed must be in an electronic form acceptable to the Department and include a written statement that the notice is filed pursuant to this section.

"(b) Upon receipt and filing by the Department, a notice pursuant to this section shall be sufficient as a matter of law under G.S. 55D-31 and G.S. 59B-11 to update registered office and registered agent information for each entity on file with the Department for which the filer is listed on the records of the Department as the registered office, the registered agent, or both.

"(c) The requirements of G.S. 55D-13(a) and (b), 55D-10(b)(8), 55-1-22(a), 55A-1-22(a), 57C-1-22(a), 59-35.2(a), 59-1106(a), and 59B-11(f) shall not apply to notices filed pursuant to this section.

"(d) This section shall only apply to one notice for each filer.

"(e) Unless otherwise specified, the change of address shall become effective on the 45th day following the Department's receipt of a notice filed pursuant to this section. A filer may specify in the notice a later effective date for the change of address, but not an earlier effective date.

"(f) A notice filed pursuant to this section shall be delivered to the Department no later than one year after the effective date of this section."

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 389.

§§ 55A-1-22.1 through 55A-1-27: Repealed by Session Laws 2001-358, s. 7(b), effective January 1, 2002.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which repealed these sections, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the repeal of these sections by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§ 55A-1-28. Certificate of existence.

(a) Anyone may apply to the Secretary of State to furnish a certificate of existence for a domestic corporation or a certificate of authorization for a foreign corporation.

(b) A certificate of existence or authorization sets forth:

(1) The domestic corporation's corporate name or the foreign corporation's name used in this State;

(2) That the domestic corporation is duly incorporated under the law of this State, the date of its incorporation, and the period of its duration if less than perpetual; or that the foreign corporation is authorized to conduct affairs in this State;

(3) That the articles of incorporation of a domestic corporation or the certificate of authority of a foreign corporation has not been suspended for failure to comply with the Revenue Act of this State and that the corporation has not been administratively dissolved for failure to comply with the provisions of this Chapter;

(4) Repealed by Session Laws c. 539, s. 14.

(5) That articles of dissolution have not been filed; and

(6) Other facts of record in the office of the Secretary of State that may be requested by the applicant.

(c) Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the Secretary of State may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to conduct affairs in this State. (1955, c. 1230; 1993, c. 398, s. 1; 1995, c. 539, s. 14.)

§ 55A-1-29: Repealed by Session Laws 2001-358, s. 7(b), effective January 1, 2002.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which repealed this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the repeal of these sections by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Part 3. Secretary of State.

§ 55A-1-30. Powers.

The Secretary of State has the power reasonably necessary to perform the duties required of the Secretary of State by this Chapter. (1955, c. 1230; 1993, c. 398, s. 1.)

§ 55A-1-31. Interrogatories by Secretary of State.

The Secretary of State may propound to any domestic or foreign corporation which the Secretary of State has reason to believe is subject to the provisions of this Chapter, and to any officer or director thereof, any written interrogatories as may be reasonably necessary and proper to enable the Secretary of State to ascertain whether the corporation is subject to the provisions of this Chapter or has complied with all the provisions of this Chapter applicable to it. The interrogatories shall be answered within 30 days after the mailing thereof, or within such additional time as shall be fixed by the Secretary of State, and the answers thereto shall be full and complete and shall be made in writing and under oath. If the interrogatories are directed to an individual, they shall be answered by the individual, and if directed to a corporation, they shall be answered by the presiding officer of the board of directors, the president, or by another officer of the corporation. The Secretary of State shall certify to the Attorney General, for such action as the Attorney General may deem appropriate, all interrogatories and answers thereto which disclose a violation of any of the provisions of this Chapter, requiring or permitting action by the Attorney General. (1955, c. 1230; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section brings forward former G.S. 55A-79 with minor modifications.

§ 55A-1-32. Penalties imposed upon corporations, officers, and directors for failure to answer interrogatories.

(a) The knowing failure or refusal of a domestic or foreign corporation to answer truthfully and fully, within the time prescribed in this Chapter, interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter shall constitute grounds for administrative dissolution under G.S. 55A-14-20 or for revocation under G.S. 55A-15-30, as the case may be.

(b) Each officer and director of a domestic or foreign corporation who knowingly fails or refuses, within the time prescribed by this Chapter, to answer truthfully and fully interrogatories propounded to him by the Secretary of State in accordance with the provisions of this Chapter shall be guilty of a Class 1 misdemeanor. (1955, c. 1230; 1993, c. 398, s. 1; 1994, Ex. Sess., c. 14, s. 37.)

NORTH CAROLINA COMMENTARY

This section brings forward former G.S. 55A-80 with two exceptions: First, a violation of this section by a corporation is not a misdemeanor; instead, the Secretary of State is empowered to dissolve administratively an offending domestic corporation under Article 14 and to revoke the certificate of authority of an offending foreign corporation under Article 15. Second, the provisions relating to the signing of false documents by a director or officer were omitted and are covered by G.S. 55A-1-29.

§ 55A-1-33. Information disclosed by interrogatories.

Interrogatories propounded by the Secretary of State and the answers thereto shall not be open to public inspection nor shall the Secretary of State disclose any facts or information obtained therefrom except when the Secretary of State's official duty requires disclosure to be made public or when the interrogatories or the answers thereto are required for evidence in any criminal proceeding or in any other action or proceeding by this State. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section had no counterpart in the prior law.

§§ 55A-1-34 through 55A-1-39: Reserved for future codification purposes.

Part 4. Definitions.

§ 55A-1-40. Chapter definitions.

In this Chapter unless otherwise specifically provided:

(1) "Articles of incorporation" include amended and restated articles of incorporation and articles of merger.

(2) "Board" or "board of directors" means the group of natural persons vested by the corporation with the management of its affairs whether or not the group is designated as directors in the articles of incorporation or bylaws.

(2a) "Business corporation" or "domestic business corporation" means a corporation as defined in G.S. 55-1-40.

(3) "Bylaws" means the rules (other than the articles) adopted pursuant to this Chapter for the regulation or management of the affairs of the corporation irrespective of the name or names by which the rules are designated.

(4) "Charitable or religious corporation" means any corporation that is exempt under section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section, or that is organized exclusively for one or more of the purposes specified in section 501(c)(3) of the Internal

Revenue Code of 1986 or any successor section and that upon dissolution shall distribute its assets to a charitable or religious corporation, the United States, a state or an entity that is exempt under section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section.

(4a) "Conspicuous" means so written that a reasonable person against whom the writing is to operate should have noticed it. For example, printing in italics or boldface or contrasting color, or typing in capitals or underlined, is conspicuous.

(5) "Corporation" or "domestic corporation" means a nonprofit corporation subject to the provisions of this Chapter, except a foreign corporation.

(6) "Delegates" means those persons elected or appointed to vote in a representative assembly for the election of a director or directors or on other matters.

(7) "Deliver" includes mail.

(8) "Distribution" means a direct or indirect transfer of money or other property or incurrence of indebtedness by a corporation to or for the benefit of its members, directors, or officers, or to or for the benefit of transferees in liquidation under Article 14 of this Chapter (other than creditors).

(8a) "Domestic limited liability company" has the same meaning as in G.S. 57C-1-03.

(8b) "Domestic limited partnership" has the same meaning as in G.S. 59-102.

(9) "Effective date of notice" is defined in G.S. 55A-1-41.

(9a) "Electronic" has the same meaning as in G.S. 66-312.

(9b) "Electronic record" has the same meaning as in G.S. 66-312.

(9c) "Electronic signature" has the same meaning as in G.S. 66-312.

(10) "Entity" includes:

a. Any domestic or foreign:
    1. Corporation; business corporation; professional corporation;
    2. Limited liability company;
    3. Profit and nonprofit unincorporated association, chapter or other organizational unit; and
    4. Business trust, estate, partnership, trust;
b. Two or more persons having a joint or common economic interest; and
c. The United States, and any state and foreign government.

(10a) "Foreign business corporation" means a foreign corporation as defined in G.S. 55-1-40.

(11) "Foreign corporation" means a corporation (with or without capital stock) organized under a law other than the law of this State for purposes for which a corporation might be organized under this Chapter.

(11a) "Foreign limited liability company" has the same meaning as in G.S. 57C-1-03.

(11b) "Foreign limited partnership" has the same meaning as in G.S. 59-102.

(12) "Governmental subdivision" includes authority, county, district, and municipality.

(13) "Includes" denotes a partial definition.

(14) "Individual" denotes a natural person legally competent to act and also includes the estate of an incompetent or deceased individual.

(15) "Means" denotes an exhaustive definition.

(16) "Member" means a person who is, by the articles of incorporation or bylaws of the corporation, either (i) specifically designated as a

member or (ii) included in a category of persons specifically designated as members. A person is not a member solely by reason of having voting rights or other rights associated with membership.

(17) "Nonprofit corporation" means a corporation intended to have no income or intended to have income none of which is distributable to its members, directors, or officers, except as permitted by Article 13 of this Chapter, and includes all associations without capital stock formed under Subchapter V of Chapter 54 of the General Statutes or under any act or acts replaced thereby.

(18) "Notice" includes demand and is defined in G.S. 55A-1-41.

(19) "Person" includes individual and entity.

(20) "Principal office" means the office (in or out of this State) where the principal offices of a domestic or foreign corporation are located, as most recently designated by the domestic or foreign corporation in its articles of incorporation, a Designation of Principal Office Address form, a Corporation's Statement of Change of Principal Office Address form, or in the case of a foreign corporation, its application for a certificate of authority.

(21) "Proceeding" includes civil suit and criminal, administrative, and investigatory action.

(22) "Record date" means the date established under Article 7 of this Chapter on which a corporation determines the identity of its members for the purposes of this Chapter.

(23) "Secretary" means the corporate officer to whom the board of directors has delegated responsibility under G.S. 55A-8-40(c) for custody of the minutes of the meetings of the board of directors and of the members and for authenticating records of the corporation.

(24) "State," when referring to a part of the United States, includes a state and commonwealth (and their agencies and governmental subdivisions) and a territory, and insular possession (and their agencies and governmental subdivisions) of the United States.

(24a) "Unincorporated entity" means a domestic or foreign limited liability company, a domestic or foreign limited partnership, a registered limited liability partnership or foreign limited liability partnership as defined in G.S. 59-32, or any other partnership as defined in G.S. 59-36, whether or not formed under the laws of this State.

(25) "United States" includes district, authority, bureau, commission, department, and any other agency of the United States.

(26) "Vote" includes authorization by written ballot and written consent, including electronic ballot and electronic consent. (1955, c. 1230; 1959, c. 1161, s. 4; 1985 (Reg. Sess., 1986), c. 801, s. 1; 1993, c. 398, s. 1; 1995, c. 539, s. 15; 1999-369, s. 2.2; 2001-358, s. 5(b); 2001-387, ss. 33, 34, 35, 173, 175(a); 2001-413, s. 6; 2001-487, s. 62(e); 2008-37, s. 1.)

NORTH CAROLINA COMMENTARY

This section defines more terms than former G.S. 55A-2. Several definitions deserve special mention:

1. Charitable or religious corporation

"Charitable or religious corporation" is defined in subdivision (4) to mean a corporation (a) that the Internal Revenue Service has determined is tax exempt under Section 501(c)(3) of the Internal Revenue Code, (b) that qualifies for tax exemption under Section 501(c)(3) but with respect to which no determination has been made by the Internal Revenue Service, or (c) that would qualify for tax exemption under Section 501(c)(3) if it did not engage in certain prohibited political activities or other disqualifying activities. Section 501(c)(3) generally provides tax exempt status to corporations organized and operated exclusively for one or more of the following purposes: religious, charitable, scientific, testing for public safety, literacy, educational or prevention of cruelty to children or animals. Certain provisions of the Act apply exclusively to charitable or religious corporations and distributions by charitable or religious corporations are strictly limited by Article 13.

2. Distribution

"Distribution" is defined broadly in subdivision (8) to include transfers to, and debt incurred for the benefit of, members, directors, officers and transferees in liquidation. This broad definition effectuates the basic rule that a nonprofit corporation is prohibited from making distributions except as specifically authorized by Article 13.

3. Member

Subdivision (16) makes clear that a person does not have the rights of a member (under Article 16, for example), solely by reason of having voting rights or other rights commonly associated with membership.

Editor's Note. — The subdivision added by Session Laws 1999-369, s. 2.2, has been designated as (24a) pursuant to directions from the Revisor of Statutes.

Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 154(6) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Effect of Amendments. — Session Laws 2008-37, s. 1, effective October 1, 2008, added subdivisions (9a) through (9c); and at the end of subdivision (26), added "including electronic ballot and electronic consent" and made a minor punctuation change.

Legal Periodicals. — For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

CASE NOTES

Cited in Lynnwood Found. v. N.C. Dep't of Revenue, 190 N.C. App. 593, 660 S.E.2d 611, 2008 N.C. App. LEXIS 991 (2008).

§ 55A-1-41. Notice.

(a) Notice under this Chapter shall be in writing unless oral notice is authorized in the corporation's articles of incorporation or bylaws and written notice is not specifically required by this Chapter.

(b) Notice may be communicated in person; by electronic means; or by mail or private carrier. If these forms of personal notice are impracticable as to one or more persons, notice may be communicated to such persons by publishing notice in a newspaper, or by radio, television, or other form of public broadcast communication, in the county where the corporation has its principal place of business in the State, or if it has no principal place of business in the State, the county where it has its registered office.

(c) Written notice by a domestic or foreign corporation to its member is effective when deposited in the United States mail with postage thereon prepaid and correctly addressed to the member's address shown in the corporation's current record of members. To the extent the corporation pursuant to G.S. 55A-1-70 and the member have agreed, notice by a domestic corporation to its member in the form of an electronic record sent by electronic means is effective when it is sent as provided in G.S. 66-325. A member may terminate any such agreement at any time on a prospective basis effective upon written notice of termination to the corporation or upon such later date as may be specified in the notice.

(d) Written notice to a domestic or foreign corporation (authorized to conduct affairs in this State) may be addressed to its registered agent at its registered office or to the corporation or its secretary at its principal office shown in its articles of incorporation, the Designation of Principal Office Address form, or any Corporation's Statement of Change of Principal Office Address form filed with the Secretary of State.

(e) Except as provided in subsection (c) of this section, written notice is effective at the earliest of the following:

(1) When received;

(2) Five days after its deposit in the United States mail, as evidenced by the postmark or otherwise, if mailed with at least first-class postage thereon prepaid and correctly addressed;

(3) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee;

(4) If mailed with less than first-class postage, 30 days after its deposit in the United States mail, as evidenced by the postmark or otherwise, if mailed with postage thereon prepaid and correctly addressed;

(5) When delivered to the member's address shown in the corporation's current list of members.

In the case of notice in the form of an electronic record sent by electronic means, the time of receipt shall be determined as provided in G.S. 66-325.

(f) Written notice is correctly addressed to a member of a domestic or foreign corporation if addressed to the member's address shown in the corporation's current list of members. In the case of members who are residents of the same household and who have the same address, the corporation's bylaws may provide that a single notice may be given to such members jointly.

(g) Oral notice is effective when actually communicated to the person entitled to oral notice.

(h) If this Chapter prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements not inconsistent with this section or other provisions of this Chapter, those requirements govern.

(i) Written notice need not be provided in a separate document and may be included as part of a newsletter, magazine, or other publication regularly sent to members if conspicuously identified as a notice. (1993, c. 398, s. 1; 1995, c. 539, s. 16; 2008-37, s. 2.)

NORTH CAROLINA COMMENTARY

The prior law contained no general definition of "notice." Subdivision (e)(4) recognizes that nonprofit corporations may have special mailing privileges. Notices mailed at the nonprofit rate are effective 30 days after deposit in the United States mail. Many nonprofit corporations include notices in newsletters, magazines and other publications regularly sent to members, and subsection (i) specifically authorizes this form of notice if it is conspicuously identified as a notice.

Effect of Amendments. — Session Laws 2008-37, s. 2, effective October 1, 2008, substituted "electronic means" for "telephone, telegraph, teletype, or other form of wire or wireless communication, or by facsimile transmission" in the first sentence of subsection (b); added the second and third sentences in subsection (c); and added the last paragraph in subsection (e).

§§ 55A-1-42 through 55A-1-49: Reserved for future codification purposes.

Part 5. Private Foundations.

§ 55A-1-50. Private Foundations.

Except where otherwise determined by a court of competent jurisdiction, a corporation that is a private foundation as defined in section 509(a) of the Internal Revenue Code of 1986:

(1) Shall distribute such amounts for each taxable year at such time and in such manner as not to subject the corporation to tax under section 4942 of the Code.
(2) Shall not engage in any act of self-dealing as defined in section 4941(d) of the Code.
(3) Shall not retain any excess business holdings as defined in section 4943(c) of the Code.
(4) Shall not make any investments in such manner as to subject the corporation to tax under section 4944 of the Code.
(5) Shall not make any taxable expenditures as defined in section 4945(d) of the Code.

All references in this section to sections of the Code shall be to sections of the Internal Revenue Code of 1986 as amended from time to time, or to corresponding provisions of subsequent internal revenue laws of the United States. (1955, c. 1230; 1957, c. 783, s. 7; 1969, c. 875, s. 4; 1971, c. 1136, s. 1; 1977, c. 236, s. 1; c. 663; 1979, c. 1027; 1985, c. 505; 1985 (Reg. Sess., 1986), c. 801, ss. 8-14; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section is substantially the same as former G.S. 55A-15(c). It is applicable to nonprofit corporations that are private foundations, as defined in Section 509(a) of the Internal Revenue Code, and is intended to comply with Section 1.508-3(d) of the Income Tax Regulations, which provides that a private foundation's governing instrument is deemed to conform with the requirements of Section 508(e) of the Code if valid provisions of state law require the foundation to comply with the requirements and prohibitions described in Section 508(e)(1) of the Code.

Legal Periodicals. — For survey of 1977 law on business associations, see 56 N.C.L. Rev. 939 (1977).

For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

§§ 55A-1-51 through 55A-1-59: Reserved for future codification purposes.

Part 6. Judicial Relief.

§ 55A-1-60. Judicial relief.

(a) If for any reason it is impracticable for any corporation to call or conduct a meeting of its members, delegates, or directors, or otherwise obtain their consent, in the manner prescribed by its articles of incorporation, bylaws, or this Chapter, then upon petition of a director, officer, delegate, member, or the Attorney General, the superior court may order that such a meeting be held or that a written ballot or other method be used for obtaining the vote of members, delegates, or directors, in such a manner as the court finds fair and equitable under the circumstances.

(b) The court shall, in an order issued pursuant to this section, provide for a method of notice reasonably designed to give actual notice to all such persons who would be entitled to notice of a meeting held pursuant to the articles of incorporation, bylaws, and this Chapter, and notice given in this manner shall be effective whether or not it results in actual notice to all such persons or conforms to the notice requirements that would otherwise apply. Notice shall be given in this manner to all persons determined by the court to be members or directors.

(c) The order issued pursuant to this section may, to the extent the court finds it reasonably required under the circumstances, dispense with any requirement relating to the holding of or voting at meetings or obtaining votes, including any requirement as to quorums or as to the number or percentage of votes needed for approval, that would otherwise be imposed by the articles of incorporation, bylaws, or this Chapter.

(d) Whenever practical any order issued pursuant to this section shall limit the subject matter of meetings or other forms of consent authorized to items, including amendments to the articles of incorporation or bylaws, the resolution of which will or may enable the corporation to continue managing its affairs without further resort to this section; provided, however, that an order under this section may also authorize the obtaining of whatever votes and approvals are necessary for the dissolution, merger, or sale of assets.

(e) Any meeting or other method of obtaining the vote of members, delegates, or directors conducted pursuant to an order issued under this section, and that complies with all the provisions of the order, is for all purposes a valid meeting or vote, as the case may be, and shall have the same force and effect as if it complied with every requirement imposed by the articles of incorporation, bylaws, and this Chapter. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section had no counterpart in the prior law and is adapted from the Model Act. It authorizes the superior court, in its discretion, to prescribe special procedures that will enable a corporation to call and conduct meetings or obtain the consent of members, delegates or directors when it is otherwise impracticable to do so. This section permits judicial relief only if the procedures established in the corporation's articles of incorporation or bylaws or prescribed by statute are not viable under the circumstances and any relief granted should be limited in scope to that necessary to remove the impediment which makes compliance with such procedures impracticable, regardless of whether the impediment prevents a continuation of the corporation's activities or consideration of dissolution, merger or a sale of the corporation's assets.

Part 7. Miscellaneous.

§ 55A-1-70. Electronic transactions.

For purposes of applying Article 40 of Chapter 66 of the General Statutes to transactions under this Chapter, a corporation may agree to conduct a transaction by electronic means through provision in its articles of incorporation or bylaws or by action of its board of directors. (2008-37, s. 3.)

Editor's Note. — Session Laws 2008-37, s. 8, made this Part effective October 1, 2008.

ARTICLE 2.

Organization.

§ 55A-2-01. Incorporators.

One or more persons may act as the incorporator or incorporators of a corporation by delivering articles of incorporation to the Secretary of State for filing. (1955, c. 1230; 1969, c. 875, s. 1; 1971, c. 1231, s. 1; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Under former G.S. 55A-6, only natural persons could serve as incorporators. Use of the word "persons" in this section means that entities as well as natural persons may now serve as incorporators of nonprofit corporations.

§ 55A-2-02. Articles of incorporation.

(a) The articles of incorporation shall set forth:

(1) A corporate name for the corporation that satisfies the requirements of G.S. 55D-20 and G.S. 55D-21;

(2) If the corporation is a charitable or religious corporation, a statement to that effect if it was incorporated on or after the effective date of this Chapter;

(3) The street address, and the mailing address if different from the street address, of the corporation's initial registered office, the county in which the initial registered office is located, and the name of the corporation's initial registered agent at that address;

(4) The name and address of each incorporator;

(5) Whether or not the corporation will have members;

(6) Provisions not inconsistent with law regarding the distribution of assets on dissolution; and

(7) The street address, and the mailing address, if different from the street address, of the principal office, and the county in which the principal office is located.

(b) The articles of incorporation may set forth any provision that under this Chapter is required or permitted to be set forth in the bylaws, and may also set forth:

(1) The purpose or purposes for which the corporation is organized, which may be, either alone or in combination with other purposes, the transaction of any lawful activity;

(2) The names and addresses of the individuals who are to serve as the initial directors;

(3) Provisions not inconsistent with law regarding:

a. Managing and regulating the affairs of the corporation;

b. Defining, limiting, and regulating the powers of the corporation, its board of directors, and members (or any class of members); and

c. The characteristics, qualifications, rights, limitations, and obligations attaching to each or any class of members;

(4) A provision limiting or eliminating the personal liability of any director for monetary damages arising out of an action whether by or in the right of the corporation or otherwise for breach of any duty as a director. No such provision shall be effective with respect to (i) acts or omissions that the director at the time of the breach knew or believed were clearly in conflict with the best interests of the corporation, (ii) any liability under G.S. 55A-8-32 or G.S. 55A-8-33, (iii) any transaction from which the

director derived an improper personal financial benefit, or (iv) acts or omissions occurring prior to the date the provision became effective. As used herein, the term "improper personal financial benefit" does not include a director's reasonable compensation or other reasonable incidental benefit for or on account of his service as a director, trustee, officer, employee, independent contractor, attorney, or consultant of the corporation. A provision permitted by this Chapter in the articles of incorporation, bylaws, or a contract or resolution indemnifying or agreeing to indemnify a director against personal liability shall be fully effective whether or not there is a provision in the articles of incorporation limiting or eliminating personal liability.

(c) The articles of incorporation need not set forth any of the corporate powers enumerated in this Chapter. (1955, c. 1230; 1957, c. 979, s. 11; 1959, c. 1161, s. 5; 1985 (Reg. Sess., 1986), c. 801, ss. 3, 4; 1993, c. 398, s. 1; 1995, c. 539, s. 17; 2001-358, s. 20; 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

NORTH CAROLINA COMMENTARY

A nonprofit corporation incorporated on or after July 1, 1994, that is a charitable or religious corporation under G.S. 55A-1-40(4) must include a statement to that effect in its articles of incorporation. It is not necessary to state a corporation's period of duration, its purpose or its initial board of directors as was required under former G.S. 55A-7.

A provision limiting or eliminating the personal liability of directors in certain circumstances may now be included in the articles of incorporation. Although such a provision affects only claims by or on behalf of the corporation and does not relieve directors from liability to third parties, immunity from liability to third parties is available to the extent provided in G.S. 55A-8-60 and G.S. 1-539.10. Use of the term "any director" in subdivision (b)(4) is intended to mean that a corporation is not required to be uniform in its treatment of directors under this subdivision.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§ 55A-2-03. Incorporation.

(a) Unless a delayed effective date is specified, the corporate existence begins when the articles of incorporation are filed.

(b) The Secretary of State's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the State to cancel or revoke the incorporation or involuntarily dissolve the corporation. (1955, c. 1230; 1967, c. 13, s. 4; 1993, c. 398, s. 1.)

§ 55A-2-04: Reserved for future codification purposes.

§ 55A-2-05. Organization of corporation.

(a) After incorporation:

(1) If initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting at the call of a majority

of the directors to complete the organization of the corporation by appointing officers, adopting bylaws, and conducting any other business brought before the meeting.

(2) If initial directors are not named in the articles of incorporation, the incorporator or incorporators shall hold an organizational meeting at the call of a majority of the incorporators (i) to elect directors and complete the organization of the corporation, or (ii) to elect a board of directors who shall complete the organization of the corporation.

(b) Action required or permitted by this Chapter to be taken by incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by one or more written consents describing the action taken and signed by each incorporator. If the incorporators act at a meeting, the notice and procedural provisions of G.S. 55A-8-22, 55A-8-23, and 55A-8-24 shall apply.

(c) An organizational meeting may be held in or out of this State. (1955, c. 1230; 1969, c. 875, s. 2; 1985 (Reg. Sess., 1986), c. 801, s. 6; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section contains the substance of former G.S. 55A-9 and, in addition, specifies the procedure for organization in the event initial directors are not named in the articles of incorporation.

§ 55A-2-06. Bylaws.

(a) The incorporators or board of directors of a corporation shall adopt initial bylaws for the corporation.

(b) The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation. (1955, c. 1230; 1993, c. 398, s. 1.)

CASE NOTES

Failure to Comply With Bylaw Vote Requirement Before Bringing Suit. — Trial court properly dismissed a property owners association's suit against its developer, which asserted claims of constructive fraud and unfair and deceptive trade practices, for lack of standing on the part of the association, because the association failed to obtain a two-thirds vote of its membership authorizing the suit, as was required by its bylaws. As a result, the trial court lacked subject matter jurisdiction and properly granted the developer's motion to dismiss and motion for summary judgment. Peninsula Prop. Owners Ass'n v. Crescent Res., LLC, 171 N.C. App. 89, 614 S.E.2d 351, 2005 N.C. App. LEXIS 1165 (2005), cert. denied, — N.C. —, 626 S.E.2d 648 (2005).

Cited in Armstrong v. Ledges Homeowners Ass'n, 360 N.C. 547, 633 S.E.2d 78, 2006 N.C. LEXIS 845 (2006).

§ 55A-2-07. Emergency bylaws.

(a) Unless the articles of incorporation provide otherwise, the board of directors of a corporation may adopt, amend, or repeal bylaws to be effective only in an emergency defined in subsection (d) of this section. The emergency bylaws, which are subject to amendment or repeal by the members, may make all provisions necessary for managing the corporation during the emergency, including:

(1) Procedures for calling a meeting of the board of directors;

(2) Quorum requirements for the meeting; and

(3) Designation of additional or substitute directors.

(b) All provisions of the regular bylaws consistent with the emergency bylaws remain effective during the emergency. The emergency bylaws are not effective after the emergency ends.

(c) Corporate action taken in good faith in accordance with the emergency bylaws binds the corporation, and the fact that the action was taken pursuant to emergency bylaws shall not be used to impose liability on a corporate director, officer, employee, or agent.

(d) An emergency exists for purposes of this section if a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section had no counterpart in the prior law.

ARTICLE 3.

Purposes and Powers.

§ 55A-3-01. Purposes.

(a) Every corporation incorporated under this Chapter has the purpose of engaging in any lawful activity unless a more limited purpose is set forth in its articles of incorporation.

(b) A corporation engaging in an activity that is subject to regulation under another statute of this State may incorporate under this Chapter only if permitted by, and subject to all limitations of, the other statute. (1955, c. 1230; 1993, c. 398, s. 1.)

Legal Periodicals. — For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

CASE NOTES

Lending by Hospital Authorized. — The proposal of a county hospital system to lend money to a separately licensed acute care hospital was authorized by law. See opinion of Attorney General to Granger R. Barrett, Cumberland County Attorney, and Wilson Hayman, Poyner & Spruill, L.L.P., 2002 N.C. AG LEXIS 14 (2/19/02).

§ 55A-3-02. General powers.

(a) Unless its articles of incorporation or this Chapter provides otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including without limitation, power:

(1) To sue and be sued, complain and defend in its corporate name;

(2) To have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing it or in any other manner reproducing it;

(3) To make and amend bylaws not inconsistent with its articles of incorporation or with the laws of this State, for regulating and managing the affairs of the corporation;

(4) To purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located;

(5) To sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;

(6) To purchase, receive, subscribe for, or otherwise acquire; own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of; and deal in and with shares or other interests in, or obligations of, any other entity;

(7) To make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income;

(8) To lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment, except as limited by G.S. 55A-8-32;

(9) To be a promoter, partner, member, associate or manager of any partnership, joint venture, trust, or other entity;

(10) To conduct its affairs, locate offices, and exercise the powers granted by this Chapter within or without this State;

(11) To elect or appoint directors, officers, employees, and agents of the corporation, define their duties, and fix their compensation;

(12) To pay pensions and establish pension plans, pension trusts, and other benefit and incentive plans for any or all of its current or former directors, officers, employees, and agents;

(13) To make donations for the public welfare or for charitable, religious, cultural, scientific, or educational purposes, and to make payments or donations not inconsistent with law for other purposes that further the corporate interest;

(14) To impose dues, assessments, admission and transfer fees upon its members;

(15) To establish conditions for admission of members, admit members and issue memberships;

(16) To carry on a business;

(17) To procure insurance for its benefit on the life or physical or mental ability of any director, officer or employee and, in the case of a charitable or religious corporation, any sponsor, contributor, pledgor, student or former student whose death or disability might cause financial loss to the corporation, and for these purposes the corporation is deemed to have an insurable interest in each such person; and to procure insurance for its benefit on the life or physical or mental ability of any other person in whom it has an insurable interest;

(18) To engage in any lawful activity that will aid governmental policy;

(19) To do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.

(b) It shall not be necessary to set forth in the articles of incorporation any of the powers enumerated in this section. (1955, c. 1230; 1957, c. 783, s. 7; 1969, c. 875, s. 4; 1971, c. 1136, s. 1; 1977, c. 236, s. 1; c. 663; 1979, c. 1027; 1985, c. 505; 1985 (Reg. Sess., 1986), c. 801, ss. 8-14; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section eliminates the distinction that former G.S. 55A-15 made between unconditional powers and those exercisable only "in connection with carrying out the purposes stated in its charter." The authority for nonprofit corporations to make loans to directors or officers who are full-time employees is treated in 55A-8-32.

The language "any other person" in the last phrase in subdivision (a)(17) can include a member if the corporation has an insurable interest in the member. Under G.S. 58-58-86, a charitable or religious corporation that purchases or receives by assignment life insurance is deemed to have an insurable interest in the insured person's life if the insured person consents to the purchase or assignment.

Legal Periodicals. — For survey of 1977 law on business associations, see 56 N.C.L. Rev. 939 (1977).

For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

CASE NOTES

Assessment to Pay Legal Fees. — Homeowners association's "welfare" covenant was not vague with respect to the levy of a special assessment for legal fees incurred in a discrimination dispute with two homeowners as under the North Carolina Nonprofit Corporation Act, specifically G.S. 55A-3-02(a)(1), the association had the power to sue and be sued, and it was foreseeable that the association would have to pay fees to defend itself; the covenant contained an ascertainable standard by which it could be objectively determined if the amount of the assessment and the purpose for which it was levied fell within the covenant. Willow Bend Homeowners Ass'n v. Robinson, — N.C. App. —, 665 S.E.2d 570, 2008 N.C. App. LEXIS 1614 (2008).

§ 55A-3-03. Emergency powers.

(a) In anticipation of or during an emergency defined in subsection (d) of this section, the board of directors of a corporation may:

(1) Modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent; and

(2) Relocate the principal office, designate alternative principal offices or regional offices, or authorize the officers to do so.

(b) During an emergency defined in subsection (d) of this section, unless emergency bylaws provide otherwise:

(1) Notice of a meeting of the board of directors need be given only to those directors it is practicable to reach and may be given in any practicable manner, including by publication and radio; and

(2) One or more officers of the corporation present at a meeting of the board of directors may be deemed to be directors for the meeting, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum.

(c) Corporate action taken in good faith during an emergency under this section, to further the ordinary affairs of the corporation, binds the corporation and the fact that the action is taken pursuant to this section shall not be used to impose liability on a corporate director, officer, employee, or agent.

(d) An emergency exists for purposes of this section if a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section had no counterpart in the prior law.

§ 55A-3-04. Ultra vires.

(a) Except as provided in subsection (b) of this section, the validity of corporate action shall not be challenged on the ground that the corporation lacks or lacked power to act.

(b) A corporation's power to act may be challenged:

(1) In a proceeding by a member or a director against the corporation to enjoin the act;

(2) In a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation; or

(3) In a proceeding by the Attorney General under G.S. 55A-14-30.

(c) In a proceeding by a member or a director under subdivision (b)(1) of this section to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss (other than anticipated profits) suffered by the corporation or another party because of enjoining the unauthorized act. (1955, c. 1230; 1993, c. 398, s. 1.)

CASE NOTES

Cited in Morris v. Thomas, 161 N.C. App. 680, 589 S.E.2d 419, 2003 N.C. App. LEXIS 2271 (2003); Willow Bend Homeowners Ass'n v. Robinson, — N.C. App. —, 665 S.E.2d 570, 2008 N.C. App. LEXIS 1614 (2008).

§ 55A-3-05. Exercise of corporate franchises not granted.

The Attorney General may upon the Attorney General's own information or upon complaint of a private party bring an action in the name of the State to restrain any person from exercising corporate franchises not granted. (1985 (Reg. Sess., 1986), c. 801, s. 5; 1993, c. 398, s. 1.)

CASE NOTES

Cited in Morris v. Thomas, 161 N.C. App. 680, 589 S.E.2d 419, 2003 N.C. App. LEXIS 2271 (2003).

§ 55A-3-06. Special powers; public parks and drives and certain recreational corporations.

Any corporation heretofore or hereafter formed for the purpose of creating and maintaining public parks and drives shall have full power and authority to lay out, manage, and control parks and drives within the State, under any rules and regulations as the corporation may prescribe and shall have power to purchase and hold property and take gifts or donations for such purpose. It may hold property and exercise such powers and trust for any town, city, township, or county, in connection with which the parks and drives shall be maintained. Any city, town, township, or county, holding such property, may vest and transfer the same to any such corporation for the purpose of controlling and maintaining the same as public parks and drives under any regulations and subject to any conditions as may be determined upon by the city, town, township, or county. All such lands as the corporation may acquire shall be held in trust as public parks and drives, and shall be held open to the public under any rules, laws, and regulations as the corporation may adopt through its board of directors, and it shall have power and authority to make and adopt all laws and regulations as it may determine upon for the reasonable management of such parks and drives. The terms "public parks and drives" as used in this section shall be construed so as to include playgrounds, recreational centers, and other recreational activities and facilities which may be provided and established under the sponsorship of any county, city, town, township, or school district in North Carolina and constructed or established with the assistance of the government of the United States or any agency thereof. (1955, c. 1230; 1973, c. 695, s. 9; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section brings forward former G.S. 55A-16.

§ 55A-3-07. Certain corporations subject to Public Records Act and Open Meetings Law.

Any of the following corporations organized under this Chapter is subject to the Public Records Act (Chapter 132 of the General Statutes) and the Open Meetings Law (Article 33C of Chapter 143 of the General Statutes):

(1) A corporation organized under the terms of any consent decree and final judgment in any civil action calling on a state officer to create the corporation, for the purposes of receipt and distribution of funds allocated to the State of North Carolina to provide economic impact assistance on account of one industry.

(2) A corporation organized upon the request of the State for the sole purpose of financing projects for public use. (1999-2, s. 7; 2001-84, s. 4.)

Editor's Note. — Session Laws 1999-2, s. 8, made this section effective March 16, 1999.

Session Laws 1999-2, ss. 1-6, provide in part that the creation of the nonprofit corporation pursuant to subparagraph VI.A.1 of the Consent Decree and Final Judgment entered in that action of the State of North Carolina v. Philip Morris Incorporated, Et. Al (98 CVS 14377) on December 21, 1998, is hereby approved.

Except as provided in subsection 2(b), transfer and assignment to the nonprofit corporation of the right, title, and interest of the State to each annual installment payment constituting the fifty percent (50%) of North Carolina's State Specific Account specified in subparagraph VI.A.1 of the Consent Decree is hereby approved.

Unless provided otherwise by an act of the General Assembly before the installment payment is received in North Carolina's State Specific Account, the right, title, and interest to each installment payment vests in the nonprofit corporation upon receipt of that payment in North Carolina's State Specific Account for the public charitable purposes of providing economic impact assistance to economically affected or tobacco dependent regions of North Carolina. These funds shall be distributed to the nonprofit corporation under the Consent Decree and shall constitute support of the nonprofit corporation from the State of North Carolina.

The General Assembly also approves the provisions in the Consent Decree concerning the governance of the nonprofit corporation by 15 directors, five to be appointed by the Governor of the State of North Carolina, five by the President Pro Tempore of the North Carolina Senate, and five by the Speaker of the North Carolina House of Representatives, respectively in their sole discretion; and that the Governor shall appoint the first Chair among his appointees, and the directors shall elect their own Chair from among their number for subsequent terms. Members of the General Assembly may not be appointed to serve on the board of directors while serving in the General Assembly.

The Attorney General shall draft articles of incorporation for the nonprofit corporation to enable the nonprofit corporation to carry out its mission as set out in the Consent Decree. The articles of incorporation shall provide for the following:

(1) Consultation; reporting. — The nonprofit corporation shall consult with the Joint Legislative Commission on Governmental Operations ("Commission") prior to the corporation's board of directors (i) adopting bylaws and (ii) adopting the annual operating budget and shall report on its programs and activities, its administrative expenses and copies of its annual report and tax return information to the Commission on or before March 1 of each fiscal year and more frequently as requested by the Commission.

(2) Public records; open meetings. — The nonprofit corporation is subject to the Open Meetings Law as provided in Article 33C of Chapter 143 of the General Statutes and the Public Records Act as provided in Chapter 132 of the General Statutes. The nonprofit corporation shall publish at least annually a report, available to the public and filed with the Joint Legislative Commission on Governmental Operations, of every expenditure or distribution in furtherance of the public charitable purposes of the nonprofit corporation.

(3) Transfer of assets. — The nonprofit corporation may not dispose of assets pursuant to G.S. 55A-12-02 without the approval of the General Assembly.

(4) Charter repeal. — The charter of the nonprofit corporation may be repealed at any

time by the legislature pursuant to Article VIII, Section 1 of the North Carolina Constitution. The nonprofit corporation may not amend its articles of incorporation without the approval of the General Assembly.

(5) Dissolution. — The nonprofit corporation may be dissolved pursuant to Chapter 55A of the General Statutes, by the General Assembly, or by the Court pursuant to the Consent Decree. Upon dissolution, all unencumbered assets and funds of the nonprofit corporation, including the right to receive future funds are transferred to the Settlement Reserve Fund established pursuant to G.S. 143-16.4.

The nonprofit corporation's right to receive funds is contingent upon the filing of articles of incorporation that comply this act.

It is the intent of the General Assembly that the Governor, Speaker of the House of Representatives, and President Pro Tempore of the Senate, in appointing directors to the nonprofit corporation, shall, in their sole discretion, include among their appointments representatives of tobacco production, tobacco manufacturing, tobacco-related employment, health, and economic development interests, with each appointing authority selecting at least two directors from these interests. It is also the intent of the General Assembly that the appointing authorities, in appointing directors, shall appoint members that represent the geographic, gender, and racial diversity of the State.

It is the intent of the General Assembly that the funds under the Master Settlement Agreement, which is incorporated into the Consent Decree, be allocated as follows:

(1) Fifty percent (50%) to the nonprofit corporation as provided by the Consent Decree.

(2) Twenty-five percent (25%) to a trust fund to be established by the General Assembly for the benefit of tobacco producers, tobacco allotment holders, and persons engaged in tobacco-related businesses, with this trust fund to be governed by a board of trustees representing these interests.

(3) Twenty-five percent (25%) to a trust fund to be established by the General Assembly for the benefit of health, with this trust fund to be governed by a board of trustees comprised of a broad representation of health interests.

Session Laws 2001-84, s. 2, provided: "This act, being necessary for the health and welfare of the people of the State, shall be liberally construed to effect its purposes."

ARTICLE 4.

Names.

§§ 55A-4-01 through 55A-4-05: Repealed by Session Laws 2001-358, s. 23, effective January 1, 2002.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which repealed these sections, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the repeal of these sections by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-390, s. 10, rewrote subsection (f) of G.S. 55A-4-01, effective August 26, 2001, and applying retroactively to applications for reinstatement made on or after December 1, 1999.

ARTICLE 5.

Office and Agent.

§ 55A-5-01. Registered office and registered agent.

Each corporation must maintain a registered office and registered agent as required by Article 4 of Chapter 55D of the General Statutes and is subject to service on the Secretary of State under that Article. (1955, c. 1230; 1957, c. 979, s. 20; 1993, c. 398, s. 1; 1995, c. 400, s. 1; 2000-140, s. 101(d); 2001-358, s. 48(a); 2001-387, s. 173; 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§ **55A-5-02:** Repealed by Session Laws 2001-358, s. 48, effective January 1, 2002.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which repealed this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the repeal of this section by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§ **55A-5-02.1:** Transferred to § 55A-16-23 by Session Laws 2001-358, s. 48(d).

§§ **55A-5-03 through 55A-5-04:** Repealed by Session Laws 2001-358, s. 48(c), effective January 1, 2002.

Cross References. — For provisions similar to former G.S. 55A-5-03, regarding resignation of registered agents, see G.S. 55D-32. For provisions similar to former G.S. 55A-5-04, regarding service of process on entities, see G.S. 55D-33.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which repealed these sections, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the repeal of these sections by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

ARTICLE 6.

Members and Memberships.

Part 1. Admission of Members.

§ 55A-6-01. Members.

(a) A corporation may have one or more classes of members or may have no members.

(b) No person shall be admitted as a member without the person's consent. (1955, c. 1230; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Whether or not a corporation will have members must be stated in its articles of incorporation as required by G.S. 55A-2-02(a)(5). If it does have members, their rights and obligations must be defined pursuant to G.S. 55A-6-20.

Legal Periodicals. — For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

§§ 55A-6-02 through 55A-6-19: Reserved for future codification purposes.

Part 2. Members' Rights and Obligations.

§ 55A-6-20. Designations, qualifications, rights, and obligations of members.

If a corporation has members, the designations, qualifications, rights, and obligations of members shall be set forth in or authorized by the articles of incorporation or bylaws, and may include any provisions not inconsistent with law or the articles of incorporation with respect to:

(1) Conditions of admission and membership;
(2) Voting rights and the manner of exercising voting rights;
(3) The relative rights and obligations of members among themselves, to the corporation, and with respect to the property of the corporation;
(4) The manner of terminating membership in the corporation;
(5) The rights and obligations of the members and the corporation upon such termination;
(6) The transferability or nontransferability of memberships; and
(7) Any other matters.

Except as otherwise provided in or authorized by the articles of incorporation or bylaws, all members shall have the same designations, qualifications, rights, and obligations. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 35; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Any rights or obligations of a member, and any differentiation of designations, qualifications, rights and obligations among members, must be prescribed pursuant to this section. Except for certain procedural or auxiliary rights, such as the right to bring a derivative action or to inspect corporate records, a member does not have any rights or obligations, such as the right to vote, solely by reason of being a member; and, conversely, G.S. 55A-1-40(16) provides that a person is not a member solely by reason of having voting or other rights normally associated with membership. Thus, for example, there can be voting nonmembers as well as nonvoting members.

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 398, s. 1 having been 55A-6-10.

Legal Periodicals. — For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

CASE NOTES

Failure to Comply With Bylaw Vote Requirement Before Bringing Suit. — Trial court properly dismissed a property owners association's suit against its developer, which asserted claims of constructive fraud and unfair and deceptive trade practices, for lack of standing on the part of the association, because the association failed to obtain a two-thirds vote of its membership authorizing the suit, as was required by its bylaws; as a result, the trial court lacked subject matter jurisdiction and properly granted the developer's motion to dismiss and motion for summary judgment. Peninsula Prop. Owners Ass'n v. Crescent Res., LLC, 171 N.C. App. 89, 614 S.E.2d 351, 2005 N.C. App. LEXIS 1165 (2005), cert. denied, — N.C. —, 626 S.E.2d 648 (2005).

§ 55A-6-21. Prohibition of stock.

A corporation shall neither authorize nor issue shares of stock. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 32; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

G.S. 55-17-01(b) prohibits the formation of nonprofit corporations with capital stock under Chapter 55. G.S. 55-17-01(a) provides that domestic nonprofit corporations with capital stock organized prior to July 1, 1957 under former Chapter 55 or its predecessor are governed by Chapter 55. But, under the provisions of G.S. 55A-1-40(11) and G.S. 55A-15-01(a), foreign nonprofit corporations with capital stock are governed by Chapter 55A if they are conducting affairs in North Carolina.

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 398, s. 1 having been 55A-6-11.

§ 55A-6-22. Member's liability to third parties.

A member of a corporation is not, as such, personally liable for the acts, debts, liabilities, or obligations or corporation. (1993, c. 398, s. 1.)

§ 55A-6-23. Member's liability for dues, assessments, and fees.

A member may become liable to the corporation for dues, assessments, or fees; provided, however, that a provision in the articles of incorporation or bylaws or a resolution adopted by the board of directors authorizing or imposing dues, assessments, or fees does not, of itself, create liability. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Under this section, a member must agree or consent, explicitly or implicitly, to become liable for dues, assessments or fees.

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 398, s. 1 having been 55A-6-13.

§ 55A-6-24. Creditor's action against member.

(a) A creditor of a corporation shall not bring a proceeding to enforce any liability of a member to the corporation unless final judgment has been rendered in favor of the creditor against the corporation and execution has been returned unsatisfied in whole or in part or unless a proceeding against the corporation would be futile.

(b) All creditors of the corporation, with or without reducing their claims to judgment, may intervene in any creditor's proceeding brought under subsection (a) of this section to collect and apply the proceeds of obligations owed to the corporation. Any or all members who are indebted to the corporation may be joined in such proceeding. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section is intended to protect members and not to create any new cause of action in favor of creditors.

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 398, s. 1 having been 55A-6-14.

§§ 55A-6-25 through 55A-6-29: Reserved for future codification purposes.

Part 3. Resignation and Termination.

§ 55A-6-30. Resignation.

(a) Any member may resign at any time.

(b) The resignation of a member does not relieve the member from any obligations incurred or commitments made to the corporation prior to resignation. (1993, c. 398, s. 1.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 398, s. 1 having been 55A-6-20.

§ 55A-6-31. Termination, expulsion, and suspension.

(a) No member of a corporation may be expelled or suspended, and no membership may be terminated or suspended, except in a manner that is fair and reasonable and is carried out in good faith.

(b) Any proceeding challenging an expulsion, suspension, or termination shall be commenced within one year after the member receives notice of the expulsion, suspension, or termination.

(c) A member who has been expelled or suspended may be liable to the corporation for dues, assessments, or fees as a result of obligations incurred or commitments made by the member prior to expulsion or suspension. (1955, c. 1230; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

In view of the requirements imposed by subsection (a), former G.S. 55A-29(b), which granted appraisal rights in certain circumstances, was not brought forward.

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 398, s. 1 having been 55A-6-21.

Legal Periodicals. — For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

CASE NOTES

Civil Court's Jurisdiction Over Church's Termination of Members. — Members of a church, which was a nonprofit corporation under Chapter 55A of the North Carolina General Statutes, could not turn to G.S. 55A-6-31(a) to claim that their membership in the church was improperly terminated in violation of that statute because the courts of the State of North Carolina did not have jurisdiction in what were ecclesiastical disputes. Tubiolo v. Abundant Life Church, Inc., 167 N.C. App. 324, 605 S.E.2d 161, 2004 N.C. App. LEXIS 2166 (2004), cert. denied, — U.S. —, 126 S. Ct. 350, 163 L. Ed. 2d 59 (2005).

§§ 55A-6-32 through 55A-6-39: Reserved for future codification purposes.

Part 4. Delegates.

§ 55A-6-40. Delegates.

(a) A corporation may provide in its articles of incorporation or bylaws for delegates having some or all of the authority of members.

(b) The articles of incorporation or bylaws may set forth provisions relating to:

(1) The characteristics, qualifications, rights, limitations, and obligations of delegates, including their selection and removal;

(2) Calling, noticing, holding, and conducting meetings of delegates; and

(3) Carrying on corporate activities during and between meetings of delegates. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section had no counterpart in the prior law. It was adapted from Section 6.40 of the Model Act.

ARTICLE 7.

Members' Meetings and Voting; Derivative Proceedings.

Part 1. Meetings and Action Without Meetings.

§ 55A-7-01. Annual and regular meetings.

(a) A corporation having members with the right to vote for directors shall hold a meeting of such members annually.

(b) A corporation with members may hold regular membership meetings at the times stated in or fixed in accordance with the bylaws.

(c) Annual and regular membership meetings may be held in or out of this State at the place stated in or fixed in accordance with the bylaws. If no place is stated in or fixed in accordance with the bylaws, annual and regular meetings shall be held at the corporation's principal office.

(d) At annual and regular meetings, the members shall consider and act upon such matters as may be raised consistent with the notice requirements of G.S. 55A-7-05 and G.S. 55A-7-22(d).

(e) The failure to hold an annual or regular meeting at a time stated in or fixed in accordance with the corporation's bylaws does not affect the validity of any corporate action. (1955, c. 1230; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Subsection (a) requires a corporation having members that have a right to vote for directors to have a meeting of members annually. Former G.S. 55A-30 required annual meetings if there were members, whether or not members had a right to vote for directors.

§ 55A-7-02. Special meeting.

(a) A corporation with members shall hold a special meeting of members:

(1) On call of its board of directors or the person or persons authorized to do so by the articles of incorporation or bylaws; or

(2) Within 30 days after the holders of at least ten percent (10%) of all the votes entitled to be cast on any issue proposed to be considered at the proposed special meeting sign, date, and deliver to the corporation's secretary one or more written demands for the meeting describing the purpose or purposes for which it is to be held.

(b) If not otherwise fixed under G.S. 55A-7-03 or G.S. 55A-7-07, the record date for determining members entitled to demand a special meeting is the date the first member signs the demand.

(c) Special meetings of members may be held in or out of this State at the place stated in or fixed in accordance with the bylaws. If no place is stated or fixed in accordance with the bylaws, special meetings shall be held at the corporation's principal office.

(d) Only those matters that are within the purpose or purposes described in the meeting notice required by G.S. 55A-7-05 may be acted upon at a special meeting of members. (1955, c. 1230; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section changes prior law in that (1) the president is not statutorily authorized to call special members' meetings as under prior law and must now be given that authority by the articles of incorporation or bylaws and (2) formerly, members holding 5% of the votes could call a special meeting in the absence of a provision fixing a different number or percentage, whereas under this section, 10% of the votes entitled to be cast on any issue proposed to be considered is required and this percentage cannot be modified by the corporation. Subsection (b) had no counterpart in the prior law.

§ 55A-7-03. Court-ordered meeting.

(a) The superior court of the county where a corporation's principal office, or, if there is none in this State, its registered office, is located may, after notice is given to the corporation and upon such further notice and opportunity to be heard, if any, as the court may deem appropriate under the circumstances, summarily order a meeting to be held:

(1) On application of any member if an annual meeting was not held within 15 months after the corporation's last annual meeting; or

(2) On application of a member who signed a demand for a special meeting valid under G.S. 55A-7-02, if the corporation has not held the meeting as required by that section.

(b) The court may fix the time and place of the meeting, specify a record date for determining those persons entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting (or direct that the votes represented at the meeting constitute a quorum for action on those matters), and enter other orders necessary to accomplish the purpose or purposes of the meeting.

(c) If the court orders a meeting, it may also order the corporation to pay all or part of the member's costs (including reasonable attorneys' fees) incurred to obtain the order. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section had no counterpart in the prior law.

§ 55A-7-04. Action by written consent.

(a) Action required or permitted by this Chapter to be taken at a meeting of members may be taken without a meeting if the action is taken by all members entitled to vote on the action. The action shall be evidenced by one or more written consents describing the action taken, signed before or after such action by all members entitled to vote thereon, and delivered to the corporation for inclusion in the minutes or filing with the corporate records. To the extent the corporation has agreed pursuant to G.S. 55A-1-70, a member's consent to action taken without a meeting may be in electronic form and delivered by electronic means.

(b) If not otherwise determined under G.S. 55A-7-03 or G.S. 55A-7-07, the record date for determining members entitled to take action without a meeting is the date the first member signs the consent under subsection (a) of this section.

(c) A consent signed under this section has the effect of a meeting vote and may be described as such in any document. (1977, c. 193, s. 2; 1993, c. 398, s. 1; 2008-37, s. 4.)

Effect of Amendments. — Session Laws 2008-37, s. 4, effective October 1, 2008, added the last sentence in subsection (a).

§ 55A-7-05. Notice of meeting.

(a) A corporation shall give notice of meetings of members by any means that is fair and reasonable and consistent with its bylaws.

(b) Any notice that conforms to the requirements of subsection (c) is fair and reasonable, but other means of giving notice may also be fair and reasonable when all the circumstances are considered; provided, however, that notice of matters referred to in subdivision (c)(2) of this section shall be given as provided in subsection (c) of this section.

(c) Notice is fair and reasonable if:

(1) The corporation gives notice to all members entitled to vote at the meeting of the place, date, and time of each annual, regular, and special meeting of members no fewer than 10, or, if notice is mailed by other than first class, registered or certified mail, no fewer than 30, nor more than 60 days before the meeting date;

(2) Notice of an annual or regular meeting includes a description of any matter or matters that shall be approved by the members under G.S. 55A-8-31, 55A-8-55, 55A-10-03, 55A-10-21, 55A-11-04, 55A-12-02, or 55A-14-02; and

(3) Notice of special meeting includes a description of the matter or matters for which the meeting is called.

(d) Unless the bylaws require otherwise, if an annual, regular, or special meeting of members is adjourned to a different date, time, or place, notice need not be given of the new date, time, or place, if the new date, time, or place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under G.S. 55A-7-07, however, notice of the adjourned meeting shall be given under this section to the members of record entitled to vote at the meeting as of the new record date.

(e) When giving notice of an annual, regular, or special meeting of members, a corporation shall give notice of a matter a member intends to raise at the meeting if:

(1) Requested in writing to do so by a person or persons entitled to call a special meeting pursuant to G.S. 55A-7-02; and

(2) The request is received by the secretary or president of the corporation at least 10 days before the corporation gives notice of the meeting. (1955, c. 1230; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Subsection (a) is a departure from prior law and recognizes that the traditional written notice to each member by personal delivery or mail may be burdensome in certain cases. Thus, notice may be given by any means that is consistent with the bylaws and that is "fair and reasonable when all the circumstances are considered." Relevant circumstances include the purpose of the meeting and the nature and size of the corporation.

Subsection (c) establishes a "safe harbor" for what is fair and reasonable notice, but subsection (b) provides that the safe harbor is not mandatory except with respect to matters referred to in subdivision (c)(2).

§ 55A-7-06. Waiver of notice.

(a) A member may waive any notice required by this Chapter, the articles of incorporation, or bylaws before or after the date and time stated in the notice. The waiver shall be in writing, be signed by the member entitled to the notice, and be delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(b) A member's attendance at a meeting:

(1) Waives objection to lack of notice or defective notice of the meeting, unless the member at the beginning of the meeting objects to holding the meeting or conducting business at the meeting; and

(2) Waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the member objects to considering the matter before it is voted upon. (1955, c. 1230; 1993, c. 398, s. 1.)

§ 55A-7-07. Record date.

(a) The bylaws of a corporation may fix or provide the manner of fixing a date as the record date for determining the members entitled to notice of a members' meeting. If the bylaws do not fix or provide for fixing a record date, the board of directors may fix a future date as the record date. If no record date is fixed, members at the close of business on the business day preceding the day on which notice is given are entitled to notice of the meeting.

(b) The bylaws of a corporation may fix or provide the manner of fixing a date as the record date for determining the members entitled to vote at a members' meeting. If the bylaws do not fix or provide for fixing a record date, the board of directors may fix a future date as the record date. If no record date is fixed, members on the date of the meeting who are otherwise eligible to vote are entitled to vote at the meeting.

(c) The bylaws may fix or provide the manner for determining a date as the record date for the purpose of determining the members entitled to any rights in respect of any other lawful action. If the bylaws do not fix or provide for fixing a record date, the board may fix in advance the record date. If no record date is fixed, members at the close of business on the day on which the board adopts the resolution relating to such action, or the 60th day prior to the date of such action, whichever is later, are entitled to such rights.

(d) A record date fixed under this section shall not be more than 70 days before the meeting or action for which a determination of members is required.

(e) A determination of members entitled to notice of or to vote at a membership meeting is effective for any adjournment of the meeting unless the board fixes a new date for determining the right to notice or the right to vote, which it shall do if the meeting is adjourned to a date more than 120 days after the date fixed for the original meeting.

(f) If a court orders a meeting adjourned to a date more than 120 days after the date fixed for the original meeting, it may provide that the original record date for notice or voting continues in effect or it may fix a new record date for notice or voting. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section had no counterpart in the prior law.

§ 55A-7-08. Action by written ballot.

(a) Unless prohibited or limited by the articles of incorporation or bylaws and without regard to the requirements of G.S. 55A-7-04, any action that may be taken at any annual, regular, or special meeting of members may be taken without a meeting if the corporation delivers a written ballot to every member entitled to vote on the matter. Any requirement that any vote of the members be made by written ballot may be satisfied by a ballot submitted by electronic transmission, including electronic mail, provided that such electronic transmission shall either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the member or the member's proxy.

(b) A written ballot shall:

(1) Set forth each proposed action; and

(2) Provide an opportunity to vote for or against each proposed action.

(c) Approval by written ballot pursuant to this section shall be valid only when the number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action, and the number of approvals equals or exceeds the number of votes that would be required to approve the matter at a meeting at which the same total number of votes were cast.

(d) All solicitations for votes by written ballot shall indicate the time by which a ballot shall be received by the corporation in order to be counted.

(e) Except as otherwise provided in the articles of incorporation or bylaws, a written ballot shall not be revoked. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 35; 1993, c. 398, s. 1; 2008-37, s. 5.)

NORTH CAROLINA COMMENTARY

This section enables North Carolina corporations to allow their members to vote on any issue by written ballot, unless otherwise provided in the articles of incorporation or bylaws. Under former G.S. 55A-32(b), the bylaws could provide that elections of directors and officers be conducted by mail.

Effect of Amendments. — Session Laws 2008-37, s. 5, effective October 1, 2008, added the last sentence in subsection (a).

§§ 55A-7-09 through 55A-7-19: Reserved for future codification purposes.

Part 2. Voting.

§ 55A-7-20. Members' list for meeting.

(a) After fixing a record date for a notice of a meeting, a corporation shall prepare an alphabetical list of the names of all its members who are entitled to notice of the meeting. The list shall show the address and number of votes each member is entitled to cast at the meeting. The corporation shall prepare on a current basis through the time of the membership meeting a list of members, if any, who are entitled to vote at the meeting, but not entitled to notice of the meeting. This list shall be prepared on the same basis as and be part of the list of members.

(b) Beginning two business days after notice is given of the meeting for which the list was prepared and continuing through the meeting, the list of members shall be available at the corporation's principal office or at a reasonable place identified in the meeting notice in the city where the meeting will be held for inspection by any member for the purpose of communication with other members concerning the meeting. A member, personally or by or with his representatives, is entitled on written demand to inspect and, subject to the limitations of G.S. 55A-16-02(c) and G.S. 55A-16-05 and at his expense, to copy the list at a reasonable time during the period it is available for inspection.

(c) The corporation shall make the list of members available at the meeting, and any member, personally or by or with his representatives, is entitled to inspect the list at any time during the meeting or any adjournment.

(d) If the corporation refuses to allow a member or his representative to inspect or copy the list of members as permitted in subsections (b) and (c) of this section, the superior court of the county where a corporation's principal office (or, if there is none in this State, its registered office) is located, on application of the member, after notice is given to the corporation and upon such further evidence, notice and opportunity to be heard, if any, as the court may deem appropriate under the circumstances, may summarily order the inspection or copying at the corporation's expense. The court may postpone the meeting for which the list was prepared until the inspection or copying is complete and may order the corporation to pay the member's costs, including reasonable attorneys' fees, incurred to obtain the order.

(e) Refusal or failure to prepare or make available the members' list does not affect the validity of action taken at the meeting. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section had no counterpart in the prior law and is based on the Model Act. The list required by this section must include the name and address and number of votes each member is entitled to cast at the meeting and must be updated to and including the date of the meeting. The need to update the list would only occur if members entitled to vote at the meeting join the corporation after the notice of the meeting is given.

§ 55A-7-21. Voting entitlement generally.

(a) Unless the articles of incorporation or bylaws provide otherwise, each member is entitled to one vote on each matter voted on by the members.

(b) Unless the articles of incorporation or bylaws provide otherwise, if a membership stands of record in the names of two or more persons, their acts with respect to voting shall have the following effect:

(1) If only one votes, such act binds all; and

(2) If more than one votes, the vote shall be divided on a pro rata basis.

(c) An amendment to the articles of incorporation or bylaws on which members are entitled to vote, the purpose of which is to increase or decrease the number of votes any member is entitled to cast on any member action, shall be approved by the members entitled to vote on that action by a vote that would be sufficient to take the action before the amendment. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 35; 1993, c. 398, s. 1; 1995, c. 400, s. 2.)

NORTH CAROLINA COMMENTARY

Subsection (b), which had no counterpart in the prior law, specifies the manner in which jointly held memberships are voted.

§ 55A-7-22. Quorum requirements.

(a) Unless this Chapter, the articles of incorporation, or bylaws provide for a higher or lower quorum, ten percent (10%) of the votes entitled to be cast on a matter shall be represented at a meeting of members to constitute a quorum on that matter. Once a member is represented for any purpose at a meeting, the member is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless a new record date is or must be set for that adjourned meeting.

(b) A bylaw amendment to decrease the quorum for any member action may be approved by the members entitled to vote on that action or, unless prohibited by the bylaws, by the board of directors.

(c) A bylaw amendment to increase the quorum required for any member action shall be approved by the members entitled to vote on that action.

(d) Unless one-third or more of the votes entitled to be cast in the election of directors are represented in person or by proxy, the only matters that may be voted upon at an annual or regular meeting of members are those matters that are described in the meeting notice. (1955, c. 1230; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Subsections (b) through (d) had no counterpart in the prior law and were adapted from the Model Act.

§ 55A-7-23. Voting requirements.

(a) Unless this Chapter, the articles of incorporation, or the bylaws require a greater vote or voting by class, if a quorum is present, the affirmative vote of a majority of the votes cast is the act of the members.

(b) An amendment to the articles of incorporation or bylaws on which members are entitled to vote, the purpose of which is to increase or decrease the vote required for any member action, shall be approved by the members entitled to vote on that action by a vote that would be sufficient to take the action before the amendment. (1955, c. 1230; 1993, c. 398, s. 1; 1995, c. 400, s. 3.)

NORTH CAROLINA COMMENTARY

Former 55A-33 provided that the vote of a majority of "the votes entitled to be cast" at a meeting at which a quorum is present was the act of the members. Subsection (a) provides that "a majority of the votes cast" at a meeting at which a quorum is present is the act of the members, so that members present at a meeting cannot defeat an action by withholding their votes. Subsection (b) had no counterpart in the prior law.

§ 55A-7-24. Proxies.

(a) Unless the articles of incorporation or bylaws prohibit or limit proxy voting, a member may vote in person or by proxy. A member may appoint one or more proxies to vote or otherwise act for the member by signing an appointment form, either personally or by the member's attorney-in-fact. Without limiting G.S. 55A-1-70, an appointment in the form of an electronic record that bears the member's electronic signature and that may be directly reproduced in paper form by an automated process shall be deemed a valid appointment form within the meaning of this section. In addition, if and to the extent permitted by the nonprofit corporation, a member may appoint one or more proxies by any kind of telephonic transmission, even if not accompanied by written communication, under circumstances or together with information from which the nonprofit corporation can reasonably assume that the appointment was made or authorized by the member.

(b) An appointment of a proxy is effective when received by the secretary or other officer or agent authorized to tabulate votes. An appointment is valid for 11 months unless a different period is expressly provided in the appointment form.

(c) An appointment of a proxy is revocable by the member unless the appointment form conspicuously states that it is irrevocable and the appointment is coupled with an interest. An appointment made irrevocable under this subsection shall be revocable when the interest with which it is coupled is extinguished. A transferee for value of an interest subject to an irrevocable appointment may revoke the appointment if he did not have actual knowledge of its irrevocability.

(d) The death or incapacity of the member appointing a proxy does not affect the right of the corporation to accept the proxy's authority unless notice of the death or incapacity is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises authority under the appointment.

(e) A revocable appointment of a proxy is revoked by the person appointing the proxy:

(1) Attending any meeting and voting in person; or

(2) Signing and delivering to the secretary or other officer or agent authorized to tabulate proxy votes either a writing stating that the appointment of the proxy is revoked or a subsequent appointment form.

(f) Subject to G.S. 55A-7-27 and to any express limitation on the proxy's authority appearing on the face of the appointment form, a corporation is entitled to accept the proxy's vote or other action as that of the member making the appointment. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 35; 1993, c. 398, s. 1; 1999-139, s. 1; 2008-37, s. 6.)

Effect of Amendments. — Session Laws 2008-37, s. 6, effective October 1, 2008, in subsection (a), in the first sentence, substituted "the member" for "him" and substituted "the member's" for "his", substituted "Without limiting G.S. 55A-1-70, an appointment in the form of an electronic record that bears the member's electronic signature and that may be directly reproduced in paper form by an automated process" for "A photocopy, telegram, cablegram, facsimile transmission, or equivalent reproduction of a writing appointing one or more proxies" in the second sentence, and deleted "(i) by an electronic mail message or other form of electronic, wire, or wireless communication that provides a written statement appearing to have been sent by the member, or (ii)" following "more proxies" and deleted "electronic or" following "by any kind of" in the third sentence.

§ 55A-7-25. Voting for directors; cumulative voting.

(a) Unless otherwise provided in the articles of incorporation, the bylaws, or an agreement valid under G.S. 55A-7-30, directors are elected by a plurality of the votes cast by the members entitled to vote in the election at a meeting at which a quorum is present. If the articles of incorporation, bylaws, or an agreement valid under G.S. 55A-7-30 provides for cumulative voting by members, members may so vote, by multiplying the number of votes the members are entitled to cast by the number of directors for whom they are entitled to vote, and casting the product for a single candidate or distributing the product among two or more candidates.

(b) Members otherwise entitled to vote cumulatively shall not vote cumulatively at a particular meeting unless:

(1) The meeting notice or statement accompanying the notice states that cumulative voting will take place; or

(2) A member or proxy who has the right to cumulate his votes announces in open meeting, before voting for directors starts, his intention to vote cumulatively; and if such announcement is made, the chair shall declare that all persons entitled to vote have the right to vote cumulatively, shall announce the number of votes entitled to be cast, and shall grant a recess of not less than one hour nor more than four hours, as the chair shall determine, or of such other period of time as is unanimously then agreed upon.

(c) A director elected by cumulative voting may be removed by the members without cause if the requirements of G.S. 55A-8-08 are met unless the votes cast against removal would be sufficient to elect such director if voted cumulatively at an election at which the same total number of votes were cast and the entire number of directors elected at the time of the director's most recent election were then being elected. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 35; 1993, c. 398, s. 1.)

§ 55A-7-26. Other methods of electing directors.

A corporation may provide in its articles of incorporation or bylaws for election of directors by members or delegates:

(1) On the basis of chapter or other organizational unit;

(2) By region or other geographic unit;

(3) By preferential voting; or

(4) By any other reasonable method. (1955, c. 1230; 1973, c. 192, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 801, ss. 19-21; 1993, c. 398, s. 1.)

Legal Periodicals. — For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

§ 55A-7-27. Corporation's acceptance of votes.

(a) If the name signed on a vote, consent, waiver, or proxy appointment corresponds to the name of a member, the corporation if acting in good faith is entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the member.

(b) If the name signed on a vote, consent, waiver, or proxy appointment does not correspond to the record name of a member, the corporation if acting in good faith is nevertheless entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the member if:

(1) The member is an entity and the name signed purports to be that of an officer or agent of the entity;

(2) The name signed purports to be that of an attorney-in-fact of the member and, if the corporation requests it, evidence acceptable to the corporation of the signatory's authority to sign for the member is presented with respect to the vote, consent, waiver, or proxy appointment;

(3) Two or more persons hold the membership as cotenants or fiduciaries and the name signed purports to be the name of at least one of the coholders and the person signing appears to be acting on behalf of all the coholders; or

(4) In the case of a corporation other than a charitable or religious corporation:

   a. The name signed purports to be that of an administrator, executor, guardian, or conservator representing the member and, if the corporation requests it, evidence of fiduciary status acceptable to the corporation is presented with respect to the vote, consent, waiver, or proxy appointment;

   b. The name signed purports to be that of a receiver or trustee in bankruptcy of the member, and, if the corporation requests it, evidence of this status acceptable to the corporation is presented with respect to the vote, consent, waiver, or proxy appointment.

(c) The corporation is entitled to reject a vote, consent, waiver, or proxy appointment if the secretary or other officer or agent authorized to tabulate votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the member.

(d) The corporation and its officer or agent who accepts or rejects a vote, consent, waiver, or proxy appointment in good faith and in accordance with the standards of this section are not liable in damages to the member for the consequences of the acceptance or rejection.

(e) Corporate action based on the acceptance or rejection of a vote, consent, waiver, or proxy appointment under this section is valid unless a court of competent jurisdiction determines otherwise. (1993, c. 398, s. 1; 1995, c. 509, s. 27.)

NORTH CAROLINA COMMENTARY

This section had no counterpart in the prior law.

§§ 55A-7-28, 55A-7-29: Reserved for future codification purposes.

Part 3. Voting Agreements.

§ 55A-7-30. Voting agreements.

(a) Two or more members may provide for the manner in which their voting rights will be exercised by signing an agreement for that purpose. The agreement may be valid for a period of up to 10 years. All or some of the parties to the agreement may extend it for more than 10 years from the date the first party signs the extension agreement, but the extension agreement binds only those parties signing it. For charitable or religious corporations, such agreements shall have a reasonable purpose not inconsistent with the corporation's charitable or religious purposes.

(b) Subject to subsection (a) of this section, a voting agreement created under this section may be specifically enforceable.

(c) The provisions of a voting agreement created under this section will bind a transferee of a membership covered by the agreement only if the transferee acquires the membership with knowledge of the provisions. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section had no counterpart in the prior law.

§§ 55A-7-31 through 55A-7-39: Reserved for future codification purposes.

Part 4. Derivative Proceedings.

§ 55A-7-40. Derivative proceedings.

(a) An action may be brought in a superior court of this State, which shall have exclusive original jurisdiction over actions brought hereunder, in the right of any domestic or foreign corporation by any member or director, provided that, in the case of an action by a member, the plaintiff or plaintiffs shall allege, and it shall appear, that each plaintiff-member was a member at the time of the transaction of which he complains.

(b) The complaint shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort. Whether or not a demand for action was made, if the corporation commences an investigation of the charges made in the demand or complaint, the court may stay any proceedings until the investigation is completed.

(c) Upon motion of the corporation, the court may appoint a committee composed of two or more disinterested directors or other disinterested persons, acceptable to the corporation, to determine whether it is in the best interest of the corporation to pursue a particular legal right or remedy. The committee shall report its findings to the court. After considering the report and any other relevant evidence, the court shall determine whether the proceeding should be continued.

(d) Such action shall not be discontinued, dismissed, compromised, or settled without the approval of the court. The court, in its discretion, may direct that notice, by publication or otherwise, shall be given to any directors, members, creditors, and other persons whose interests it determines will be substantially affected by the discontinuance, dismissal, compromise, or settlement. If notice is so directed to be given, the court may determine which one or more of the parties to the action shall bear the expense of giving the same, in such amount as the court shall determine and find to be reasonable in the circumstances, and the amount of the expense shall be awarded as costs of the action.

(e) If the action on behalf of the corporation is successful, in whole or in part, whether by means of a compromise and settlement or by a judgment, the court may award the plaintiff the reasonable expenses of maintaining the action, including reasonable attorneys' fees, and shall direct the plaintiff to account to the corporation for the remainder of any proceeds of the action.

(f) In any such action, the court, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the defendant or defendants the reasonable expenses, including attorneys' fees, incurred by them in the defense of the action.

(g) In proceedings hereunder, no member shall be entitled to obtain or have access to any communication within the scope of the corporation's attorney-client privilege which could not be obtained by or would not be accessible to a party in an action other than on behalf of the corporation. (1985 (Reg. Sess., 1986), c. 801, s. 34; 1993, c. 398, s. 1.)

CASE NOTES

Standing. — G.S. 55A-7-40(a) plainly restricts standing to bring a derivative action to the members and directors of a nonprofit corporation. Thus, by statute, only members, directors, or the attorney general have standing to challenge ultra vires acts of a not-for-profit corporation. Morris v. Thomas, 161 N.C. App. 680, 589 S.E.2d 419, 2003 N.C. App. LEXIS 2271 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 379 (2003).

Derivative Action Not Appropriate. — Even if the board had exceeded its authority, a member's derivative action would not have been the appropriate cause of action where plaintiff alleged no injury to the association by the board's action and was not seeking to recover on behalf of the association. Stewart v. Kopp, 118 N.C. App. 161, 454 S.E.2d 672, cert. denied, 340 N.C. 263, 456 S.E.2d 838 (1995).

ARTICLE 8.

Directors and Officers.

Part 1. Board of Directors.

§ 55A-8-01. Requirement for and duties of board.

(a) Except as provided in subsection (c) of this section, each corporation shall have a board of directors.

(b) All corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board of directors, except as otherwise provided in the articles of incorporation.

(c) A corporation may dispense with or limit the authority of a board of directors by describing in its articles of incorporation who will perform some or all of the duties of a board of directors; but no such limitation upon the authority which the board of directors would otherwise have shall be effective against other persons without actual knowledge of such limitation.

(d) To the extent the articles of incorporation vests authority of the board of directors in an individual or group other than the board of directors, the individual or group in the exercise of such authority shall be deemed to be acting as the board of directors for all purposes of this Chapter. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 18; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Subsection (c) of this section permits a corporation to dispense with or limit the authority of its board of directors only by a provision in its articles of incorporation; it does not permit a members' agreement to effect such an arrangement, in contrast with G.S. 55-8-01(c) which permits a shareholders' agreement to do so.

§ 55A-8-02. Qualifications of directors.

The articles of incorporation or bylaws may prescribe qualifications for directors. A director need not be a resident of this State or a member of the corporation unless the articles of incorporation or bylaws so prescribe. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 18; 1993, c. 398, s. 1.)

§ 55A-8-03. Number of directors.

(a) A board of directors shall consist of one or more natural persons, with the number specified in or fixed in accordance with the articles of incorporation or bylaws.

(b) The number of directors may be increased or decreased from time to time by amendment to or in the manner prescribed in the articles of incorporation or bylaws.

(c) The articles of incorporation or bylaws may establish a variable range for the size of the board of directors by fixing a minimum and maximum number of directors. If a variable range is established, the number of directors may be fixed or changed from time to time, within the minimum and maximum, by the members entitled to vote for directors or (unless the articles of incorporation or an agreement valid under G.S. 55A-7-30 shall otherwise provide) the board of directors. If the corporation has members entitled to vote for directors, only such members may change the range for the size of the board or change from a fixed to a variable-range size board or vice versa. (1955, c. 1230; 1973, c. 192, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 801, ss. 19-21; 1993, c. 398, s. 1.)

Legal Periodicals. — For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

§ 55A-8-04. Election, designation, and appointment of directors.

(a) If the corporation has members entitled to vote for directors, all the directors (except the initial directors) shall be elected at the first annual meeting of such members, and at each annual meeting thereafter, unless the articles of incorporation or bylaws provide some other time or method of election, or provide that some of the directors are appointed by some other person or are designated. If the articles of incorporation authorize dividing the members into classes, the articles of incorporation may also authorize the election of all or a specified number of directors by the members of one or more authorized classes.

(b) If the corporation does not have members entitled to vote for directors, all the directors (except the initial directors) shall be elected, appointed, or designated as provided in the articles of incorporation or bylaws. If no method of designation or appointment is set forth in the articles of incorporation or bylaws, the directors (other than the initial directors) shall be elected by the board of directors.

(c) If any member entitled to vote for directors so demands, election of directors by the members shall be by ballot, unless the articles of incorporation or bylaws otherwise provide. (1955, c. 1230; 1973, c. 192, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 801, ss. 19-21; 1993, c. 398, s. 1.)

CASE NOTES

Power to Appoint Director. — Board of directors of a nonprofit rural electric cooperative had the power to appoint two new directors to fill vacant positions that were added to the cooperative. Hammonds v. Lumbee River Elec. Mbrshp. Corp., 178 N.C. App. 1, 631 S.E.2d 1, 2006 N.C. App. LEXIS 1301 (2006).

§ 55A-8-05. Terms of directors generally.

(a) The articles of incorporation or bylaws may specify the terms of directors. In the absence of a contrary provision in the articles of incorporation or bylaws, the term of each director shall be one year, and directors may serve successive terms.

(b) A decrease in the number of directors or term of office does not shorten an incumbent director's term.

(c) Except as provided in the articles of incorporation or bylaws:

(1) The term of a director filling a vacancy in the office of a director elected by members expires at the next election of directors by members; and

(2) The term of a director filling any other vacancy expires at the end of the unexpired term that such director is filling.

(d) Despite the expiration of a director's term, the director continues to serve until the director's successor is elected, designated, or appointed and qualifies, or until there is a decrease in the number of directors. (1955, c. 1230; 1973, c. 192, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 801, ss. 19-21; 1993, c. 398, s. 1; 1995, c. 509, s. 28.)

§ 55A-8-06. Staggered terms for directors.

The articles of incorporation or bylaws may provide for staggering the terms of directors by dividing the total number of directors into groups. The terms of office of the several groups need not be uniform. (1955, c. 1230; 1973, c. 192, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 801, ss. 19-21; 1993, c. 398, s. 1.)

§ 55A-8-07. Resignation of directors.

(a) A director may resign at any time by communicating his resignation to the board of directors, its presiding officer, or to the corporation.

(b) A resignation is effective when it is communicated unless the notice specifies a later effective date or subsequent event upon which it will become effective. (1993, c. 398, s. 1.)

§ 55A-8-08. Removal of directors elected by members or directors.

(a) The members may remove one or more directors elected by them with or without cause unless the articles of incorporation provide that directors may be removed only for cause.

(b) If a director is elected by a class, chapter or other organizational unit, or by region or other geographic grouping, the director may be removed only by that class, chapter, unit, or grouping.

(c) Except as provided in subsection (i) of this section, a director may be removed under subsection (a) or (b) of this section, only if the number of votes cast to remove the director would be sufficient to elect the director at a meeting to elect directors.

(d) If cumulative voting is authorized, a director shall not be removed:

(1) If the number of votes; or

(2) If the director was elected by a class, chapter, unit, or grouping of members, the number of votes of that class, chapter, unit, or grouping;

sufficient to elect the director under cumulative voting, if an election were then being held, is voted against the director's removal.

(e) A director elected by members may be removed by the members only at a meeting called for the purpose of removing the director and the meeting notice shall state that the purpose, or one of the purposes, of the meeting is removal of the director.

(f) In computing whether a director is protected from removal under subsections (b) through (d) of this section, it should be assumed that the votes against removal are cast in an election for the number of directors of the class to which the director to be removed belonged on the date of that director's election.

(g) An entire board of directors may be removed under subsections (a) through (e) of this section.

(h) A majority of the directors then in office or such greater number as is set forth in the articles of incorporation or bylaws may, subject to any limitation in the articles of incorporation or bylaws, remove any director elected by the board of directors; provided, however, that a director elected by the board to fill the vacancy of a director elected by the members may be removed by the members, but not the board.

(i) Notwithstanding any other provision of this section, if, at the beginning of a director's term on the board of directors, the articles of incorporation or bylaws provide that the director may be removed by the board for missing a specified number of board meetings, the board may remove the director for failing to attend the specified number of meetings. The director may be removed only if a majority of the directors then in office vote for the removal.

(j) Notwithstanding any other provision of this section, the articles of incorporation or bylaws may provide that directors elected after the effective date of such provision shall be removed automatically for missing a specified number of board meetings.

(k) The articles of incorporation may:

(1) Limit the application of this section in the case of a charitable or religious corporation; and

(2) Set forth the vote and procedures by which the board of directors or any person may remove with or without cause a director elected by the members or the board. (1955, c. 1230; 1973, c. 192, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 801, ss. 19-21; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Subsections (i) and (j) had no counterpart in the prior law. Subdivision (k)(1) was limited to charitable or religious corporations in order not to give other nonprofit corporations, in which members may have property rights, full power to limit the application of the section in general. Subdivision (k)(2) was not so limited in order not to invalidate procedures adopted under former G.S. 55A-20(f) and to authorize such procedures to be established under the new Act.

Legal Periodicals. — For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

§ 55A-8-09. Removal of designated or appointed directors.

(a) A designated director may be removed by an amendment to the articles of incorporation or bylaws deleting or changing the provision containing the designation.

(b) Except as otherwise provided in the articles of incorporation or bylaws:

(1) An appointed director may be removed with or without cause by the person appointing the director;

(2) The person removing the director shall do so by giving written notice of the removal to the director and to the corporation; and

(3) A removal is effective when the notice is effective unless the notice specifies a future effective date.

(c) Notwithstanding any other provision of this section, the articles of incorporation or bylaws may provide that directors appointed after the effective date of such provision shall be removed automatically for missing a specified number of board meetings. (1955, c. 1230; 1973, c. 192, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 801, ss. 19-21; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section had no counterpart in the prior law.

§ 55A-8-10. Removal of directors by judicial proceeding.

(a) The superior court of the county where a corporation's principal office (or, if there is none in this State, its registered office) is located may remove any director of the corporation from office in a proceeding commenced either by the corporation or by its members holding at least ten percent (10%) of the votes entitled to be cast of any class of members, if the court finds that:

(1) The director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation, or a final judgment has been entered finding that the director has violated a duty set forth in G.S. 55A-8-30 through G.S. 55A-8-33, and

(2) Removal is in the best interest of the corporation.

(b) The court that removes a director may bar the director from serving on the board of directors for a period prescribed by the court.

(c) If members commence a proceeding under subsection (a) of this section, the corporation shall be made a party defendant. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section had no counterpart in the prior law.

§ 55A-8-11. Vacancy on board.

(a) Unless the articles of incorporation or bylaws provide otherwise, and except as provided in subsections (b) and (c) of this section, if a vacancy occurs on a board of directors, including, without limitation, a vacancy resulting from an increase in the number of directors or from the failure by the members to elect the full authorized number of directors, the vacancy may be filled:

(1) By the members entitled to vote for directors, if any, or if the vacant office was held by a director elected by a class, chapter or other organizational unit, or by region or other geographic grouping, by the members of that class, chapter, unit, or grouping;

(2) By the board of directors; or

(3) If the directors remaining in the office constitute fewer than a quorum of the board, by the affirmative vote of a majority of all the directors, or by the sole director, remaining in office.

(b) Unless the articles of incorporation or bylaws provide otherwise, if a vacant office was held by an appointed director, only the person who appointed the director may fill the vacancy.

(c) If a vacant office was held by a designated director, the vacancy shall be filled only as provided in the articles of incorporation or bylaws.

(d) A vacancy that will occur at a specific later date (by reason of a resignation effective at a later date under G.S. 55A-8-07(b) or otherwise) may be filled before the vacancy occurs but the new director shall not take office until the vacancy occurs. (1955, c. 1230; 1993, c. 398, s. 1.)

CASE NOTES

Power to Appoint Director. — Board of directors of a nonprofit rural electric cooperative had the power to appoint two new directors to fill vacant positions that were added to the cooperative. Hammonds v. Lumbee River Elec. Mbrshp. Corp., 178 N.C. App. 1, 631 S.E.2d 1, 2006 N.C. App. LEXIS 1301 (2006).

§ 55A-8-12. Compensation of directors.

Unless the articles of incorporation provide otherwise, a board of directors may fix the compensation of directors. (1985 (Reg. Sess., 1986), c. 801, s. 26; 1993, c. 398, s. 1.)

§§ 55A-8-13 through 55A-8-19: Reserved for future codification purposes.

Part 2. Meetings and Action of the Board.

§ 55A-8-20. Regular and special meetings.

(a) The board of directors may hold regular or special meetings in or out of this State.

(b) Unless the articles of incorporation or bylaws provide otherwise, the board of directors may permit any or all directors to participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting. (1955, c. 1230; 1973, c. 314, s. 3; 1985 (Reg. Sess., 1986), c. 801, ss. 24, 25; 1993, c. 398, s. 1.)

§ 55A-8-21. Action without meeting.

(a) Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by this Chapter to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action shall be evidenced by one or more written consents signed by each director before or after such action, describing the action taken, and included in the minutes or filed with the corporate records reflecting the action taken. To the extent the corporation has agreed pursuant to G.S. 55A-1-70, a director's consent to action taken without meeting may be in electronic form and delivered by electronic means.

(b) Action taken under this section is effective when the last director signs the consent, unless the consent specifies a different effective date.

(c) A consent signed under this section has the effect of a meeting vote and may be described as such in any document. (1973, c. 314, s. 3; 1993, c. 398, s. 1; 2008-37, s. 7.)

Effect of Amendments. — Session Laws 2008-37, s. 7, effective October 1, 2008, added the last sentence in subsection (a).

§ 55A-8-22. Notice of meetings.

(a) Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting.

(b) Special meetings of the board of directors shall be held upon such notice as is provided in the articles of incorporation or bylaws, or in the absence of any such provision, upon notice sent by any usual means of communication not less than five days before the meeting. The notice need not describe the purpose of the special meeting unless required by: (i) this Chapter, (ii) the articles of incorporation, or (iii) the bylaws.

(c) Unless the articles of incorporation or bylaws provide otherwise, the presiding officer of the board, the president or twenty percent (20%) of the directors then in office may call and give notice of a meeting of the board. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, ss. 24, 25; 1993, c. 398, s. 1.)

§ 55A-8-23. Waiver of notice.

(a) A director may waive any notice required by this Chapter, the articles of incorporation, or bylaws before or after the date and time stated in the notice. Except as provided by subsection (b) of this section, the waiver shall be in writing, signed by the director entitled to the notice, and filed with the minutes or corporate records.

(b) A director's attendance at or participation in a meeting waives any required notice to him of the meeting unless the director at the beginning of the meeting (or promptly upon his arrival) objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, ss. 24, 25; 1993, c. 398, s. 1; 1995, c. 509, s. 29.)

§ 55A-8-24. Quorum and voting.

(a) Except as otherwise provided in: (i) this Chapter, (ii) the articles of incorporation, or (iii) the bylaws, a quorum of a board of directors consists of a majority of the directors in office immediately before a meeting begins. In no event may the articles of incorporation or bylaws authorize a quorum of fewer than one-third of the number of directors in office.

(b) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board unless: (i) this Chapter, (ii) the articles of incorporation, or (iii) the bylaws require the vote of a greater number of directors.

(c) A director who is present at a meeting of the board of directors or a committee of the board of directors when corporate action is taken is deemed to have assented to the action taken unless:

(1) He objects at the beginning of the meeting (or promptly upon his arrival) to holding it or transacting business at the meeting;

(2) His dissent or abstention from the action taken is entered in the minutes of the meeting; or

(3) He files written notice of his dissent or abstention with the presiding officer of the meeting before its adjournment or with the corporation immediately after adjournment of the meeting. The right of dissent or abstention is not available to a director who votes in favor of the action taken. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 33; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section is generally based on G.S. 55-8-24; however, unlike G.S. 55-8-24 and former G.S. 55A-22, but like Section 8.24 of the Model Act, it defines a quorum in terms of the number of directors in office instead of the number of directors authorized.

§ 55A-8-25. Committees of the board.

(a) Unless the articles of incorporation or bylaws provide otherwise, a board of directors may create one or more committees of the board and appoint members of the board to serve on them. Each committee shall have two or more members, who serve at the pleasure of the board.

(b) The creation of a committee and appointment of members to it shall be approved by the greater of:

(1) A majority of all the directors in office when the action is taken; or

(2) The number of directors required by the articles of incorporation or bylaws to take action under G.S. 55A-8-24.

(c) G.S. 55A-8-20 through G.S. 55A-8-24, which govern meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board, apply to committees of the board and their members as well.

(d) To the extent specified by the board of directors or in the articles of incorporation or bylaws, each committee of the board may exercise the board's authority under G.S. 55A-8-01.

(e) A committee of the board shall not, however:

(1) Authorize distributions;

(2) Recommend to members or approve dissolution, merger or the sale, pledge, or transfer of all or substantially all of the corporation's assets;

(3) Elect, appoint or remove directors, or fill vacancies on the board of directors or on any of its committees; or

(4) Adopt, amend, or repeal the articles of incorporation or bylaws.

(f) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in G.S. 55A-8-30. (1955, c. 1230; 1969, c. 875, s. 5; 1985 (Reg. Sess., 1986), c. 801, ss. 22, 23; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Subsection (e), unlike former G.S. 55A-23(a)(5), does not prohibit a committee from fixing the compensation of directors.

§§ 55A-8-26 through 55A-8-29: Reserved for future codification purposes.

Part 3. Standards of Conduct.

§ 55A-8-30. General standards for directors.

(a) A director shall discharge his duties as a director, including his duties as a member of a committee:

(1) In good faith;

(2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) In a manner the director reasonably believes to be in the best interests of the corporation.

(b) In discharging his duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(2) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within their professional or expert competence; or

(3) A committee of the board of which he is not a member if the director reasonably believes the committee merits confidence.

(c) A director is not entitled to the benefit of subsection (b) of this section if he has actual knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) of this section unwarranted.

(d) A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section.

(e) A director's personal liability for monetary damages for breach of a duty as a director may be limited or eliminated only to the extent provided in G.S. 55A-8-60 or permitted in G.S. 55A- 2-02(b)(4), and a director may be entitled to indemnification against liability and expenses pursuant to Part 5 of Article 8 of this Chapter.

(f) A director shall not be deemed to be a trustee with respect to the corporation or with respect to any property held or administered by the corporation, including without limit, property that may be subject to restrictions imposed by the donor or transferor of such property. (1985 (Reg. Sess., 1986), c. 801, s. 29; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Although the word "fiduciary" is no longer used in describing the duty owed by a director, there is no intent to change North Carolina law in this area. See North Carolina Commentary to G.S. 55-8-30.

The Model Act counterpart of this section contains a provision in subsection (b) explicitly allowing reliance on ministers, priests and other religious authorities in the case of religious corporations. That provision was rejected as unnecessary because the subject is adequately covered by subdivision (b)(2).

Subsection (f) should not be inconsistent with the fiduciary duties prescribed by the Uniform Management of Institutional Funds Act in view of the Commentary to G.S. 36B-6, which states that the standard of care and prudence established by that section is generally comparable to that of a director of a business corporation rather than that of a private trustee; but in the event of any inconsistency, the provisions of the Uniform Act will control, as provided in G.S. 36B-8.

§ 55A-8-31. Director conflict of interest.

(a) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true:

(1) The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board and the board or committee authorized, approved, or ratified the transaction;

(2) The material facts of the transaction and the director's interest were disclosed or known to the members entitled to vote and they authorized, approved, or ratified the transaction; or

(3) The transaction was fair to the corporation.

(b) For purposes of this section, a director of the corporation has an indirect interest in a transaction if:

(1) Another entity in which he has a material financial interest or in which he is a general partner is a party to the transaction; or

(2) Another entity of which he is a director, officer, or trustee is a party to the transaction and the transaction is or should be considered by the board of directors of the corporation.

(c) For purposes of subdivision (a)(1) of this section, a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors (or on the committee) who have no direct or indirect interest in the transaction, but a transaction shall not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken under subdivision (a)(1) of this section if the transaction is otherwise authorized, approved, or ratified as provided in that subdivision.

(d) For purposes of subdivision (a)(2) of this section, a conflict of interest transaction is authorized, approved, or ratified by the members if it receives a majority of the votes entitled to be counted under this subsection. Votes cast by or voted under the control of a director who has a direct or indirect interest in the transaction, and votes cast by or voted under the control of an entity described in subdivision (b)(1) of this section, shall not be counted in a vote of members to determine whether to authorize, approve, or ratify a conflict of interest transaction under subdivision (a)(2) of this section. The vote of these members, however, is counted in determining whether the transaction is approved under other sections of this Chapter. A majority of the votes, whether or not present, that are entitled to be cast in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

(e) The articles of incorporation, bylaws, or a resolution of the board may impose additional requirements on conflict of interest transactions. (1985 (Reg. Sess., 1986), c. 801, s. 26; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section generally conforms to G.S. 55-8-31, except that subsection (e), which states an obvious proposition, was brought forward from the Model Act solely to avoid any contrary implication that might be created by its omission.

OPINIONS OF ATTORNEY GENERAL

The statute applied to a process whereby a regional medical center made a grant to a nonprofit corporation, where one member of the board of trustees of the regional medical center was a member of the board of directors of the nonprofit corporation and another was executive director of the nonprofit corporation. See opinion of Attorney General to A. Dumay Gorham, Jr., Marshall, Williams & Gorham, L.L.P., 1999 N.C. AG LEXIS 42 (9/1/99).

§ 55A-8-32. Loans to or guaranties for directors and officers.

No loan, guaranty, or other form of security shall be made or provided by a corporation to or for the benefit of its directors or officers, except that loans, guaranties, or other forms of security may be made to full-time employees of the corporation who are also directors or officers by action of its board of directors in accordance with G.S. 55A-8-31(a)(1). (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 17; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section brings forward former G.S. 55A-18, with a conforming reference to the conflict of interest section.

§ 55A-8-33. Liability for unlawful loans or distributions.

(a) The liabilities imposed by this section are in addition to any other liabilities imposed by law upon directors of a corporation.

(b) A director who votes for or assents to the making of a loan or guaranty or other form of security is personally liable to the corporation for the repayment or return of the money or value loaned, with interest thereon at the legal rate until paid, or for any liability of the corporation upon the guaranty, if it is established that he did not perform his duties in compliance with G.S. 55A-8-30 or that the loan or guaranty was made in violation of G.S. 55A-8-32.

(c) A director who votes for or assents to a distribution made in violation of Article 13 of this Chapter, Article 14 of this Chapter, or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating Article 13 of this Chapter, Article 14 of this Chapter, or the articles of incorporation if it is established that he did not perform his duties in compliance with G.S. 55A-8-30. In any proceeding commenced under this section, a director has all of the defenses ordinarily available to a director.

(d) A director held liable under subsection (b) or (c) of this section is entitled to:

(1) Contribution from every other director who could be held liable under subsection (b) or (c) of this section for the unlawful loan or distribution; and

(2) Reimbursement from each person for the amount he accepted knowing the unlawful loan or distribution was made in violation of G.S. 55A-8-32, Article 13 of this Chapter, or Article 14 of this Chapter, or the articles of incorporation.

(e) No action shall be brought against the directors for liability under this section after three years from the time when the cause of action was discovered or ought to have been discovered. (1985 (Reg. Sess., 1986), c. 801, s. 33; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section is an adaptation of former G.S. 55A-28.1, except that subsection (j) of that former section, which allowed creditors to enforce the statutory liabilities of the section in direct actions against directors, was not brought forward because a comparable provision in former G.S. 55-32(1) was not brought forward into the present Chapter 55. See the last paragraph of the North Carolina Commentary to G.S. 55-14-08.

§§ 55A-8-34 through 55A-8-39: Reserved for future codification purposes.

Part 4. Officers.

§ 55A-8-40. Officers.

(a) A corporation has the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws.

(b) A duly appointed officer may appoint one or more officers or assistant officers if authorized by the bylaws or the board of directors.

(c) The secretary or any assistant secretary or any one or more other officers designated by the bylaws or the board of directors shall have the responsibility and authority to maintain and authenticate the records of the corporation.

(d) The same individual may simultaneously hold more than one office in a corporation, but no individual may act in more than one capacity where action of two or more officers is required.

(e) Whenever a specific office is referred to in this Chapter, it shall be deemed to include any person who, individually or collectively with one or more other persons, holds or occupies such office. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 28; 1993, c. 398, s. 1.)

§ 55A-8-41. Duties of officers.

Each officer has the authority and duties set forth in the bylaws or, to the extent consistent with the bylaws, the authority and duties prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the authority and duties of other officers. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 28; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section does not bring forward former G.S. 55A-25(c), which gave the chief executive officer authority to institute or defend legal proceedings when the directors were deadlocked. See the last paragraph of the North Carolina Commentary to G.S. 55-8-41.

Former G.S. 55A-26.2, which related to the authority of officers to execute corporate documents, was not brought forward because the substance of that section is covered by G.S. 47-18.3, G.S. 47-41.01, G.S. 47-41.02 and general principles of agency law.

§ 55A-8-42. Standards of conduct for officers.

(a) An officer with discretionary authority shall discharge his duties under that authority:

(1) In good faith;

(2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) In a manner the officer reasonably believes to be in the best interests of the corporation.

(b) In discharging his duties, an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) One or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented; or

(2) Legal counsel, public accountants, or other persons as to matters the officer reasonably believes are within the person's professional or expert competence.

(c) An officer is not entitled to the benefit of subsection (b) of this section if the officer has actual knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) of this section unwarranted.

(d) An officer is not liable for any action taken as an officer, or any failure to take any action, if the officer performed the duties of his office in compliance with this section.

(e) An officer may be entitled to immunity under Part 6 of Article 8 of this Chapter or to indemnification against liability and expenses pursuant to Part 5 of Article 8 of this Chapter. (1985 (Reg. Sess., 1986), c. 801, s. 29; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

The Model Act counterpart of this section contains a provision in subsection (b) explicitly allowing reliance on ministers, priests and other religious authorities in the case of religious corporations. That provision was rejected as unnecessary because the subject is adequately covered by subdivision (b)(2).

§ 55A-8-43. Resignation and removal of officers.

(a) An officer may resign at any time by communicating his resignation to the corporation. A resignation is effective when it is communicated unless it specifies in writing a later effective date. If a resignation is made effective at a later date and the corporation accepts the future effective date, its board of directors may fill the pending vacancy before the effective date if the board of directors provides that the successor does not take office until the effective date.

(b) A board of directors may remove any officer at any time with or without cause. (1955, c. 1230; 1993, c. 398, s. 1.)

§ 55A-8-44. Contract rights of officers.

(a) The appointment of an officer does not itself create contract rights.

(b) An officer's removal does not affect the officer's contract rights, if any, with the corporation. An officer's resignation does not affect the corporation's contract rights, if any, with the officer. (1955, c. 1230; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section makes clear that the appointment of an officer does not itself create contract rights in the officer. The removal of an officer with contract rights is without prejudice to his later enforcement of contract rights in a suit for damages for breach of contract. See the Official Comment to G.S. 55-8-43. Similarly, an officer with an employment contract who prematurely resigns may be in breach of his employment contract. The mere appointment of an officer for a term does not create a contractual obligation on his part to complete the term.

§§ 55A-8-45 through 55A-8-49: Reserved for future codification purposes.

Part 5. Indemnification.

§ 55A-8-50. Policy statement and definitions.

(a) It is the public policy of this State to enable corporations organized under this Chapter to attract and maintain responsible, qualified directors, officers, employees, and agents, and, to that end, to permit corporations organized under this Chapter to allocate the risk of personal liability of directors, officers, employees, and agents through indemnification and insurance as authorized in this Part.

(b) Definitions in this Part:

(1) "Corporation" includes any domestic or foreign corporation absorbed in a merger which, if its separate existence had continued, would have had the obligation or power to indemnify its directors, officers, employees, or agents, so that a person who would have been entitled to receive or request indemnification from such corporation if its separate existence had continued shall stand in the same position under this Part with respect to the surviving corporation.

(2) "Director" means an individual who is or was a director of a corporation or an individual who, while a director of a corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee, or agent of another foreign or domestic business or nonprofit corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise. A director is considered to be serving an employee benefit plan at the corporation's request if the director's duties to the corporation also impose duties on, or otherwise involve services by, the director to the plan or to participants in or beneficiaries of the plan. "Director" includes, unless the context requires otherwise, the estate or personal representative of a director.

(3) "Expenses" means expenses of every kind incurred in defending a proceeding, including counsel fees.

(4) "Liability" means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or reasonable expenses actually incurred with respect to a proceeding.

(5) "Officer," "employee," or "agent" includes, unless the context requires otherwise, the estate or personal representative of a person who acted in that capacity.

(6) "Official capacity" means: (i) when used with respect to a director, the office of director in a corporation; and (ii) when used with respect to an individual other than a director, as contemplated in G.S. 55A-8-56, the office in a corporation held by the officer or the employment or agency relationship undertaken by the employee or agent on behalf of the corporation. "Official capacity" does not include service for any other foreign or domestic business or nonprofit corporation or any partnership, joint venture, trust, employee benefit plan, or other enterprise.

(7) "Party" includes an individual who was, is, or is threatened to be made a named defendant or respondent in a proceeding.

(8) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding whether civil, criminal, administrative, or investigative and whether formal or informal. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Subsection (a) of this section is the same as its counterpart in Chapter 55 and is intended to reinforce the broad nonstatutory indemnification permitted by G.S. 55A-8-57.

The definition of "corporation" in subdivision (b)(1) is intended to provide that only a surviving corporation in a statutory merger, and not an acquiring corporation in an asset acquisition, will have successor liability for indemnification. The surviving corporation in a statutory merger has both the obligation and the power to indemnify to the same extent as the merging corporation. G.S. 55-8-50(b)(1) was amended in 1993 to accomplish the same purposes. See N.C. Sess. Laws 1993, c. 552, s. 12.

§ 55A-8-51. Authority to indemnify.

(a) Except as provided in subsection (d) of this section, a corporation may indemnify an individual made a party to a proceeding because the individual is or was a director against liability incurred in the proceeding if the individual:

(1) Conducted himself in good faith;

(2) Reasonably believed (i) in the case of conduct in his official capacity with the corporation, that his conduct was in its best interests; and (ii) in all other cases, that his conduct was at least not opposed to its best interests; and

(3) In the case of any criminal proceeding, had no reasonable cause to believe his conduct was unlawful.

(b) A director's conduct with respect to an employee benefit plan for a purpose the director reasonably believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of clause (ii) of subdivision (a)(2) of this section.

(c) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of no contest or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.

(d) A corporation shall not indemnify a director under this section:

(1) In connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

(2) In connection with any other proceeding charging improper personal benefit to the director, whether or not involving action in his official capacity, in which the director was adjudged liable on the basis that personal benefit was improperly received by the director.

(e) Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation that is concluded without a final adjudication on the issue of liability is limited to reasonable expenses incurred in connection with the proceeding.

(f) The authorization, approval, or favorable recommendation by the board of directors of a corporation of indemnification, as permitted by this section, shall not be deemed an act or corporate transaction in which a director has a conflict of interest, and no such indemnification shall be void or voidable on such ground. (1977, c. 236, s. 2; 1985 (Reg. Sess., 1986), c. 801, ss. 15, 16; 1993, c. 398, s. 1.)

Legal Periodicals. — For survey of 1977 law on business associations, see 56 N.C.L. Rev. 939 (1977).

For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

For article, "Corporate Director and Officer Indemnification: Alternative Methods for Funding," see 24 Wake Forest L. Rev. 53 (1989).

§ 55A-8-52. Mandatory indemnification.

Unless limited by its articles of incorporation, a corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceedings to which the director was a party because he is or was a director of the corporation against reasonable expenses actually incurred by the director in connection with the proceeding. (1977, c. 236, s. 2; 1993, c. 398, s. 1.)

§ 55A-8-53. Advance for expenses.

Expenses incurred by a director in defending a proceeding may be paid by the corporation in advance of the final disposition of such proceeding as authorized by the board of directors in the specific case or as authorized or required under any provision in the articles of incorporation or bylaws or by any applicable resolution or contract upon receipt of an undertaking by or on behalf of the director to repay such amount unless it shall ultimately be determined that the director is entitled to be indemnified by the corporation against such expenses. (1977, c. 236, s. 2; 1985 (Reg. Sess., 1986), c. 801, ss. 15, 16; 1993, c. 398, s. 1.)

Legal Periodicals. — For survey of 1977 law on business associations, see 56 N.C.L. Rev. 939 (1977).

For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

For article, "Corporate Director and Officer Indemnification: Alternative Methods for Funding," see 24 Wake Forest L. Rev. 53 (1989).

§ 55A-8-54. Court-ordered indemnification.

Unless a corporation's articles of incorporation provide otherwise, a director of the corporation who is a party to a proceeding may apply for indemnification to the court conducting the proceeding or to another court of competent jurisdiction. On receipt of an application, the court, after giving any notice the court considers necessary, may order indemnification if it determines:

(1) The director is entitled to mandatory indemnification under G.S. 55A-8-52, in which case the court shall also order the corporation to pay the director's reasonable expenses incurred to obtain court-ordered indemnification; or

(2) The director is fairly and reasonably entitled to indemnification, in whole or in part, in view of all the relevant circumstances, whether or not the director met the standard of conduct set forth in G.S. 55A-8-51 or was adjudged liable as described in G.S. 55A-8-51(d), but if the director was adjudged so liable, such indemnification is limited to reasonable expenses incurred. (1977, c. 236, s. 2; 1993, c. 398, s. 1.)

§ 55A-8-55. Determination and authorization of indemnification.

(a) A corporation shall not indemnify a director under G.S. 55A-8-51 unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because the director has met the standard of conduct set forth in G.S. 55A-8-51.

(b) The determination shall be made:

(1) By the board of directors by majority vote of a quorum consisting of directors not at the time parties to the proceeding;

(2) If a quorum cannot be obtained under subdivision (1) of this subsection, by a majority vote of a committee duly designated by the board of directors (in which designation directors who are parties may participate), consisting solely of two or more directors not at the time parties to the proceeding;

(3) By special legal counsel (i) selected by the board of directors or its committee in the manner prescribed in subdivision (1) or (2) of this subsection; or (ii) if a quorum of the board cannot be obtained under subdivision (1) of this subsection and a committee cannot be designated under subdivision (2) of this subsection, selected by majority vote of the full board (in which selection directors who are parties may participate); or

(4) By the members, but directors who are at the time parties to the proceeding shall not vote on the determination.

(c) Authorization of indemnification and evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if the determination is made by special legal counsel, authorization of indemnification and evaluation as to reasonableness of expenses shall be made by those entitled under subdivision (b)(3) of this section to select counsel. (1977, c. 236, s. 2; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

G.S. 55A-16-21 requires the corporation to give members notice of indemnification or the advance of expenses in any direct or derivative action by or on behalf of the corporation.

§ 55A-8-56. Indemnification of officers, employees, and agents.

Unless a corporation's articles of incorporation provide otherwise:

(1) An officer of the corporation is entitled to mandatory indemnification under G.S. 55A-8-52, and is entitled to apply for court-ordered indemnification under G.S. 55A-8-54, in each case to the same extent as a director;

(2) The corporation may indemnify and advance expenses under this Part to an officer, employee, or agent of the corporation to the same extent as to a director; and

(3) A corporation may also indemnify and advance expenses to an officer, employee, or agent to the extent, consistent with public policy, that may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract. (1977, c. 236, s. 2; 1993, c. 398, s. 1.)

§ 55A-8-57. Additional indemnification and insurance.

(a) In addition to and separate and apart from the indemnification provided for in G.S. 55A-8-51, 55A-8-52, 55A-8-54, 55A-8-55, and 55A-8-56, a corporation may in its articles of incorporation or bylaws or by contract or resolution indemnify or agree to indemnify any one or more of its directors, officers, employees, or agents against liability and expenses in any proceeding (including without limitation a proceeding brought by or on behalf of the corporation itself) arising out of their status as such or their activities in any of the foregoing capacities; provided, however, that a corporation shall not indemnify or agree to indemnify a person against liability or expenses the person may incur on account of his activities which were at the time taken, known, or believed by the person to be clearly in conflict with the best interests of the corporation or if the person received an improper personal benefit. A corporation may likewise and to the same extent indemnify or agree to indemnify any person who, at the request of the corporation, is or was serving as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, or other enterprise or as a trustee or administrator under an employee benefit plan. Any provision in any articles of incorporation, bylaw, contract, or resolution permitted under this section may include provisions for recovery from the corporation of reasonable costs, expenses, and attorneys' fees in connection with the enforcement of rights to indemnification granted therein and may further include provisions establishing reasonable procedures for determining and enforcing the rights granted therein.

(b) A corporation may purchase and maintain insurance on behalf of an individual who is or was a director, officer, employee, or agent of the corporation, or who, while a director, officer, employee, or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise, against liability asserted against or incurred by him in that capacity or arising from his status as a director, officer, employee, or agent, whether or not the corporation would have power to indemnify him against the same liability under any provision of this Chapter. (1977, c. 236, s. 2; 1985 (Reg. Sess., 1986), c. 801, ss. 15, 16; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Subject to one exception, subsections (a) and (b) of this section are the same as subsections (a) and (c) of G.S. 55-8-57, based on the theory that the nonstatutory indemnification available to nonprofit corporations under this section should generally be no more restrictive than that available to business corporations. The single exception is that subsection (a) of this section, unlike its counterpart in Chapter 55, prohibits a nonprofit corporation from indemnifying a person "if the person received an improper personal benefit"; the theory being that the nature of a nonprofit corporation makes this additional limitation appropriate. This section also does not contain a counterpart to subsection (b) of G.S. 55-8-57, on the theory that the conflict of interest provisions in G.S. 55A-8-31 should apply to all forms of nonstatutory indemnification under G.S. 55A-8-57, regardless of the nature or constituency of the nonprofit corporation and regardless of whether the indemnification is retroactive or prospective.

Legal Periodicals. — For survey of 1977 law on business associations, see 56 N.C.L. Rev. 939 (1977).

For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

For article, "Corporate Director and Officer Indemnification: Alternative Methods for Funding," see 24 Wake Forest L. Rev. 53 (1989).

§ 55A-8-58. Application of Part.

(a) If articles of incorporation limit indemnification or advance for expenses, indemnification and advance for expenses are valid only to the extent consistent with the articles of incorporation.

(b) This Part does not limit a corporation's power to pay or reimburse expenses incurred by a director in connection with appearing as a witness in a proceeding at a time when the director has not been made a named defendant or respondent to the proceeding. (1993, c. 398, s. 1.)

§ 55A-8-59: Reserved for future codification purposes.

Part 6. Immunity.

§ 55A-8-60. Immunity.

(a) In addition to the immunity that is authorized in G.S. 55A-2-02(b)(4), a person serving as a director or officer of a nonprofit corporation shall be immune individually from civil liability for monetary damages, except to the extent covered by insurance, for any act or failure to act arising out of this service, except where the person:

(1) Is compensated for his services beyond reimbursement for expenses;
(2) Was not acting within the scope of his official duties;
(3) Was not acting in good faith;
(4) Committed gross negligence or willful or wanton misconduct that resulted in the damage or injury;
(5) Derived an improper personal financial benefit from the transaction;
(6) Incurred the liability from the operation of a motor vehicle; or

(7) Is a defendant in an action brought under G.S. 55A-8-33.
The immunity in this subsection may be limited or eliminated by a provision in the articles of incorporation, but only with respect to acts or omissions occurring on or after the effective date of such provision.

(b) The immunity in subsection (a) of this section is personal to the directors and officers, and does not immunize the corporation against liability for the acts or omissions of the directors or officers.

(c) Without diminishing the applicability of any other provisions of this Chapter, "nonprofit corporation" as referred to in this section shall include any credit union chartered under the laws of this State, the laws of any other state, or under the laws of the United States. (1987, c. 799, s. 3; 1989, c. 472; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section brings forward former G.S. 55A-28.1, except that immunity otherwise available under this section is now also available in a derivative action brought under G.S. 55A-7-40.

The articles of incorporation may provide additional immunity to any director, subject to the limitations contained in G.S. 55A-2-02(b)(4). Immunity may also be available under G.S. 1-539.10.

Cross References. — As to immunity from civil liability for volunteers, see G.S. 1-539.10.

ARTICLE 9.

[Reserved].

ARTICLE 10.

Amendment of Articles of Incorporation and Bylaws.

Part 1. Amendment of Articles of Incorporation.

§ 55A-10-01. Authority to amend.

(a) A corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles of incorporation or to delete a provision not required in the articles of incorporation. Whether a provision is required or permitted in the articles of incorporation is determined as of the effective date of the amendment.

(b) A member of the corporation does not have a vested property right resulting from any provision in the articles of incorporation, including provisions relating to management, control, distribution entitlement, or purpose or duration of the corporation. (1955, c. 1230; 1993, c. 398, s. 1.)

§ 55A-10-02. Amendment by board of directors.

(a) Unless the articles of incorporation provide otherwise, a corporation's board of directors may adopt one or more amendments to the corporation's articles of incorporation without member approval:

(1) To delete the names and addresses of the initial directors;

(2) To delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the Secretary of State;

(3) To change the corporate name by substituting the word "corporation", "incorporated", "company", "limited", or the abbreviation "corp.", "inc.", "co.", or "ltd.", for a similar word or abbreviation in the name, or by adding, deleting or changing a geographical attribution to the name; or

(4) To make any other change expressly permitted by this Chapter to be made by director action.

(b) If a corporation has no members entitled to vote thereon, its incorporators, until directors have been chosen, and thereafter its board of directors, may adopt one or more amendments to the corporation's articles of incorporation subject to any approval required pursuant to G.S. 55A-10-30. The corporation shall provide at least five days' written notice of any meeting at which an amendment is to be voted upon. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider a proposed amendment to the articles of incorporation and contain or be accompanied by a copy or summary of the amendment or state the general nature of the amendment. The amendment shall be approved by a majority of the directors in office at the time the amendment is adopted. (1955, c. 1230; 1981, c. 372; 1985 (Reg. Sess., 1986), c. 801, ss. 36, 37; 1993, c. 398, s. 1.)

§ 55A-10-03. Amendment by directors and members.

(a) If the corporation has members entitled to vote thereon, then, unless this Chapter, the articles of incorporation, bylaws, the members (acting pursuant to subsection (b) of this section), or the board of directors (acting pursuant to subsection (c) of this section) require a greater vote or voting by class, an amendment to a corporation's articles of incorporation to be adopted shall be approved:

(1) By the board or in lieu thereof in writing by the number or proportion of members entitled under G.S. 55A-7-02(a)(2) to call a special meeting to consider such amendment;

(2) By the members entitled to vote thereon by two-thirds of the votes cast or a majority of the votes entitled to be cast on the amendment, whichever is less; and

(3) In writing by any person or persons whose approval is required by a provision of the articles of incorporation authorized by G.S. 55A-10-30.

(b) The members entitled to vote thereon may condition the amendment's adoption on receipt of a higher percentage of affirmative votes or on any other basis.

(c) If the board initiates an amendment to the articles of incorporation or board approval is required by subsection (a) of this section to adopt an amendment to the articles of incorporation, the board may condition the amendment's adoption on receipt of a higher percentage of affirmative votes or any other basis.

(d) If the board or the members seek to have the amendment approved by the members entitled to vote thereon at a membership meeting, the corporation shall give notice of the membership meeting to those members in accordance with G.S. 55A-7-05. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment.

(e) If the board or the members seek to have the amendment approved by the members entitled to vote thereon by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the amendment. (1955, c. 1230; 1981, c. 372; 1985 (Reg. Sess., 1986), c. 801, ss. 36, 37; 1993, c. 398, s. 1; 1995, c. 400, s. 4.)

NORTH CAROLINA COMMENTARY

This section does not apply unless the corporation has members entitled to vote on amendments to its articles of incorporation. Subdivision (a)(1) carries forward former G.S. 55A-35(a)(1) by authorizing amendments without the board's approval where members have acted pursuant to G.S. 55A-7-02(a)(2) to call a special meeting of the membership. Subdivision (a)(2) differs from former G.S. 55A-35(a)(1) in that approval by a majority of the votes entitled to be cast is required. Subdivision (a)(3) and subsections (b) and (c) had no counterpart in the prior law.

§ 55A-10-04. Class voting by members on amendments.

(a) The members of a class in a charitable or religious corporation are entitled to vote as a class on a proposed amendment to the articles of incorporation if the amendment would affect the rights of that class as to voting in a manner that is different from the manner in which the amendment would affect another class.

(b) The members of a class in a corporation other than a charitable or religious corporation are entitled to vote as a class on a proposed amendment to the articles of incorporation if the amendment would:

(1) Affect the rights, privileges, preferences, restrictions, or conditions of that class as to voting, dissolution, redemption, or transfer of memberships in a manner that is different from the manner in which the amendment would affect another class;
(2) Affect the rights, privileges, preferences, restrictions, or conditions of that class as to voting, dissolution, redemption, or transfer of memberships by changing the rights, privileges, preferences, restrictions, or conditions of another class;
(3) Increase or decrease the number of memberships authorized for that class;
(4) Increase the number of memberships authorized for another class;
(5) Effect an exchange, reclassification, or termination of the memberships of that class; or
(6) Authorize a new class of memberships.

(c) If a class is to be divided into two or more classes as a result of an amendment to the articles of incorporation, the amendment shall be approved by the members of each class that would be created by the amendment.

(d) If a class vote is required to approve an amendment to the articles of incorporation of a corporation, the amendment shall be approved by the members of the class by two-thirds of the votes cast by the class or a majority of the votes entitled to be cast by the class on the amendment, whichever is less.

(e) A class of members is entitled to the voting rights granted by this section although the articles of incorporation and bylaws provide that the class shall not vote on the proposed amendment. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Former Chapter 55A did not contain class voting requirements such as those set forth in this section.

§ 55A-10-05. Articles of amendment.

A corporation amending its articles of incorporation shall deliver to the Secretary of State for filing articles of amendment setting forth:

(1) The name of the corporation;
(2) The text of each amendment adopted;
(3) The date of each amendment's adoption;
(4) If approval of members was not required, a statement to that effect and a brief explanation of why member action was not required, and a statement that the amendment was approved by a sufficient vote of the board of directors or incorporators;
(5) If approval by members was required, a statement that member approval was obtained as required by this Chapter;
(6) If approval of the amendment by some person or persons other than the members, the board, or the incorporators is required pursuant to G.S. 55A-10-30, a statement that the approval was obtained. (1955, c. 1230; 1993, c. 398, s. 1.)

§ 55A-10-06. Restated articles of incorporation.

(a) A corporation's board of directors may restate its articles of incorporation at any time with or without approval by members or any other person.

(b) The restated articles of incorporation may include one or more amendments to the articles of incorporation. If the restated articles of incorporation include an amendment requiring approval by the members or any other person, it shall be adopted as provided in G.S. 55A-10-03.

(c) If the board of directors submits restated articles of incorporation for member action, the corporation shall notify in writing each member entitled to vote on the proposed amendment of the membership meeting in accordance with G.S. 55A-7-05. The notice shall (i) state that the purpose, or one of the purposes, of the meeting is to consider the proposed restated articles of incorporation, (ii) contain or be accompanied by a copy of the proposed restated articles of incorporation, and (iii) identify any amendment or other change they would make in the articles of incorporation.

(d) If the restated articles of incorporation include an amendment requiring approval pursuant to G.S. 55A-10-30, the board of directors shall submit the restated articles of incorporation for such approval.

(e) A corporation restating its articles of incorporation shall deliver to the Secretary of State for filing articles of restatement which shall:

(1) Set forth the name of the corporation;
(2) Attach as an exhibit thereto the text of the restated articles of incorporation;
(3) State whether the restated articles of incorporation contain an amendment to the articles of incorporation requiring member approval and, if they do not, that the board of directors adopted the restated articles of incorporation;
(4) If the restated articles of incorporation contain an amendment to the articles of incorporation requiring member approval, state that member approval was obtained as required by this Chapter; and
(5) If the restated articles of incorporation contain an amendment to the articles of incorporation requiring approval by a person whose approval is required pursuant to G.S. 55A-10-30, state that such approval was obtained.

(f) Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments to them.

(g) The Secretary of State may certify restated articles of incorporation, as the articles of incorporation currently in effect, without including the other information required by subsection (e) of this section. (1965, c. 762; 1993, c. 398, s. 1.)

§ 55A-10-07. Effect of amendment.

An amendment to articles of incorporation does not affect a cause of action existing against or in favor of the corporation, a proceeding to which the corporation is a party, any requirement or limitation imposed upon the corporation or any property held by it by virtue of any restriction or condition upon which such property is held by the corporation or the existing rights of persons other than members of the corporation. An amendment changing a corporation's name does not abate a proceeding brought by or against the corporation in its former name. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 38; 1993, c. 398, s. 1.)

§§ 55A-10-08 through 55A-10-19: Reserved for future codification purposes.

Part 2. Bylaws.

§ 55A-10-20. Amendment by directors.

If a corporation has no members entitled to vote thereon, its incorporators, until directors have been chosen, and thereafter its board of directors, may adopt one or more amendments to the corporation's bylaws subject to any approval required pursuant to G.S. 55A-10-30. The corporation shall provide at least five days' written notice of any meeting of directors at which an amendment is to be voted upon. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider a proposed amendment to the bylaws and contain or be accompanied by a copy or summary of the amendment or state the general nature of the amendment. The amendment shall be approved by a majority of the directors in office at the time the amendment is adopted. (1955, c. 1230; 1993, c. 398, s. 1.)

§ 55A-10-21. Amendment by directors and members.

(a) If the corporation has members entitled to vote thereon, then, unless this Chapter, the articles of incorporation, bylaws, the members (acting pursuant to subsection (b) of this section), or the board of directors (acting pursuant to subsection (c) of this section) require a greater vote or voting by class, an amendment to a corporation's bylaws to be adopted shall be approved:

(1) By the board or in lieu thereof in writing by the number or proportion of members entitled under G.S. 55A-7-02(a) (2) to call a special meeting to consider such amendment;

(2) By the members entitled to vote thereon by two-thirds of the votes cast or a majority of the votes entitled to be cast on the amendment, whichever is less; and

(3) In writing by any person or persons whose approval is required by a provision of the articles of incorporation authorized by G.S. 55A-10-30.

(b) The members entitled to vote thereon may condition the amendment's adoption on its receipt of a higher percentage of affirmative votes or on any other basis.

(c) If the board initiates an amendment to the bylaws or board approval is required by subsection (a) of this section to adopt an amendment to the bylaws, the board may condition the amendment's adoption on receipt of a higher percentage of affirmative votes or on any other basis.

(d) If the board or the members seek to have the amendment approved by the members entitled to vote thereon at a membership meeting, the corporation shall give notice of the membership meeting to those members in accordance with G.S. 55A-7-05. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment.

(e) If the board or the members seek to have the amendment approved by the members entitled to vote thereon by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the amendment. (1955, c. 1230; 1993, c. 398, s. 1; 2002-27, s. 1.)

NORTH CAROLINA COMMENTARY

This section, which applies when a corporation has members entitled to vote on bylaw amendments, had no counterpart in the prior law and incorporates the procedures set forth in G.S. 55A-10-03 for amendments to the articles of incorporation.

§ 55A-10-22. Class voting by members on amendments.

(a) The members of a class in a charitable or religious corporation are entitled to vote as a class on a proposed amendment to the bylaws if the amendment would affect the rights of that class as to voting in a manner that is different from the manner in which such amendment would affect another class.

(b) The members of a class in a corporation other than a charitable or religious corporation are entitled to vote as a class on a proposed amendment to the bylaws if the amendment would:

(1) Affect the rights, privileges, preferences, restrictions, or conditions of that class as to voting, dissolution, redemption, or transfer of memberships in a manner that is different from the manner in which such amendment would affect another class;

(2) Affect the rights, privileges, preferences, restrictions, or conditions of that class as to voting, dissolution, redemption, or transfer of memberships by changing the rights, privileges, preferences, restrictions, or conditions of another class;

(3) Increase or decrease the number of memberships authorized for that class;

(4) Increase the number of memberships authorized for another class;

(5) Effect an exchange, reclassification, or termination of all or part of the memberships of that class; or

(6) Authorize a new class of memberships.

(c) If a class is to be divided into two or more classes as a result of an amendment to the bylaws, the amendment shall be approved by the members of each class that would be created by the amendment.

(d) If a class vote is required to approve an amendment to the bylaws, the amendment shall be approved by the members of the class by two-thirds of the votes cast by the class or a majority of the votes entitled to be cast by the class on the amendment, whichever is less.

(e) A class of members is entitled to the voting rights granted by this section although the articles of incorporation and bylaws provide that the class shall not vote on the proposed amendment. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Former Chapter 55A did not have class voting requirements such as those set forth in this section.

§§ 55A-10-23 through 55A-10-29: Reserved for future codification purposes.

Part 3. Articles of Incorporation and Bylaws.

§ 55A-10-30. Approval by third persons.

The articles of incorporation or bylaws may require an amendment to the articles of incorporation or bylaws to be approved in writing by a specified person or persons other than the board of directors. Such a provision in the articles of incorporation or bylaws may only be amended with the approval in writing of such person or persons. (1993, c. 398, s. 1; 1995, c. 509, s. 30.)

NORTH CAROLINA COMMENTARY

Former Chapter 55A did not expressly authorize a corporation to condition an amendment to the articles of incorporation or bylaws on approval by third persons.

ARTICLE 11.

Merger.

§ 55A-11-01. Approval of plan of merger.

(a) Subject to the limitations set forth in G.S. 55A-11-02, one or more nonprofit corporations may merge into another nonprofit corporation, if the plan of merger is approved as provided in G.S. 55A-11-03.

(b) The plan of merger shall set forth:

(1) The name of each corporation planning to merge and the name of the surviving corporation into which each other corporation plans to merge;

(2) The terms and conditions of the merger; and

(3) The manner and basis, if any, of converting memberships of each merging corporation into memberships, obligations, or securities of the surviving or any other corporation or into cash or other property in whole or part.

(c) The plan of merger may set forth:

(1) Any amendments to the articles of incorporation or bylaws of the surviving corporation to be effected by the merger; and

(2) Other provisions relating to the merger.

(d) The provisions of the plan of merger, other than the provisions referred to in subdivisions (b)(1) and (c)(1) of this section, may be made dependent on facts objectively ascertainable outside the plan of merger if the plan of merger sets forth the manner in which the facts will operate upon the affected provisions. The facts may include any of the following:

(1) Statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data.

(2) A determination or action by the corporation or by any other person, group, or body.
(3) The terms of, or actions taken under, an agreement to which the corporation is a party, or any other agreement or document. (1955, c. 1230; 1993, c. 398, s. 1; 1995, c. 400, s. 5; 2005-268, s. 38.)

NORTH CAROLINA COMMENTARY

Subdivision (b)(3) is not an enabling provision but merely sets out what must be included in the plan of merger if conversion of memberships is part of the plan and is otherwise permitted.

Former G.S. 55A-39 provided for statutory consolidation. Article 11 of this Act, like Article 11 of the Business Corporation Act, contains no procedure for consolidation.

§ 55A-11-02. Limitations on mergers by charitable or religious corporations.

(a) Without the prior approval of the superior court in a proceeding in which the Attorney General has been given written notice, a charitable or religious corporation may merge only with:
(1) A charitable or religious corporation;
(2) A foreign corporation that would qualify under this Chapter as a charitable or religious corporation;
(3) A wholly owned foreign or domestic corporation (business or nonprofit) which is not a charitable or religious corporation, or an unincorporated entity, provided the charitable or religious corporation is the survivor in the merger and continues to be a charitable or religious corporation after the merger; or
(4) A business or nonprofit corporation (foreign or domestic) other than a charitable or religious corporation, or an unincorporated entity, provided that: (i) on or prior to the effective date of the merger, assets with a value equal to the greater of the fair market value of the net tangible and intangible assets (including goodwill) of the charitable or religious corporation or the fair market value of the charitable or religious corporation if it were to be operated as a business concern are transferred or conveyed to one or more persons who would have received its assets under G.S. 55A-14-03(a)(1) and (2) had it dissolved; (ii) it shall return, transfer or convey any assets held by it upon condition requiring return, transfer or conveyance, which condition occurs by reason of the merger, in accordance with such condition; and (iii) the merger is approved by a majority of directors of the charitable or religious corporation who are not and will not become members, as "member" is defined in G.S. 55A-1-40(16) or G.S. 57C-1-03, partners, limited partners, or shareholders in or directors, managers, officers, employees, agents, or consultants of the survivor in the merger.

(b) At least 30 days before consummation of any merger of a charitable or religious corporation pursuant to subdivision (a)(4) of this section, notice, including a copy of the proposed plan of merger, shall be delivered to the Attorney General. This notice shall include all the information the Attorney General determines is required for a complete review of the proposed transaction. The Attorney General may require an additional 30-day period to review the proposed transaction by providing written notice to the charitable or religious corporation prior to the expiration of the initial notice period. During this 30-day period, the transaction may not be finalized.

(c) Without the prior written consent of the Attorney General, or approval of the superior court in a proceeding in which the Attorney General has been given notice, no member of a charitable or religious corporation may receive or retain any property as a result of a merger other than an interest as a member, as "member" is defined in G.S. 55A-1-40(16), in the survivor of the merger. The Attorney General may consent to the transaction, or the court shall approve the transaction, if it is fair and not contrary to the public interest. (1993, c. 398, s. 1; c. 553, s. 83(a); 1995, c. 400, s. 6; 1999-204, s. 1; 1999-369, s. 2.4.)

NORTH CAROLINA COMMENTARY

This section had no counterpart in the prior law. It is based upon the Model Act and is designed to prevent the assets of charitable or religious corporations from being diverted from their intended charitable purposes as a result of a merger.

§ 55A-11-03. Action on plan.

(a) Unless this Chapter, the articles of incorporation, bylaws, or the board of directors or members (acting pursuant to subsection (c) of this section) require a greater vote or voting by class, a plan of merger to be adopted shall be approved for each constituent corporation:

(1) By the board;

(2) By the members entitled to vote thereon, if any, by two-thirds of the votes cast or a majority of the votes entitled to be cast on the plan of merger, whichever is less; and

(3) In writing by any person or persons whose approval is required by a provision of the articles of incorporation authorized by G.S. 55A-10-30 for an amendment to the articles of incorporation or bylaws.

(b) If the corporation does not have members entitled to vote thereon, the merger shall be approved by a majority of the directors then in office. The corporation shall provide at least five days' written notice of any directors' meeting at which the approval will be considered. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the proposed merger.

(c) The board may condition its approval of the proposed merger, and the members entitled to vote thereon may condition their approval of the merger, on receipt of a higher percentage of affirmative votes or on any other basis.

(d) If the board seeks to have the plan approved by the members entitled to vote thereon at a membership meeting, the corporation shall give notice of the membership meeting to those members in accordance with G.S. 55A-7-05. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger and contain or be accompanied by a copy or summary of the plan. The copy or summary of the plan for members of the surviving corporation shall include any provision that, if contained in a proposed amendment to the articles of incorporation or bylaws, would entitle members to vote on the provision. The copy or summary of the plan for members of the disappearing corporation shall include a copy or summary of the articles of incorporation and bylaws that will be in effect immediately after the merger takes effect.

(e) If the board seeks to have the plan approved by the members entitled to vote thereon by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the plan. The copy or summary of the plan for members of the surviving corporation shall include any provision that, if contained in a proposed amendment to the articles of incorporation or bylaws, would entitle members to vote on the provision. The copy or summary of the plan for members of the disappearing corporation shall include a copy or summary of the articles of incorporation and bylaws that will be in effect immediately after the merger takes effect.

(f) Voting by a class of members is required on a plan of merger if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation or bylaws, would entitle the class of members to vote as a class on the proposed amendment under G.S. 55A-10-04 or G.S. 55A-10-22. The plan is approved by a class of members by two-thirds of the votes cast by the class or a majority of the votes entitled to be cast by the class, whichever is less.

(g) After a merger is adopted but before the articles of merger become effective, the plan of merger (i) may be amended as provided in the plan of merger, or (ii) may be abandoned, subject to any contractual rights, as provided in the plan of merger, or, if there is no such provision, as determined by the board of directors without further action by the members or other persons who approved the plan of merger. (1955, c. 1230; 1993, c. 398, s. 1; 2005-268, s. 39.)

NORTH CAROLINA COMMENTARY

Subdivision (a)(2) differs from former G.S. 55A-40 in that the plan of merger may generally be approved by a majority of the votes entitled to be cast or by two-thirds of the votes cast, whichever is less. Subdivision (a)(3), by requiring written approval of the merger by a third party if such approval is required for an amendment of the articles of incorporation or bylaws pursuant to G.S. 55A-10-30, prevents the corporation from circumventing such a third party approval requirement by merging. This subdivision had no counterpart in the prior law. Subsections (c), (d) and (f) had no counterpart in the prior law.

CASE NOTES

Injunction to Dissolve Merger Unjust. — A court cannot issue a mandatory injunction to prevent that which has already been consumated; thus, court could not enter a mandatory injunction to dissolve merger between nonprofit corporations as it would work an injustice to mandate that the merged entity be dissolved and ask parties, who were not involved in this action, to relinquish their responsibilities to the new organization. Roberts v. Madison County Realtors Ass'n, 121 N.C. App. 233, 465 S.E.2d 328 (1996).

§ 55A-11-04. Articles of merger.

(a) After a plan of merger has been authorized as required by this Chapter, the surviving corporation shall deliver to the Secretary of State for filing articles of merger setting forth:

(1) The name and state or country of incorporation of each merging corporation.

(2) The name of the merging corporation that will survive the merger and, if the surviving corporation is not authorized to transact business or conduct affairs in this State, a designation of its mailing address and a commitment to file with the Secretary of State a statement of any subsequent change in its mailing address.

(3) If the surviving corporation is a domestic corporation, any amendment to the articles of incorporation of the corporation provided in the plan of merger.

(4) A statement that the plan of merger has been approved by each merging corporation in the manner required by law.

(a1) If the plan of merger is amended after the articles of merger have been filed but before the articles of merger become effective and any statement in the articles of merger becomes incorrect as a result of the amendment, the surviving corporation shall deliver to the Secretary of State for filing prior to the time the articles of merger become effective an amendment to the articles of merger correcting the incorrect statement. If the articles of merger are abandoned after the articles of merger are filed but before the articles of merger become effective, the surviving corporation shall deliver to the Secretary of State for filing prior to the time the articles of merger become effective an amendment reflecting abandonment of the plan of merger.

(b) A merger takes effect when the articles of merger become effective.

(c) Certificates of merger shall also be registered as provided in G.S. 47-18.1.

(d) In the case of a merger pursuant to G.S. 55A-11-06 or G.S. 55A-11-08, references in subsections (a) and (a1) of this section to "corporation" shall include a domestic corporation, a foreign nonprofit corporation, a domestic business corporation, and a foreign business corporation as applicable. (1955, c. 1230; 1967, c. 823, s. 22; 1993, c. 398, s. 1; 2005-268, s. 40; 2006-264, s. 44(d).)

§ 55A-11-05. Effect of merger.

(a) When a merger pursuant to G.S. 55A-11-01, 55A-11-06, or 55A-11-08 takes effect:

(1) Each other merging corporation merges into the surviving corporation and the separate existence of each merging corporation except the surviving corporation ceases.

(2) The title to all real estate and other property owned by each merging corporation is vested in the surviving corporation without reversion or impairment subject to any and all conditions to which the property was subject prior to the merger.

(3) The surviving corporation has all liabilities and obligations of each merging corporation.

(4) A proceeding pending by or against any merging corporation may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for a merging corporation whose separate existence ceases in the merger.

(5) If a domestic corporation survives the merger, its articles of incorporation are amended to the extent provided in the articles of merger.

(6) If a foreign corporation or a foreign business corporation survives the merger, it is deemed:

a. To agree that it may be served with process in this State in any proceeding for enforcement (i) of any obligation of any merging domestic corporation and (ii) of any obligation of the surviving foreign corporation or foreign business corporation arising from the merger.

b. To have appointed the Secretary of State as its agent for service of process in any proceeding for enforcement as specified in sub-subdivision a. of this subdivision. Service of process on the Secretary of State shall be made by delivering to, and leaving with, the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process and the fee required by G.S. 55A-1-22(b). Upon receipt of service of process on behalf of a surviving foreign corporation or foreign business corporation in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the surviving foreign corporation or foreign business corporation. If the surviving foreign corporation or foreign business corporation is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office, or if there is no principal office on file, its registered office. If the surviving foreign corporation or foreign business corporation is not authorized to transact business or conduct affairs in this

State, the address for mailing shall be the mailing address designated pursuant to G.S. 55A-11-04(a)(2).

The merger shall not affect the liability or absence of liability of any member of a merging corporation for acts, omissions, or obligations of any merging corporation made or incurred prior to the effectiveness of the merger.

(b) In the case of a merger pursuant to G.S. 55A-11-06 or G.S. 55A-11-08, references in subsection (a) of this section to "corporation" shall include a domestic corporation, a foreign nonprofit corporation, a domestic business corporation, and a foreign business corporation, as applicable. (1955, c. 1230; 1967, c. 950, s. 2; 1993, c. 398, s. 1; 1999-369, s. 2.5; 2005-268, s. 41; 2006-264, s. 44(e).)

CASE NOTES

Editor's Note. *— The case below was decided under the Nonprofit Corporation Act adopted in 1955.*

When Separate Existence of Consolidating Corporations Terminated. — If a consolidation agreement is valid, upon the filing thereof in the office of the Secretary of State the separate existence of each of the consolidating corporations is terminated. Adams v. Flora MacDonald College, 251 N.C. 617, 111 S.E.2d 859 (1960).

§ 55A-11-06. Merger with foreign corporation.

(a) Except as provided in G.S. 55A-11-02, one or more foreign corporations may merge with one or more domestic nonprofit corporations if:

(1) The merger is permitted by the law of the state or country under whose law each foreign corporation is incorporated and each foreign corporation complies with that law in effecting the merger;

(2) The foreign corporation complies with G.S. 55A-11-04 if it is the surviving corporation of the merger; and

(3) Each domestic nonprofit corporation complies with the applicable provisions of G.S. 55A-11-01 through G.S. 55A-11-03 and, if it is the surviving corporation of the merger, with G.S. 55A-11-04.

(b) Repealed by Session Laws 2005, c. 268, s. 42.

(c) This section does not limit the power of a foreign corporation to acquire all or part of the memberships of one or more classes of a domestic nonprofit corporation through a voluntary exchange or otherwise. (1973, c. 314, s. 4; 1985 (Reg. Sess., 1986), c. 801, s. 39; 1993, c. 398, s. 1; 1995, c. 400, s. 7; 2001-387, ss. 36, 37; 2005-268, s. 42; 2006-226, s. 16(c); 2006-264, s. 44(f).)

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 55A-11-07. Bequests, devises, and gifts.

Any bequest, devise, gift, grant, or promise contained in a will or other instrument of donation, subscription, or conveyance, that is made to a constituent corporation and that takes effect or remains payable after the merger, inures to the survivor in the merger unless the will or other instrument otherwise specifically provides. (1993, c. 398, s. 1; 1999-369, s. 2.6.)

NORTH CAROLINA COMMENTARY

This section had no counterpart in the prior law. It is taken from the Model Act.

§ 55A-11-08. Merger with business corporation.

(a) One or more domestic or foreign business corporations may merge with one or more domestic nonprofit corporations if:

(1) Each domestic business corporation complies with the applicable provisions of G.S. 55-11-01, 55-11-03, and 55-11-04;

(2) In a merger involving one or more foreign business corporations, the merger is permitted by the law of the state or country under whose law each foreign business corporation is incorporated and each foreign business corporation complies with that law in effecting the merger;

(3) The domestic or foreign business corporation complies with G.S. 55A-11-04 if it is the surviving corporation; and

(4) Each domestic nonprofit corporation complies with the applicable provisions of G.S. 55A-11-01 through G.S. 55A-11-03 and, if it is the surviving corporation, with G.S. 55A-11-04.

(b) Repealed by Session Laws 2005, c. 268, s. 43.

(c) This section does not limit the power of a domestic or foreign business corporation to acquire all or part of the memberships of one or more classes of a domestic nonprofit corporation through a voluntary exchange or otherwise. (1995, c. 400, s. 8; 2001-387, ss. 38, 39; 2005-268, s. 43.)

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 55A-11-09. Merger with unincorporated entity.

(a) As used in this section, "business entity" means a domestic business corporation (including a professional corporation as defined in G.S. 55B-2), a foreign business corporation (including a foreign professional corporation as defined in G.S. 55B-16), a domestic or foreign nonprofit corporation, a domestic or foreign limited liability company, a domestic or foreign limited partnership, a registered limited liability partnership or foreign limited liability partnership as defined in G.S. 59-32, or any other partnership as defined in G.S. 59-36 whether or not formed under the laws of this State.

(b) One or more domestic nonprofit corporations may merge with one or more unincorporated entities and, if desired, one or more foreign nonprofit corporations, domestic business corporations, or foreign business corporations if:

(1) The merger is permitted by the laws of the state or country governing the organization and internal affairs of each of the other merging business entities;

(2) Each merging domestic nonprofit corporation and each other merging business entity comply with the requirements of this section and, to the extent applicable, the laws referred to in subdivision (1) of this subsection; and

(3) The merger complies with G.S. 55A-11-02, if applicable.

(c) Each merging domestic nonprofit corporation and each other merging business entity shall approve a written plan of merger containing:

(1) For each merging business entity, its name, type of business entity, and the state or country whose laws govern its organization and internal affairs;

(2) The name of the merging business entity that shall survive the merger;

(3) The terms and conditions of the merger;

(4) The manner and basis for converting the interests in each merging business entity into interests, obligations, or securities of the surviving business entity or into cash or other property in whole or in part; and

(5) If the surviving business entity is a domestic nonprofit corporation, any amendments to its articles of incorporation that are to be made in connection with the merger.

(c1) The plan of merger may contain other provisions relating to the merger.

(c2) The provisions of the plan of merger, other than the provisions referred to in subdivisions (1), (2), and (5) of subsection (c) of this section, may be made dependent on facts objectively ascertainable outside the plan of merger if the plan of merger sets forth the manner in which the facts will operate upon the affected provisions. The facts may include any of the following:

(1) Statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data.

(2) A determination or action by the domestic nonprofit corporation or by any other person, group, or body.

(3) The terms of, or actions taken under, an agreement to which the domestic nonprofit corporation is a party, or any other agreement or document.

(c3) In the case of a merging domestic nonprofit corporation, approval of the plan of merger requires that the plan of merger be adopted as provided in G.S. 55A-11-03. If any member of a merging domestic nonprofit corporation has or will have personal liability for any existing or future obligation of the surviving business entity solely as a result of holding an interest in the surviving business entity, then in addition to the requirements of G.S. 55A-11-03, approval of the plan of merger by the domestic nonprofit corporation shall require the affirmative vote or written consent of the member. In the case of each other merging business entity, the plan of merger must be approved in accordance with the laws of the state or country governing the organization and internal affairs of such merging business entity.

(c4) After a plan of merger has been approved by a domestic nonprofit corporation but before the articles of merger become effective, the plan of merger (i) may be amended as provided in the plan of merger, or (ii) may be abandoned (subject to any contractual rights) as provided in the plan of merger or, if there is no such provision, as determined by the board of directors.

(d) After a plan of merger has been approved by each merging domestic nonprofit corporation and each other merging business entity as provided in subsection (c) of this section, the surviving business entity shall deliver articles of merger to the Secretary of State for filing. The articles of merger shall set forth:

(1) Repealed by Session Laws 2005, c. 268, s. 45.

(2) For each merging business entity, its name, type of business entity, and the state or country whose laws govern its organization and internal affairs.

(3) The name of the merging business entity that will survive the merger and, if the surviving business entity is not authorized to transact business or conduct affairs in this State, a designation of its mailing address and a commitment to file with the Secretary of State a statement of any subsequent change in its mailing address.

(3a) If the surviving business entity is a domestic corporation, any amendment to its articles of incorporation as provided in the plan of merger.

(4) A statement that the plan of merger has been approved by each merging business entity in the manner required by law.

(5) Repealed by Session Laws 2005, c. 268, s. 45.

If the plan of merger is amended after the articles of merger have been filed but before the articles of merger become effective, and any statement in the articles of merger becomes incorrect as a result of the amendment, the surviving business entity shall deliver to the Secretary of State for filing prior to the time the articles of merger become effective an amendment to the articles of merger correcting the incorrect statement. If the articles of merger are abandoned after the articles of merger are filed but before the articles of merger become effective, the surviving business entity shall deliver to the Secretary of State for filing prior to the time the articles of merger become effective an amendment reflecting abandonment of the plan of merger.

Certificates of merger shall also be registered as provided in G.S. 47-18.1.

(e) A merger takes effect when the articles of merger become effective. When a merger takes effect:

(1) Each other merging business entity merges into the surviving business entity and the separate existence of each merging business entity except the surviving business entity ceases;

(2) The title to all real estate and other property owned by each merging business entity is vested in the surviving business entity without reversion or impairment;

(3) The surviving business entity has all liabilities of each merging business entity;

(4) A proceeding pending by or against any merging business entity may be continued as if the merger did not occur, or the surviving business entity may be substituted in the proceeding for a merging business entity whose separate existence ceases in the merger;

(5) If a domestic nonprofit corporation is the surviving business entity, its articles of incorporation shall be amended to the extent provided in the articles of merger;

(6) The interests in each merging business entity that are to be converted into interests, obligations, or securities of the surviving business entity or into the right to receive cash or other property are thereupon so converted, and the former holders of the interests are entitled only to the rights provided to them in the plan of merger or, in the case of former holders of shares in a domestic business corporation, any rights they may have under Article 13 of Chapter 55 of the General Statutes; and

(7) If the surviving business entity is not a domestic business corporation, the surviving business entity is deemed to agree that it will promptly pay to the dissenting shareholders of any merging domestic business corporation the amount, if any, to which they are entitled under Article 13 of Chapter 55 of the General Statutes and otherwise to comply with the requirements of Article 13 as if it were a surviving domestic business corporation in the merger.

The merger shall not affect the liability or absence of liability of any holder of an interest in a merging business entity for any acts, omissions, or obligations of any merging business entity made or incurred prior to the effectiveness of the merger. The cessation of separate existence of a merging business entity in the merger shall not constitute a dissolution or termination of the merging business entity.

(e1) If the surviving business entity is not a domestic limited liability company, a domestic business corporation, a domestic nonprofit corporation, or a domestic limited partnership, when the merger takes effect the surviving business entity is deemed:

(1) To agree that it may be served with process in this State in any proceeding for enforcement of (i) any obligation of any merging

domestic limited liability company, domestic business corporation, domestic nonprofit corporation, domestic limited partnership, or other partnership as defined in G.S. 59-36 that is formed under the laws of this State, (ii) the rights of dissenting shareholders of any merging domestic business corporation under Article 13 of Chapter 55 of the General Statutes, and (iii) any obligation of the surviving business entity arising from the merger; and

(2) To have appointed the Secretary of State as its agent for service of process in any such proceeding. Service on the Secretary of State of any such process shall be made by delivering to and leaving with the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of such process and the fee required by G.S. 55A-1-22(b). Upon receipt of service of process on behalf of a surviving business entity in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the surviving business entity. If the surviving business entity is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office or, if there is no principal office on file, its registered office. If the surviving business entity is not authorized to transact business or conduct affairs in this State, the address for mailing shall be the mailing address designated pursuant to subdivision (3) of subsection (d) of this section.

(f) This section does not apply to a merger that does not include a merging unincorporated entity. (1999-369, s. 2.7; 2000-140, s. 48; 2001-387, ss. 40, 41, 42; 2001-487, s. 62(f); 2005-268, ss. 44, 45, 46; 2007-385, s. 3.)

Editor's Note. — Session Laws 1999-369, s. 8, made this section effective December 15, 1999, and applicable to mergers, consolidations, or conversions effective on or after that date.

Session Laws 1999-369, s. 2.7 set out present subsection (e1) within subsection (e). The redesignation of this subsection was set out above pursuant to directions from the Revisor of Statutes.

Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Legal Periodicals. — For "Legislative Survey: Business & Banking," see 22 Campbell L. Rev. 253 (2000).

§ 55A-11-10. Merger with certain charitable or religious corporation or hospital authority.

(a) A hospital authority created by a city may merge into a charitable or religious corporation having its principal office in the county in which the city is located, under a plan of merger approved by the city and the county and by a majority of the members of the board of commissioners of such authority and by or for the corporation as provided in G.S. 55A-11-03.

This section applies only to the merger of a hospital authority formed by a city in a county with a population of less than 150,000 as of the most recent U.S. Census and either (i) a charitable or religious corporation formed on or before September 29, 2005 having its principal office located in such county as of September 29, 2005, or (ii) a hospital authority formed after September 29, 2005 by the county in which the city is located.

(b) A hospital authority created by a city may merge into a hospital authority created by the county in which the city is located, pursuant to a plan of merger approved by the city and the county and by a majority of the members of the board of commissioners of each authority.

(c) The plan of merger shall include all of the following:

(1) The name of the city hospital authority and the charitable or religious corporation or the county hospital authority planning to merge and the name of the surviving charitable or religious corporation or county hospital authority into which such city hospital authority plans to merge.

(2) The terms and conditions of the merger.

(3) Any amendments to the articles or certificate of incorporation or bylaws of the surviving charitable or religious corporation or the surviving county hospital authority to be effected by the merger.

(4) Other provisions relating to the merger.

(d) After the plan of merger is approved, the surviving charitable or religious corporation or the surviving county hospital authority shall deliver to the Secretary of State for filing articles of merger that include all of the following:

(1) The plan of merger.

(2) In the case of a merger of a city hospital authority into a charitable or religious corporation, a statement that the plan of merger was approved by the city and by a majority of the members of the board of commissioners of the city hospital authority and the statements required under G.S. 55A-11-04(a)(2), (3), or (4); or

(3) In the case of a merger of a city hospital authority into a county hospital authority, a statement that the plan of merger was approved by the city and the county and a majority of each of the boards of commissioners of the authorities.

(e) A merger takes effect upon the effective date of the articles of merger.

(f) Certificates of merger shall also be registered as provided in G.S. 47-18.1.

(g) All of the following shall occur upon an effective merger under this section:

(1) The separate existence of the city hospital authority that merges into the charitable or religious corporation or into the county hospital authority ceases.

(2) The title to all real estate and other property owned by the hospital authority is vested in the surviving charitable or religious corporation or in the surviving county hospital authority without reversion or impairment subject to any and all conditions to which the property was subject prior to the merger.

(3) The surviving charitable or religious corporation or the surviving county hospital authority has all liabilities and obligations of the city hospital authority and the charitable or religious corporation or the county hospital authority party to the merger.

(4) A proceeding pending by or against the city hospital authority and the charitable or religious corporation or the county hospital authority party to the merger may be continued as if the merger did not occur or the surviving charitable or religious corporation or the surviving county hospital authority may be substituted in the proceeding for the city hospital authority whose existence ceased.

(5) The articles or certificate of incorporation and bylaws of the surviving charitable or religious corporation or the surviving county hospital authority are amended to the extent provided in the plan of merger.

(6) Any bequest, devise, gift, grant, or promise contained in a will or other instrument of donation, subscription, or conveyance that is made to a city hospital authority that has merged into a charitable or religious corporation or into a county hospital authority and that takes effect or

remains payable after the merger, inures to the surviving charitable or religious corporation or the surviving county hospital authority unless the will or other instrument otherwise specifically provides.

(h) A merger pursuant to the provisions of this section will not be deemed to be a sale or conveyance of a hospital facility under or pursuant to G.S. 131E-8, 131E-13, or 131E-14 of the Municipal Hospital Act (Part 1, Article 2, Chapter 131E of the General Statutes) and G.S. 131E-13(d) will not be applicable to such merger. (2005-449, ss. 1, 2.)

Editor's Note. — Session Laws 2005-449, s. 2, has been codified as the last paragraph of subsection (a) of this section, at the direction of the Revisor of Statutes.

Article 12.

Transfer of Assets.

§ 55A-12-01. Sale of assets in regular course of activities and mortgage of assets.

(a) A corporation may on the terms and conditions and for the consideration determined by the board of directors:

(1) Sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property in the usual and regular course of its activities; or

(2) Mortgage, pledge, dedicate to the repayment of indebtedness (whether with or without recourse), or otherwise encumber any or all of its property whether or not in the usual and regular course of its activities.

(b) Unless the articles of incorporation require it, approval of the members or any other person of a transaction described in subsection (a) of this section is not required. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 40; 1993, c. 398, s. 1.)

CASE NOTES

Editor's Note. — *The case below was decided under the Nonprofit Corporation Act adopted in 1955.*

Conveyances Without Authorization. — Where the last recorded president and secretary of plaintiff organization signed the deed transferring the property to defendant in their capacities as president and secretary, and at the time the deed was executed the last recorded president was not president and last recorded secretary was not secretary, the former president and secretary signed the deed without the authorization necessary under this section to effectuate the conveyance of the corporate real property and the deed was void ab initio. Catawba County Horsemen's Ass'n v. Deal, 107 N.C. App. 213, 419 S.E.2d 185 (1992).

§ 55A-12-02. Sale of assets other than in regular course of activities.

(a) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property other than in the usual and regular course of its activities on the terms and conditions and for the consideration determined by the corporation's board of directors if the proposed transaction is authorized by subsection (b) of this section.

(b) Unless this Chapter, the articles of incorporation, bylaws, or the board of directors or members (acting pursuant to subsection (d) of this section) require a greater vote or voting by class, the proposed transaction to be authorized shall be approved:

(1) By the board;
(2) By the members entitled to vote thereon by two-thirds of the votes cast or a majority of the votes entitled to be cast on the proposed transaction, whichever is less; and
(3) In writing by any person or persons whose approval is required by a provision of the articles of incorporation authorized by G.S. 55A-10-30 for an amendment to the articles of incorporation or bylaws.

(c) If the corporation does not have members entitled to vote thereon, the transaction shall be approved by a vote of a majority of the directors then in office. The corporation shall provide at least five days' written notice of any directors' meeting at which such approval will be considered. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all, or substantially all, of the property or assets of the corporation and contain or be accompanied by a description of the transaction.

(d) The board may condition its approval of the proposed transaction, and the members entitled to vote thereon may condition their approval of the transaction, on receipt of a higher percentage of affirmative votes or on any other basis.

(e) If the corporation seeks to have the transaction approved by the members entitled to vote thereon at a membership meeting, the corporation shall give notice of the membership meeting to those members in accordance with G.S. 55A-7-05. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all, or substantially all, of the property or assets of the corporation and contain or be accompanied by a description of the transaction.

(f) If the board seeks to have the transaction approved by the members entitled to vote thereon by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a description of the transaction.

(g) A charitable or religious corporation shall give written notice to the Attorney General 30 days before it sells, leases, exchanges, or otherwise disposes of all, or a majority of, its property if the transaction is not in the usual and regular course of its activities unless the Attorney General has given the corporation a written waiver of this subsection. This notice shall include all the information the Attorney General determines is required for a complete review of the proposed transaction. The Attorney General may require an additional 30-day period to review the proposed transaction by providing written notice to the charitable or religious corporation prior to the expiration of the initial notice period. During this 30-day period, the transaction may not be finalized.

(h) After a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned (subject to any contractual rights), without further action by the members or any other person who approved the transaction, in accordance with the procedure set forth in the resolution proposing the transaction or, if none is set forth, in the manner determined by the board of directors. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 40; 1993, c. 398, s. 1; 1999-204, s. 2.)

NORTH CAROLINA COMMENTARY

Subdivision (b)(2) differs from former G.S. 55A-43 in that the transaction may generally be approved by a majority of the votes entitled to be cast or by two-thirds of the votes cast, whichever is less. Subdivision (b)(3), by requiring written approval of the transaction by a third party if such approval is required for an amendment of the articles of incorporation or bylaws pursuant to G.S. 55A-10-30, prevents the corporation from circumventing such a third party approval requirement by selling assets. This subdivision had no counterpart in the prior law. Subdivision (b)(3) and subsections (c) and (g) had no counterpart in the prior law. Subsection (g) is based on the Model Act and is designed to provide a measure of protection in sales of all or substantially all of the assets of a charitable or religious corporation.

ARTICLE 13.

Distributions.

§ 55A-13-01. Prohibited distributions.

Except as authorized by G.S. 55A-13-02 or Article 14 of this Chapter, a corporation shall not make any distributions. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 32; 1993, c. 398, s. 1.)

§ 55A-13-02. Authorized distributions.

(a) A corporation may pay reasonable amounts to its members, directors, or officers for services rendered or other value received and may confer benefits upon its members in conformity with its purposes.

(b) Subject to the provisions of subsection (d) of this section:

(1) A corporation may make distributions to any entity that is exempt under section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section, or that is organized exclusively for one or more of the purposes specified in section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section and that upon dissolution shall distribute its assets to a charitable or religious corporation, the United States, a state or an entity that is exempt under section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section.

(2) Any corporation other than a charitable or religious corporation may make distributions to any domestic or foreign corporation.

(3) Except as otherwise prohibited by statute, a corporation not operated for profit, the membership of which is limited to the owners or occupants of real property in a condominium, cooperative housing corporation, or other real property development, having as its primary purposes the management, operation, preservation, maintenance, and repair of common areas and improvements upon the real property owned by the members and the corporation or organization, may make distribution to its members of excess or surplus membership dues, fees, or assessments remaining after the payment of or provisions for common expenses and any prepayment of reserves; provided that these distributions are in proportion to the dues, fees, or assessments collected from the members.

(c) Subject to the provisions of subsection (d) of this section, a corporation other than a charitable or religious corporation may make distributions to purchase its memberships.

(d) A corporation shall not make any distribution under subsection (b) or (c) of this section if at the time of or as a result of such distribution:

(1) The corporation would not be able to pay its debts as they become due in the usual course of business; or

(2) The corporation's total assets would be less than the sum of its total liabilities. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 32; 1993, c. 398, s. 1; 1999-369, s. 7.)

NORTH CAROLINA COMMENTARY

This section brings forward, with conforming changes, the provisions of former G.S. 55A-28. Although distributions permitted by subsection (a) are not subject to the limitation of subsection (d), they may constitute fraudulent conveyances under certain circumstances.

Legal Periodicals. — For "Legislative Survey: Business & Banking," see 22 Campbell L. Rev. 253 (2000).

ARTICLE 14.

Dissolution.

Part 1. Voluntary Dissolution.

§ 55A-14-01. Dissolution by incorporators or directors prior to commencement of activities.

(a) A corporation that has not admitted members entitled to vote on dissolution, has not commenced activities, and has no assets may be dissolved by action of its board of directors or a majority of its incorporators, if there are no directors, by delivering to the Secretary of State for filing articles of dissolution that set forth:

(1) The name of the corporation;
(2) The names and addresses of its officers, if any;
(3) The names and addresses of its directors, if any, or if none, the names and addresses of its incorporators;
(4) The date of its incorporation;
(5) That the corporation has not admitted members entitled to vote on dissolution, has not commenced activities, and has no assets;
(6) That no debt of the corporation remains unpaid; and
(7) That a majority of the incorporators or directors authorized the dissolution.

(b) Upon the filing of articles of dissolution under this section, the corporation becomes nonexistent and is cancelled as if such corporation had never been created. (1955, c. 1230; 1973, c. 314, s. 5; 1985 (Reg. Sess., 1986), c. 801, ss. 41, 43; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

The effect of dissolution under this section is the same as the effect under former G.S. 55A-57.1 of voluntarily surrendering corporate rights prior to commencement of activities.

§ 55A-14-02. Dissolution by directors, members, and third persons.

(a) Unless this Chapter, the articles of incorporation, bylaws, or the board of directors or members (acting pursuant to subsection (c) of this section) require a greater vote or voting by class, dissolution is authorized if a plan of dissolution meeting the requirements of G.S. 55A-14-03 is approved:

(1) By the board;

(2) By the members entitled to vote thereon, if any, by two-thirds of the votes cast or a majority of the votes entitled to be cast on the plan of dissolution, whichever is less; and

(3) In writing by any person or persons whose approval is required by a provision of the articles of incorporation authorized by G.S. 55A-10-30 for an amendment to the articles of incorporation or bylaws.

(b) If the corporation does not have members entitled to vote thereon, dissolution shall be approved by a vote of a majority of the directors then in office. The corporation shall provide at least five days' written notice of any directors' meeting at which such approval will be considered. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider dissolution of the corporation and contain or be accompanied by a copy or summary of the plan of dissolution.

(c) The board of directors may condition its approval of the proposed dissolution, and the members entitled to vote thereon may condition their approval of the dissolution on receipt of a higher percentage of affirmative votes or on any other basis.

(d) If the board of directors seeks to have dissolution approved by the members entitled to vote thereon at a membership meeting, the corporation shall give notice of the membership meeting to those members in accordance with G.S. 55A-7-05. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider dissolving the corporation and contain or be accompanied by a copy or summary of the plan of dissolution.

(e) If the board seeks to have dissolution approved by the members entitled to vote thereon by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the plan of dissolution. (1955, c. 1230; 1973, c. 314, s. 5; 1985 (Reg. Sess., 1986), c. 801, s. 41; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section differs from former G.S. 55A-44 in that a plan of dissolution may generally be approved by a majority of the votes entitled to be cast by the members or by two-thirds of the votes cast at a meeting duly held at which a quorum is present, whichever is less. The articles of incorporation or bylaws may require a greater vote, and the board of directors or members, acting pursuant to subsection (c), may condition their approval of a plan of dissolution upon receipt of a higher percentage of votes than otherwise required or on any other basis. Subdivision (a)(3) and subsection (c) had no counterpart in the prior law.

§ 55A-14-03. Plan of dissolution.

(a) The plan of dissolution approved pursuant to G.S. 55A-14-02 shall provide that all liabilities and obligations of the corporation be paid and discharged, or adequate provisions be made therefor, and that the remainder of the corporation's assets be distributed as follows:

(1) Assets held by the corporation upon condition requiring return, transfer, or conveyance, which condition occurs by reason of the dissolution, shall be returned, transferred, or conveyed in accordance with such requirements;

(2) Other assets, if any, of a charitable or religious corporation shall, subject to the articles of incorporation or bylaws, be transferred or conveyed to one or more of the following: the United States, a state, a charitable or religious corporation, or a person that is exempt under section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section;

(3) Other assets, if any, of a corporation that is not a charitable or religious corporation shall, subject to the articles of incorporation and bylaws, be distributed as provided in the plan of dissolution.

(b) The plan of dissolution may set forth other provisions relating to the dissolution. (1955, c. 1230; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Subsection (a) sets forth the provisions to be included in the plan of dissolution that must be approved pursuant to G.S. 55A-14-02. Under prior law, there was no requirement that a plan of dissolution be approved.

§ 55A-14-04. Articles of dissolution.

(a) At any time after dissolution is authorized pursuant to G.S. 55A-14-02, the corporation may dissolve by delivering to the Secretary of State for filing articles of dissolution setting forth:

(1) The name of the corporation;
(2) The names and addresses of its officers;
(3) The names and addresses of its directors;
(4) The plan of dissolution as required by G.S. 55A-14-03;
(5) The date dissolution was authorized;
(6) If approval by members was not required, a statement to that effect and a statement that the plan of dissolution was approved by a sufficient vote of the board of directors;
(7) If approval by members was required, a statement that the plan of dissolution was approved as required by this Chapter; and
(8) If approval of dissolution by some person or persons other than the members or the board of directors is required pursuant to G.S. 55A-14-02(a)(3), a statement that the approval was obtained.

(b) A corporation is dissolved upon the effective date of its articles of dissolution. (1955, c. 1230; 1973, c. 314, s. 7; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section differs from prior law in that the plan of dissolution required by G.S. 55A-14-03 must be set forth in the articles of dissolution and in that articles of dissolution are the only required filing. A corporation is dissolved on the effective date of its articles of dissolution. There is no filing comparable to the certificate of dissolution issued by the Secretary of State under former G.S. 55A-49.

Articles of dissolution may be filed under this section at any time after dissolution is authorized. Under former G.S. 55A-48, articles of dissolution were filed only after all debts, liabilities and obligations of the corporation had been paid, or adequate provision made therefor, and after all of the remaining property and assets of the corporation had been transferred.

§ 55A-14-05. Revocation of dissolution.

(a) A corporation may revoke its dissolution authorized under G.S. 55A-14-02 within 120 days of its effective date.

(b) Revocation of dissolution shall be authorized in the same manner as the dissolution was authorized unless an authorization under G.S. 55A-14-02 permitted revocation by action of the board of directors alone, in which event the board of directors may revoke the dissolution without action by the members or any other person.

(c) After the revocation of dissolution is authorized, the corporation may revoke the dissolution by delivering to the Secretary of State for filing articles of revocation of dissolution, together with a copy of its articles of dissolution, that set forth:

(1) The name of the corporation;
(2) The effective date of the dissolution that was revoked;
(3) The date that the revocation of dissolution was authorized;
(4) If the corporation's board of directors revoked the dissolution, a statement to that effect;
(5) If the corporation's board of directors revoked a dissolution authorized by the members alone or in conjunction with another person or persons, a statement that revocation was permitted by action by the board of directors alone pursuant to that authorization; and
(6) If member or third person action was required to revoke the dissolution, a statement that the action was taken as required.

(d) Revocation of dissolution is effective upon the effective date of the articles of revocation of dissolution.

(e) When the revocation of dissolution is effective, it relates back to and takes effect as of the effective date of the dissolution and the corporation resumes carrying on its activities as if dissolution had never occurred, subject to the rights of any person who reasonably relied to his prejudice upon the filing of the articles of dissolution. (1955, c. 1230; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Under former G.S. 55A-47, a corporation could revoke its dissolution at any time prior to the issuance of a certificate of dissolution by the Secretary of State. Since the provision for issuing a certificate of dissolution has not been brought forward, this section provides that any revocation must occur within 120 days after the effective date of its articles of dissolution.

§ 55A-14-06. Effect of dissolution.

(a) A dissolved corporation continues its corporate existence but shall not carry on any activities except those appropriate to wind up and liquidate its affairs, including:

(1) Preserving and protecting its assets;
(2) Discharging or making provision for discharging its liabilities and obligations;
(3) Disposing of its remaining assets in accordance with its plan of dissolution; and
(4) Doing every other act necessary to wind up and liquidate its assets and affairs.

(b) Dissolution of a corporation does not:

(1) Transfer title to the corporation's property;
(2) Subject its directors or officers to standards of conduct different from those prescribed in Article 8 of this Chapter;
(3) Change quorum or voting requirements for its board of directors or members; change provisions for selection, resignation, or removal of its directors or officers or both; or change provisions for amending its bylaws;
(4) Prevent commencement of a proceeding by or against the corporation in its corporate name;
(5) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or
(6) Terminate the authority of the registered agent of the corporation. (1955, c. 1230; 1993, c. 398, s. 1.)

§ 55A-14-07. Known claims against dissolved corporation.

(a) A dissolved corporation may dispose of the known claims against it by following the procedure described in this section.

(b) The dissolved corporation shall notify its known claimants in writing of the dissolution at any time after its effective date. The written notice shall:

(1) Describe information that shall be included in a claim;
(2) Provide a mailing address where a claim may be sent;
(3) State the deadline, which shall not be fewer than 120 days from the effective date of the written notice, by which the dissolved corporation shall receive the claim; and
(4) State that the claim will be barred if not received by the deadline.

(c) A claim against the dissolved corporation is barred:

(1) If the corporation does not receive the claim by the deadline from a claimant who received written notice under subsection (b) of this section; or
(2) If a claimant whose claim was rejected by written notice from the dissolved corporation does not commence a proceeding to enforce the claim within 90 days from the date of receipt of the rejection notice.

(d) For purposes of this section, "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution. (1955, c. 1230; 1973, c. 314, s. 5; 1985 (Reg. Sess., 1986), c. 801, s. 41; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Unlike former 55A-44(b), notice to creditors and newspaper publication are not mandatory under this section.

§ 55A-14-08. Unknown and certain other claims against dissolved corporation.

(a) A dissolved corporation may also publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice.

(b) The notice shall:

(1) Be published one time in a newspaper of general circulation in the county where the dissolved corporation's principal office (or, if there is none in this State, its registered office) is or was last located;
(2) Describe the information that shall be included in a claim and provide a mailing address where the claim may be sent; and
(3) State that a claim against the corporation will be barred unless a proceeding to enforce the claim is commenced within five years after the publication of the notice.

(c) If the dissolved corporation publishes a newspaper notice in accordance with subsection (b) of this section, the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within five years after the publication date of the newspaper notice:

(1) A claimant who did not receive written notice under G.S. 55A-14-07;
(2) A claimant whose claim was timely sent to the dissolved corporation but not acted on;
(3) A claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

(d) Nothing in this section shall bar:

(1) Any claim alleging the liability of the corporation; or

(2) Any proceeding or action to establish the liability of the corporation; or
(3) The recovery on any judgment against the corporation

to the extent that the corporation is protected by insurance coverage with respect to such claim, proceeding, or judgment. (1955, c. 1230; 1973, c. 314, s. 5; 1985 (Reg. Sess., 1986), c. 801, s. 41; 1993, c. 398, s. 1.)

§ 55A-14-09. Enforcement of claims.

(a) A claim under G.S. 55A-14-07 or G.S. 55A-14-08 may be enforced:

(1) Against the dissolved corporation, to the extent of its undistributed assets, including coverage under any applicable insurance policy, or
(2) If the assets have been distributed in liquidation, against any person, other than a creditor of the corporation, to whom the corporation distributed its property to the extent of the distributee's pro rata share of the claim or the corporate assets distributed to such person in liquidation, whichever is less, but the distributee's total liability for all claims under this section shall not exceed the total amount of assets distributed to the distributee.

(b) Nothing in G.S. 55A-14-07 or G.S. 55A-14-08 shall extend any applicable period of limitation. (1985 (Reg. Sess., 1986), c. 801, s. 33; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

Subdivision (a)(2), unlike former G.S. 55A-28.1(h), makes a distributee liable regardless of whether he knew that the distribution violated the Act.

§§ 55A-14-10 through 55A-14-19: Reserved for future codification purposes.

Part 2. Administrative Dissolution.

§ 55A-14-20. Grounds for administrative dissolution.

The Secretary of State may commence a proceeding under G.S. 55A-14-21 to dissolve administratively a corporation if:

(1) The corporation does not pay within 60 days after they are due any penalties, fees, or other payments due under this Chapter;
(2) Repealed by Session Laws 1995, c. 539, s. 24, effective July 29, 1995.
(3) The corporation is without a registered agent or registered office in this State for 60 days or more;
(4) The corporation does not notify the Secretary of State within 60 days that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued;
(5) The corporation's period of duration stated in its articles of incorporation expires;
(6) The corporation knowingly fails or refuses to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter; or
(7) The corporation does not designate the address of its principal office with the Secretary of State or does not notify the Secretary of State within 60 days that the principal office has changed. (1993, c. 398, s. 1; 1995, c. 539, ss. 24, 25.)

NORTH CAROLINA COMMENTARY

The prior law did not provide for administrative dissolution.

§ 55A-14-21. Procedure for and effect of administrative dissolution.

(a) If the Secretary of State determines that one or more grounds exist under G.S. 55A-14-20 for dissolving a corporation, the Secretary of State shall mail the corporation written notice of the Secretary of State's determination.

(b) If the corporation does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within 60 days after notice is mailed, the Secretary of State shall administratively dissolve the corporation by signing a certificate of dissolution that recites the ground or grounds for dissolution and its effective date. The Secretary of State shall file the original of the certificate and mail a copy to the corporation.

(c) The provisions of G.S. 55A-14-06, [G.S.] 55A-14-07, and [G.S.] 55A-14-08 apply to a corporation administratively dissolved.

(d) The administrative dissolution of a corporation does not terminate the authority of its registered agent. (1993, c. 398, s. 1.)

§ 55A-14-22. Reinstatement following administrative dissolution.

(a) A corporation administratively dissolved under G.S. 55A-14-21 may apply to the Secretary of State for reinstatement. The application shall:

(1) Recite the name of the corporation and the effective date of its administrative dissolution; and

(2) State that the ground or grounds for dissolution either did not exist or have been eliminated.

(a1) If, at the time the corporation applies for reinstatement, the name of the corporation is not distinguishable from the name of another entity authorized to be used under G.S. 55D-21, then the corporation must change its name to a name that is distinguishable upon the records of the Secretary of State from the name of the other entity before the Secretary of State may prepare a certificate of reinstatement.

(b) If the Secretary of State determines that the application contains the information required by subsection (a) of this section, that the information is correct, and that the name of the corporation complies with G.S. 55D-21 and any other applicable section, the Secretary of State shall cancel the certificate of dissolution and prepare a certificate of reinstatement that recites the Secretary of State's determination and the effective date of reinstatement, file the original of the certificate, and mail a copy to the corporation.

(c) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its activities as if the administrative dissolution had never occurred, subject to the rights of any person who reasonably relied to his prejudice upon the certificate of dissolution. (1993, c. 398, s. 1; 1996, 2nd Ex. Sess., c. 17, s. 15.1(d); 1997-485, s. 2; 2001-390, s. 9; 2001-413, ss. 7.2, 7.3.)

§ 55A-14-23. Appeal from denial of reinstatement.

(a) If the Secretary of State denies a corporation's application for reinstatement following administrative dissolution, the Secretary of State shall serve the corporation under G.S. 55D-33 with a written notice that explains the reason or reasons for denial.

(b) The corporation may appeal the denial of reinstatement to the Superior Court of Wake County within 30 days after service of the notice of denial is perfected. The appeal is commenced by filing a petition with the court and with the Secretary of State requesting the court to set aside the dissolution. The petition shall have attached to it copies of the Secretary of State's certificate of dissolution, the corporation's application for reinstatement, and the Secretary of State's notice of denial. No service of process on the Secretary of State is required except for the filing of the petition as set forth in this subsection. The appeal to the superior court shall be determined by a judge of the superior court upon such further evidence, notice, and opportunity to be heard, if any, as the court may deem appropriate under the circumstances. The corporation shall have the burden of establishing that it is entitled to reinstatement.

(c) Upon consideration of the petition and any response made by the Secretary of State, the court may, prior to entering final judgment, order the Secretary of State to reinstate the dissolved corporation or may take other action the court considers appropriate.

(d) The court's final decision may be appealed as in other civil proceedings. (1993, c. 398, s. 1; 2001-358, ss. 5A(c), 48(e); 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§ 55A-14-24. Inapplicability of Administrative Procedure Act.

The Administrative Procedure Act shall not apply to any proceeding or appeal provided for in G.S. 55A-14-20 through G.S. 55A-14-23. (1993, c. 398, s. 1.)

§§ 55A-14-25 through 55A-14-29: Reserved for future codification purposes.

Part 3. Judicial Dissolution.

§ 55A-14-30. Grounds for judicial dissolution.

(a) The superior court may dissolve a corporation:

- (1) In a proceeding by the Attorney General if it is established that:
  - a. The corporation obtained its articles of incorporation through fraud; or
  - b. The corporation has, after written notice by the Attorney General given at least 20 days prior thereto, continued to exceed or abuse the authority conferred upon it by law;
- (2) In a proceeding by a member or director, if it is established that:
  - a. The directors are deadlocked in the management of the corporate affairs, and the members, if any, are unable to break the deadlock;

b. The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent;

c. The members are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have, or would otherwise have, expired;

d. The corporate assets are being misapplied or wasted; or

e. The corporation is no longer able to carry out its purposes.

(3) In a proceeding by a creditor if it is established that:

a. The creditor's claim has been reduced to judgment and execution on the judgment has been returned unsatisfied; or

b. The corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent.

(4) In a proceeding by the corporation to have its voluntary dissolution continued under court supervision.

(b) Prior to dissolving a corporation, the court shall consider whether:

(1) There are reasonable alternatives to dissolution;

(2) Dissolution is in the public interest, if the corporation is a charitable or religious corporation; and

(3) Dissolution is reasonably necessary for the protection of the rights or interests of the members, if any. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 42; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This Act does not bring forward the duty of the Attorney General under former G.S. 55A-51 to bring an action for involuntary dissolution under certain circumstances.

Subdivision (a)(2) differs from prior law in the following respects: First, the requirement in former G.S. 55A-53(a)(1)a. that "irreparable injury to the corporation or to the public" be established when the directors are deadlocked was not brought forward. Second, the prior law did not expressly provide that deadlock of the members was grounds for involuntary dissolution.

The requirement in former G.S. 55A-53(b) that a creditor must show that the corporation is insolvent in order to be entitled to judicial dissolution was not brought forward.

Even if there are grounds for dissolution under subsection (a), subsection (b) requires the court to consider other factors. Although former G.S. 55A-53(f), which permitted the court to grant relief other than dissolution, was not brought forward, the court has inherent power to grant such alternative relief under subsection (b). In addition, if dissolution is ordered and the articles of incorporation or bylaws of the dissolved corporation do not provide for the disposition of its assets, it is intended that the assets will be distributed or transferred as directed by the court. See former G.S. 55A-57(b) and (c).

Legal Periodicals. — For article, "The Common Law Powers of the Attorney General of North Carolina," see 9 N.C. Cent. L.J. 1 (1977).

For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

CASE NOTES

Cited in Morris v. Thomas, 161 N.C. App. 680, 589 S.E.2d 419, 2003 N.C. App. LEXIS 2271 (2003).

§ 55A-14-31. Procedure for judicial dissolution.

(a) Venue for a proceeding to dissolve a corporation lies in the county where a corporation's principal office, or, if there is none in this State, its registered office, is or was last located.

(b) It is not necessary to make directors or members parties to a proceeding to dissolve a corporation unless relief is sought against them individually.

(c) A court in a proceeding brought to dissolve a corporation may issue injunctions, appoint a receiver with all powers and duties the court directs, take other action required to preserve the corporate assets wherever located, and carry on the activities of the corporation. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 42; 1993, c. 398, s. 1.)

§ 55A-14-32. Receivership.

(a) A court in a judicial proceeding brought to dissolve a corporation may appoint one or more receivers to wind up and liquidate, or to manage, the affairs of the corporation. The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver. The court appointing a receiver has exclusive jurisdiction over the corporation and all of its property wherever located.

(b) The court may appoint an individual or a domestic or foreign business or nonprofit corporation (authorized to transact business in this State) as a receiver. The court may require the receiver to post bond, with or without sureties, in an amount the court directs.

(c) The court shall describe the powers and duties of the receiver in its appointing order, which may be amended from time to time. Such powers may include without limitation the power:

(1) To dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court;
(2) To sue and defend in his own name as receiver of the corporation in all courts of this State; and
(3) To exercise all of the powers of the corporation, through or in place of its board of directors or officers, to the extent necessary to manage the affairs of the corporation in the best interests of its members and creditors.

(d) The court from time to time during the receivership may order compensation paid and expense disbursements or reimbursements made to the receiver and his counsel from the assets of the corporation or proceeds from the sale of the assets. (1955, c. 1230; 1993, c. 398, s. 1.)

§ 55A-14-33. Decree of dissolution.

(a) If, after a hearing, the court determines that one or more grounds for judicial dissolution described in G.S. 55A-14-30 exist, it may enter a decree dissolving the corporation and specifying the effective date of the dissolution, and the clerk of the court shall deliver a certified copy of the decree to the Secretary of State, who shall file it.

(b) After entering the decree of dissolution, the court shall direct the winding up and liquidation of the corporation's affairs in accordance with G.S. 55A-14-06 and the notification of its claimants in accordance with G.S. 55A-14-07 and G.S. 55A-14-08. The corporation's name becomes available for use by another entity as provided in G.S. 55D-21. (1955, c. 1230; 1967, c. 823, s. 23; 1985 (Reg. Sess., 1986), c. 801, s. 42; 1993, c. 398, s. 1; 2001-358, s. 24; 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§§ 55A-14-34 through 55A-14-39: Reserved for future codification purposes.

Part 4. Miscellaneous.

§ 55A-14-40. Disposition of amounts due to unavailable members and creditors.

Upon liquidation of a corporation, the portion of the assets distributable to a creditor or member who is unknown or cannot be found shall be disposed of in accordance with Chapter 116B of the General Statutes. (1955, c. 1230; 1981, c. 682, s. 13; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section does not bring forward the special procedures in former G.S. 55A-57 under which assets distributable to a creditor or a member who is unknown or cannot be found were deposited with the clerk of superior court for a period of three months, after which he was directed to pay such assets to the Escheat Fund.

ARTICLE 14A.

Reorganization.

§ 55A-14A-01. Fundamental changes in reorganization proceedings.

(a) Whenever a plan of reorganization of a corporation is confirmed by decree or order of a court of competent jurisdiction in proceedings for the reorganization of the corporation pursuant to the provisions of any applicable statute of the United States relating to reorganization of corporations, the corporation may put into effect and carry out the plan and the decrees and orders of the court relative thereto and may take any action provided in the plan or directed by the decrees and orders without further action by its directors or members. Such action may be taken, as may be directed by the decrees or orders, by the trustee or trustees of the corporation appointed in the reorganization proceedings, or by designated officers of the corporation, or by a master or other representative appointed by the court, with like effect as if taken by unanimous action of the directors and members of the corporation. In particular and without limiting the generality or effect of the foregoing, the corporation may:

(1) Amend its articles of incorporation or bylaws, or both, so long as the articles of incorporation and bylaws as amended contain only such provisions as might be lawfully contained therein at the time of making such amendment;

(2) Constitute or reconstitute and classify or reclassify its board of directors, and name, constitute or appoint directors and officers in

place of or in addition to all or any of the directors or officers then in office;

(3) Make any change in its memberships or securities or cancel any or all of its outstanding memberships or securities;

(4) Dissolve and liquidate;

(5) Effect a merger;

(6) Transfer all or part of its assets;

(7) Change its registered office or registered agent, or both;

(8) Authorize the issuance of bonds, debentures, or other obligations of the corporation and fix the terms and conditions thereof.

(b) Any articles of amendment, statement of change of registered office or registered agent, restated articles of incorporation, articles of merger, articles of dissolution, or any other document appropriate to complete any action permitted by this section shall be executed and filed in accordance with the provisions of this Chapter on behalf of the corporation by such person or persons as may be authorized to take such action pursuant to subsection (a) of this section.

(c) This section does not apply after entry of a final decree in the reorganization proceeding even though the court retains jurisdiction of the proceeding for limited purposes unrelated to consummation of the reorganization plan. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section had no counterpart in the prior law.

ARTICLE 15.

Foreign Corporations.

Part 1. Certificate of Authority.

§ 55A-15-01. Authority to conduct affairs required.

(a) A foreign corporation shall not conduct affairs in this State until it obtains a certificate of authority from the Secretary of State.

(b) Without excluding other activities which might not constitute conducting affairs in this State, a foreign corporation shall not be considered to be conducting affairs in this State solely for the purposes of this Chapter, by reason of carrying on in this State any one or more of the following activities:

(1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or affecting the settlement thereof or the settlement of claims or disputes;

(2) Holding meetings of its directors or members or carrying on other activities concerning its internal affairs;

(3) Maintaining bank accounts or borrowing money in this State, with or without security, even if such borrowings are repeated and continuous transactions;

(4) Maintaining offices or agencies for the transfer, exchange, and registration of memberships or securities, or appointing and maintaining trustees or despositories with relation to those securities;

(5) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where the orders require acceptance without this State before becoming binding contracts;

(6) Making or investing in loans with or without security including servicing of mortgages or deeds of trust through independent agencies within the State, the conducting of foreclosure proceedings and sale, the acquiring of property at foreclosure sale, and the management and rental of such property for a reasonable time while liquidating its investment, provided no office or agency therefor is maintained in this State;
(7) Taking security for or collecting debts due to it or enforcing any rights in property securing the same;
(8) Conducting affairs in interstate commerce;
(9) Conducting an isolated transaction completed within a period of six months and not in the course of a number of repeated transactions of like nature;
(10) Selling through independent contractors;
(11) Owning, without more, real or personal property. (1955, c. 1230; 1993, c. 398, s. 1.)

§ 55A-15-02. Consequences of conducting affairs without authority.

(a) No foreign corporation conducting affairs in this State without permission obtained through a certificate of authority under this Chapter or through domestication under prior acts shall be permitted to maintain any action or proceeding in any court of this State unless the foreign corporation has obtained a certificate of authority prior to trial.

An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial.

(b) A foreign corporation failing to obtain a certificate of authority as required by this Chapter or by prior acts then applicable shall be liable to the State for the years or parts thereof during which it conducted affairs in this State without a certificate of authority in an amount equal to all fees and taxes which would have been imposed by law upon the corporation had it duly applied for and received such permission, plus interest and all penalties imposed by law for failure to pay such fees and taxes. In addition, the foreign corporation shall be liable for a civil penalty of ten dollars ($10.00) for each day, but not to exceed a total of one thousand dollars ($1,000) for each year or part thereof, it conducts affairs in this State without a certificate of authority. The Attorney General may bring actions to recover all amounts due the State under the provisions of this subsection. The clear proceeds of civil penalties provided for in this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(c) Notwithstanding subsection (a) of this section, the failure of a foreign corporation to obtain a certificate of authority does not impair the validity of its corporate acts or prevent it from defending any proceeding in this State.

(d) The Secretary of State is hereby directed to require that every foreign corporation conducting affairs in this State comply with the provisions of this Chapter. The Secretary of State is authorized to employ such assistants as shall be deemed necessary in the Secretary of State's office for the purpose of enforcing the provisions of this Article and for making such investigations as shall be necessary to ascertain foreign corporations now conducting affairs in this State which may have failed to comply with the provisions of this Chapter. (1955, c. 1230; 1993, c. 398, s. 1; 1998-215, s. 118; 1999-151, s. 2.)

NORTH CAROLINA COMMENTARY

This section adopts the scheme of cumulative penalties ($10.00 per day up to $1,000 per year) for failure to qualify instead of the one-time $500 penalty under former G.S. 55A-76.

§ 55A-15-03. Application for certificate of authority.

(a) A foreign corporation may apply for a certificate of authority to conduct affairs in this State by delivering an application to the Secretary of State for filing. The application shall set forth:

(1) The name of the foreign corporation or, if its name is unavailable for use in this State, a corporate name that satisfies the requirements of Article 3 of Chapter 55D of the General Statutes;
(2) The name of the state or country under whose law it is incorporated;
(3) Its date of incorporation and period of duration;
(4) The street address, and mailing address if different from the street address, of its principal office;
(5) The street address, and the mailing address if different from the street address, of its registered office in this State, the county in which the registered office is located, and the name of its registered agent at that office;
(6) The names and usual business addresses of its current officers; and
(7) Whether it has members.

(b) The foreign corporation shall deliver with the completed application a certificate of existence (or a document of similar import) duly authenticated by the Secretary of State or other official having custody of corporate records in the state or country under whose law it is incorporated.

(c) If the Secretary of State finds that the application conforms to law, the Secretary of State shall when all fees have been tended as prescribed in this Chapter:

(1) Endorse on the application and an exact or conformed copy thereof the word “filed” and the hour, day, month, and year of the filing thereof;
(2) File in the Secretary of State’s office the application and the certificate of existence (or document of similar import as described in subsection (b) of this section);
(3) Issue a certificate of authority to conduct affairs in this State to which the Secretary of State shall affix the exact or conformed copy of the application; and
(4) Send to the foreign corporation or its representative the certificate of authority, together with the exact or conformed copy of the application affixed thereto. (1955, c. 1230; 1957, c. 979, s. 14; 1969, c. 875, s. 8; 1993, c. 398, s. 1; 2001-358, s. 21; 2001-387, ss. 169(b), 173, 175(a); 2001-413, s. 6.)

NORTH CAROLINA COMMENTARY

This Act does not bring forward the requirement of former G.S. 55A-61(6) that a foreign corporation include in its application the purposes it desires to pursue in this State. In addition, the application under this Act is submitted with a certificate of existence or good standing rather than the certified charter documents required under former G.S. 55A-62.

Editor’s Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 55A-15-04. Amended certificate of authority.

(a) A foreign corporation authorized to conduct affairs in this State shall obtain an amended certificate of authority from the Secretary of State if it changes:

(1) Its corporate name;
(2) The period of its duration; or
(3) The state or country of its incorporation.

(b) A foreign corporation may apply for an amended certificate of authority by delivering an application to the Secretary of State for filing that sets forth:

(1) The name of the foreign corporation and the name in which the corporation is authorized to conduct affairs in North Carolina if different;
(2) The name of the state or country under whose law it is incorporated;
(3) The date it was originally authorized to conduct affairs in this State; and
(4) A statement of the change or changes being made.

Except for the content of the application, the requirements of G.S. 55A-15-03 for obtaining an original certificate of authority apply to obtaining an amended certificate under this section. (1955, c. 1230; 1993, c. 398, s. 1.)

§ 55A-15-05. Effect of certificate of authority.

(a) A certificate of authority authorizes the foreign corporation to which it is issued to conduct affairs in this State subject, however, to the right of the State to revoke the certificate as provided in this Chapter. A foreign corporation, however, is not eligible or entitled to qualify in this State as executor, administrator, or guardian, or as trustee under the will of any person domiciled in this State at the time of his death.

(b) Except as otherwise provided by this Chapter, a foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character. (1955, c. 1230; 1993, c. 398, s. 1.)

§ 55A-15-06: Repealed by Session Laws 2001-358, s. 22, effective January 1, 2002.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which repealed this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the repeal of this section by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§ 55A-15-07. Registered office and registered agent of foreign corporation.

Each foreign corporation authorized to conduct affairs in this State must maintain a registered office and registered agent as required by Article 4 of

Chapter 55D of the General Statutes and is subject to service on the Secretary of State under that Article. (1955, c. 1230; 1993, c. 398, s. 1; 2000-140, s. 101(e); 2001-358, s. 48(b); 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§§ 55A-15-08 through 55A-15-10: Repealed by Session Laws 2001-358, s. 48(c), effective January 1, 2002.

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which repealed these sections, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the repeal of these sections by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§§ 55A-15-11 through 55A-15-19: Reserved for future codification purposes.

Part 2. Withdrawal.

§ 55A-15-20. Withdrawal of foreign corporation.

(a) A foreign corporation authorized to conduct affairs in this State shall not withdraw from this State until it obtains a certificate of withdrawal from the Secretary of State.

(b) A foreign corporation authorized to conduct affairs in this State may apply for a certificate of withdrawal by delivering an application to the Secretary of State for filing. The application shall set forth:

(1) The name of the foreign corporation and the name of the state or country under whose law it is incorporated;

(2) That it is not conducting affairs in this State and that it surrenders its authority to conduct affairs in this State;

(3) That the corporation revokes the authority of its registered agent to accept service of process and consents that service of process in any action or proceeding based upon any cause of action arising in this State, or arising out of affairs conducted in this State, during the time the corporation was authorized to conduct affairs in this State may thereafter be made on such corporation by service thereof on the Secretary of State;

(4) A mailing address to which the Secretary of State may mail a copy of any process served on the Secretary of State under subdivision (3) of this subsection; and

(5) A commitment to file with the Secretary of State a statement of any subsequent change in its mailing address.

(c) If the Secretary of State finds that the application conforms to law, the Secretary of State shall:

(1) Endorse on the application and an exact or conformed copy thereof the word "filed", and the hour, day, month, and year of the filing thereof;
(2) File the application in the Secretary of State's office;
(3) Issue a certificate of withdrawal to which the Secretary of State shall affix the exact or conformed copy of the application; and
(4) Send to the foreign corporation or its representative the certificate of withdrawal together with the exact or conformed copy of the application affixed thereto.

(d) After the withdrawal of the foreign corporation is effective, service of process on the Secretary of State in accordance with subsection (b) of this section shall be made by delivering to and leaving with the Secretary of State, or any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process and the fee required by G.S. 55A-1-22(b). Upon receipt of process in the manner provided in this subsection, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the foreign corporation at the mailing address designated pursuant to subsection (b) of this section. (1955, c. 1230; 1973, c. 476, s. 193; 1993, c. 398, s. 1; 1995, c. 400, s. 9; 2001-387, ss. 44, 45.)

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§ 55A-15-21. Withdrawal of foreign corporation by reason of a merger, consolidation, or conversion.

(a) Whenever a foreign corporation authorized to conduct affairs in this State ceases its separate existence as a result of a statutory merger or consolidation permitted by the laws of the state or country under which it was incorporated, or converts into another entity as permitted by those laws, the surviving or resulting entity shall apply for a certificate of withdrawal for the foreign corporation by delivering to the Secretary of State for filing a copy of the articles of merger, consolidation, or conversion or a certificate reciting the facts of the merger, consolidation, or conversion duly authenticated by the secretary of state or other official having custody of corporate records in the state or country under the laws of which the foreign corporation was incorporated. If the surviving or resulting entity is not authorized to conduct affairs or transact business in this State, the articles or certificate shall be accompanied by an application which must set forth:
(1) The name of the foreign corporation authorized to conduct affairs in this State, the type of entity and the name of the surviving or resulting entity, and a statement that the surviving or resulting entity is not authorized to conduct affairs or transact business in this State;
(2) A statement that the surviving or resulting entity consents that service of process based upon any cause of action arising in this State, or arising out of affairs conducted in this State, during the time the foreign corporation was authorized to conduct affairs in this State may thereafter be made by service thereof on the Secretary of State;
(3) A mailing address to which the Secretary of State may mail a copy of any process served on the Secretary of State under subdivision (a)(2) of this section; and
(4) A commitment to file with the Secretary of State a statement of any subsequent change in its mailing address.

(b) If the Secretary of State finds that the articles or certificate and the application for withdrawal, if required, conform to law the Secretary of State shall:

(1) Endorse on the articles or certificate and the application for withdrawal, if required, the word "filed", and the hour, day, month, and year of filing thereof;
(2) File the articles or certificate and the application, if required;
(3) Issue a certificate of withdrawal; and
(4) Send to the surviving or resulting entity or its representative the certificate of withdrawal, together with the exact or conformed copy of the application, if required, affixed thereto.

(c) After the withdrawal of the foreign corporation is effective, service of process on the Secretary of State in accordance with subsection (a) of this section shall be made by delivering to and leaving with the Secretary of State, or any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process and the fee required by G.S. 55A-1-22(b). Upon receipt of process in the manner provided in this subsection, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the foreign corporation at the mailing address designated pursuant to subsection (a) of this section. (1993, c. 398, s. 1; 1999-369, s. 2.8; 2001-387, ss. 46, 47; 2001-487, s. 62(g).)

Editor's Note. — Session Laws 2001-387, s. 154(b) provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

§§ 55A-15-22 through 55A-15-29: Reserved for future codification purposes.

Part 3. Revocation of Certificate of Authority.

§ 55A-15-30. Grounds for revocation.

(a) The Secretary of State may commence a proceeding under G.S. 55A-15-31 to revoke the certificate of authority of a foreign corporation authorized to conduct affairs in this State if:
(1) Repealed by Session Laws 1995, c. 539, s. 28.
(2) The foreign corporation does not pay within 60 days after they are due any penalties, fees, or other payments due under this Chapter;
(3) The foreign corporation is without a registered agent or registered office in this State for 60 days or more;
(4) The foreign corporation does not inform the Secretary of State under G.S. 55D-31 or G.S. 55D-32 that its registered agent or registered office has changed, that its registered agent has resigned, or that its registered office has been discontinued within 60 days of the change, resignation, or discontinuance;
(5) An incorporator, director, officer, or agent of the foreign corporation signs a document he knew was false in any material respect with intent that the document be delivered to the Secretary of State for filing;
(6) The Secretary of State receives a duly authenticated certificate from the secretary of state or other official having custody of corporate records in the state or country under whose law the foreign corporation is incorporated stating that it has been dissolved or disappeared as the result of a merger;
(7) The corporation is exceeding the authority conferred upon it by this Chapter; or

(8) The corporation knowingly fails or refuses to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter.

(b) Nothing herein shall be deemed to repeal or modify any provision of the Revenue Act relating to the suspension of the certificate of authority of foreign corporations for failure to comply with the provisions thereof. (1955, c. 1230; 1993, c. 398, s. 1; 1995, c. 509, s. 32; c. 539, s. 28; 2001-358, s. 48(f); 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§ 55A-15-31. Procedure and effect of revocation.

(a) If the Secretary of State determines that one or more grounds exist under G.S. 55A-15-30 for revocation of a certificate of authority, the Secretary of State shall mail to the foreign corporation written notice of the Secretary of State's determination.

(b) If the foreign corporation does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within 60 days after notice is mailed, the Secretary of State may revoke the foreign corporation's certificate of authority by signing a certificate of revocation that recites the ground or grounds for revocation and its effective date. The Secretary of State shall file the original of the certificate and mail a copy to the foreign corporation.

(c) The authority of a foreign corporation to conduct affairs in this State ceases on the date shown on the certificate revoking its certificate of authority.

(d) The Secretary of State's revocation of a foreign corporation's certificate of authority appoints the Secretary of State the foreign corporation's agent for service of process in any proceeding based on a cause of action arising in this State or arising out of affairs conducted in this State during the time the foreign corporation was authorized to conduct affairs in this State. The Secretary of State shall then proceed in accordance with G.S. 55D-33.

(e) Revocation of a foreign corporation's certificate of authority does not terminate the authority of the registered agent of the corporation.

(f) The corporation shall not be granted a new certificate of authority until each ground for revocation has been substantially corrected to the reasonable satisfaction of the Secretary of State. (1955, c. 1230; 1993, c. 398, s. 1; 1995, c. 400, s. 10; 2001-358, s. 48(g); 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§ 55A-15-32. Appeal from revocation.

(a) A foreign corporation may appeal the Secretary of State's revocation of its certificate of authority to the Superior Court of Wake County within 30 days after service of the certificate of revocation is mailed. The appeal is commenced by filing a petition with the court and with the Secretary of State requesting the court to set aside the revocation. The petition shall have attached to it copies of the corporation's certificate of authority and the Secretary of State's certificate of revocation. No service of process on the Secretary of State is required except for the filing of the petition as set forth in this subsection. The appeal to the superior court shall be determined by a judge of the superior court upon such further evidence, notice, and opportunity to be heard, if any, as the court may deem appropriate under the circumstances. The foreign corporation shall have the burden of establishing that it is entitled to have the revocation set aside.

(b) Upon consideration of the petition and any response made by the Secretary of State, the court may, prior to entering final judgment, order the Secretary of State to set aside the revocation or may take any other action the court considers appropriate.

(c) The court's final decision may be appealed as in other civil proceedings. (1993, c. 398, s. 1; c. 553, s. 83(b); 2001-358, s. 5A(d); 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which amended this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

§ 55A-15-33. Inapplicability of Administrative Procedure Act.

The Administrative Procedure Act shall not apply to any proceeding or appeal provided for in G.S. 55A-15-30 through G.S. 55A-15-32. (1995, c. 400, s. 11.)

ARTICLE 16.

Records and Reports.

Part 1. Records.

§ 55A-16-01. Corporate records.

(a) A corporation shall keep as permanent records minutes of all meetings of its members and board of directors, a record of all actions taken by the members or directors without a meeting pursuant to G.S. 55A-7-04, 55A-7-08, or 55A-8-21, and a record of all actions taken by committees of the board of directors in place of the board of directors on behalf of the corporation.

(b) A corporation shall maintain appropriate accounting records.

(c) A corporation or its agent shall maintain a record of its members, in a form that permits preparation of a list of the names and addresses of all members, in alphabetical order by class, showing the number of votes each member is entitled to cast.

(d) A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

(e) A corporation shall keep a copy of the following records at its principal office:

(1) Its articles of incorporation or restated articles of incorporation and all amendments to them currently in effect;
(2) Its bylaws or restated bylaws and all amendments to them currently in effect;
(3) Resolutions adopted by its members or board of directors relating to the number or classification of directors or to the characteristics, qualifications, rights, limitations, and obligations of members or any class or category of members;
(4) The minutes of all membership meetings, and records of all actions taken by the members without a meeting pursuant to G.S. 55A-7-04 or G.S. 55A-7-08, for the past three years;
(5) All written communications to members generally within the past three years, and the financial statements, if any, that have been furnished or would have been required to be furnished to a member upon demand under G.S. 55A-16-20 during the past three years;
(6) A list of the names and business or home addresses of its current directors and officers; and
(7) Repealed by Session Laws 1995, c. 539, s. 29, effective July 29, 1995.
(1955, c. 1230; 1969, c. 875, s. 6; 1985 (Reg. Sess., 1986), c. 801, s. 31; 1993, c. 398, s. 1; 1995, c. 539, s. 29.)

Legal Periodicals. — For survey of 1973 case law on the admissibility of computer printouts, see 52 N.C.L. Rev. 903 (1974).

For article "Toward a Codification of the Law of Evidence in North Carolina", see 16 Wake Forest L. Rev. 669 (1980).

For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

CASE NOTES

Editor's Note. — *The cases below were decided under the Nonprofit Corporation Act adopted in 1955.*

Purpose of Section. — This section was designed to give broad legislative approval to the use in evidence of corporate computer records. However, in declaring such computer records admissible in evidence it does not deal with the special problems of reliability created by the use of computers. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Section authorizes admission of corporate computer records under appropriate safeguards deemed sufficient to render them trustworthy. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

But Does Not Preclude Judicial Development of Standards for Admission. — This section does not, and was not designed to, preclude judicial development of workable standards for the admission of computerized business records generally. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Conditions Under Which Printouts Are Admissible. — Printout cards or sheets of business records stored on electronic computing equipment are admissible in evidence, if otherwise relevant and material, if: (1) The computerized entries were made in the regular course of business, (2) the entries were made at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973); State v. Stapleton, 29 N.C. App. 363, 224 S.E.2d 204, appeal dismissed, 290 N.C. 554, 226 S.E.2d 513 (1976).

Computer printout evidence may be refuted to the same extent as business records made in books of account. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Testimony as to contents of computer printout is inadmissible under the best evidence rule. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Failure to Lay Foundation for Admission. — Computer printout referred to in oral testimony is inadmissible where no foundation is laid for its admission and the printout itself is not offered in evidence. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

§ 55A-16-02. Inspection of records by members.

(a) A member is entitled to inspect and copy, at a reasonable time and location specified by the corporation, any of the records of the corporation described in G.S. 55A-16-01(e) if the member gives the corporation written notice of his demand at least five business days before the date on which the member wishes to inspect and copy.

(b) A member is entitled to inspect and copy, at a reasonable time and reasonable location specified by the corporation, any of the following records of the corporation if the member meets the requirements of subsection (c) of this section and gives the corporation written notice of his demand at least five business days before the date on which the member wishes to inspect and copy:

(1) Excerpts from any records required to be maintained under G.S. 55A-16-01(a), to the extent not subject to inspection under G.S. 55A-16-02(a);
(2) Accounting records of the corporation; and
(3) Subject to G.S. 55A-16-05, the membership list.

(c) A member may inspect and copy the records identified in subsection (b) of this section only if:

(1) The member's demand is made in good faith and for a proper purpose;
(2) The member describes with reasonable particularity the purpose and the records the member desires to inspect; and
(3) The records are directly connected with this purpose.

(d) This section does not affect:

(1) The right of a member to inspect records under G.S. 55A-7-20 or, if the member is in litigation with the corporation, to inspect the records to the same extent as any other litigant; or
(2) The power of a court, independently of this Chapter, to compel the production of corporate records for examination.

(e) A member of a corporation that has the power to elect, appoint, or designate a majority of the directors of another domestic or foreign corporation, whether nonprofit or business, shall have inspection rights with respect to the records of that other corporation. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 31; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

In certain respects, the inspection rights provided by this section are more limited than those set forth in former G.S. 55A-27, which provided inspection rights with respect to "all books and records." However, unlike prior law, inspection rights are now granted with respect to the records of subsidiary corporations. For certain records, subsection (c) imposes conditions other than a "proper purpose," which was the only requirement under the prior law.

Legal Periodicals. — For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

CASE NOTES

Applied in Peninsula Prop. Owners Ass'n v. Crescent Res., LLC, 171 N.C. App. 89, 614 S.E.2d 351, 2005 N.C. App. LEXIS 1165 (2005).

§ 55A-16-03. Scope of inspection rights.

(a) A member's agent or attorney has the same inspection and copying rights as the member the agent or attorney represents.

(b) The right to copy records under G.S. 55A-16-02 includes, if reasonable, the right to receive copies made by photographic, xerographic, electronic, magnetic, or other means.

(c) The corporation may impose a reasonable charge, covering the costs of labor and material, for producing for inspection or copying any records provided to the member. The charge shall not exceed the estimated cost of production or reproduction of the records.

(d) The corporation may comply with a member's demand to inspect the record of members under G.S. 55A-16-02(b)(3) by providing the member with a list of its members that was compiled no earlier than the date of the member's demand. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 31; 1993, c. 398, s. 1.)

Legal Periodicals. — For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

§ 55A-16-04. Court-ordered inspection.

(a) If a corporation does not allow a member who complies with G.S. 55A-16-02(a) to inspect and copy any records required by that subsection to be available for inspection, the superior court in the county where the corporation's principal office (or, if there is none in this State, its registered office) is located may, upon application of the member, summarily order inspection and copying of the records demanded at the corporation's expense.

(b) If a corporation does not within a reasonable time allow a member to inspect and copy any other record, the member who complies with G.S. 55A-16-02(b) and (c) may apply to the superior court in the county where the corporation's principal office (or, if there is none in this State, its registered office) is located for an order to permit inspection and copying of the records demanded. The court shall dispose of an application under this subsection on an expedited basis.

(c) If the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the member's cost (including reasonable attorneys' fees) incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the member to inspect the records demanded.

(d) If the court orders inspection and copying of the records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding member. (1993, c. 398, s. 1.)

§ 55A-16-05. Limitations on use of membership list.

Without consent of the board of directors, a membership list or any part thereof shall not be obtained or used by any person for any purpose unrelated to a member's interest as a member. Without limiting the generality of the foregoing, and without the consent of the board, a membership list or any part thereof shall not be:

(1) Used to solicit money or property unless such money or property will be used solely to solicit the votes of the members in an election to be held by the corporation;
(2) Used for any commercial purpose; or
(3) Sold to or purchased by any person. (1993, c. 398, s. 1; 1995, c. 509, s. 33.)

NORTH CAROLINA COMMENTARY

This section had no counterpart in the prior law and was adapted from the Model Act.

§§ 55A-16-06 through 55A-16-19: Reserved for future codification purposes.

Part 2. Reports.

§ 55A-16-20. Financial statements for members.

(a) Except as provided in the articles of incorporation or bylaws of a charitable or religious corporation, a corporation upon written demand from a member shall furnish that member its latest annual financial statements, if any, which may be consolidated or combined statements of the corporation and one or more of its subsidiaries or affiliates, as appropriate, that include a balance sheet as of the end of the fiscal year and statement of operations for that year. If financial statements are prepared for the corporation on the basis of generally accepted accounting principles, the annual financial statements shall also be prepared on that basis.

(b) If annual financial statements are reported upon by a public accountant, the accountant's report shall accompany them. If not, the statements must be accompanied by the statement of the president or the person responsible for the corporation's financial accounting records:

(1) Stating the president's or other person's reasonable belief as to whether the statements were prepared on the basis of generally accepted accounting principles and, if not, describing the basis of preparation; and

(2) Describing any respects in which the statements were not prepared on a basis of accounting consistent with the statements prepared for the preceding year. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

A nonprofit corporation is not required to have financial statements but, if it elects to have them, subsection [subdivision] (e)(5) generally requires them to be kept at the principal office and G.S. 55A-16-02(a) makes them available for inspection by members. However, in addition to its general right not to have any financial statements at all, a charitable or religious corporation may provide in its articles of incorporation or bylaws that it will not furnish financial statements to its members. In that case, members will not have inspection rights with respect to the financial statements. See G.S. 55A-16-01(e)(5) and G.S. 55A-16-02(a).

§ 55A-16-21. Notice of indemnification to members.

If a corporation indemnifies or advances expenses to a director under G.S. 55A-8-51, 55A-8-52, 55A-8-53, 55A-8-54, or 55A-8-57 in connection with a proceeding by or in the right of the corporation, the corporation shall give notice of the indemnification or advance in writing to the members with or before the notice of the next meeting of members. (1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section had no counterpart in the prior law.

§ 55A-16-22: Repealed by Session Laws 1995, c. 539, s. 8.

§ 55A-16-23. Principal office address.

(a) Any corporation that does not designate the street address and the mailing address, if different from the street address, of the corporation's principal office and the county of location in an annual report or its articles of incorporation shall file a Designation of Principal Office Address form with the Secretary of State that contains that information.

(b) A corporation may change its principal office by delivering to the Secretary of State for filing a Corporation's Statement of Change of Principal Office form that sets forth:

(1) The street address, and the mailing address if different from the street address, of the corporation's current principal office and the county in which it is located; and

(2) The street address, and the mailing address if different from the street address, of the new principal office and the county in which it is located. (1995, c. 539, s. 21; 2001-358, s. 48(d); 2001-387, ss. 173, 175(a); 2001-413, s. 6.)

Editor's Note. — Session Laws 2001-358, s. 53, provided that the act, which recodified G.S. 55A-5-02.1 as this section, was effective October 1, 2001, and applicable to documents submitted for filing on or after that date. Section 173 of Session Laws 2001-387 changed the effective date of Session Laws 2001-358 from October 1, 2001, to January 1, 2002. Section 6 of Session Laws 2001-413, effective September 14, 2001, added a sentence to s. 175(a) of Session Laws 2001-387, making s. 173 of that act effective when it became law (August 26, 2001). As a result of these changes, the amendment by Session Laws 2001-358 is effective January 1, 2002, and applicable to documents submitted for filing on or after that date.

ARTICLE 17.

Transition and Curative Provisions.

§ 55A-17-01. Applicability of Chapter.

(a) The provisions of this Chapter relating to domestic corporations shall apply to:

(1) All corporations heretofore or hereafter organized under this Chapter.

(2) All nonprofit corporations without capital stock heretofore or hereafter organized under any other act, unless there is some other specific statutory provision particularly applicable to such corporations or inconsistent with some provisions of this Chapter, in which case that other provision prevails. Nothing herein shall apply to hospital and medical service corporations as defined in Article 65 of Chapter 58 of the General Statutes which were incorporated prior to July 1, 1957, or repeal or modify the provisions of G.S. 54-138.

(b) The provisions of this Chapter relating to foreign corporations shall apply to all corporations conducting affairs in this State for purposes for which a corporation might be organized under this Chapter. A foreign corporation authorized to conduct affairs in this State on July 1, 1994, is subject to this Chapter but is not required to obtain a new certificate of authority to conduct affairs under this Chapter. (1955, c. 1230; 1967, c. 659; 1991, c. 720, s. 76; 1993, c. 398, s. 1; 1995, c. 400, s. 12.)

§ 55A-17-02. Certain religious, etc., associations deemed incorporated.

In all cases where a religious, educational, or charitable association has been formed prior to January 1, 1894, and has since that date been acting as a corporation, exercising the powers and performing the duties of religious, educational, or charitable corporations as prescribed by the laws of this State, then such association shall be conclusively presumed to have been duly and regularly organized and existing as a corporation under the laws of this State on January 1, 1894, and all of its acts as a corporation from and after said date, if otherwise valid, are hereby declared to be valid corporate acts. (1955, c. 1230; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section brings forward former G.S. 55A-88.

§ 55A-17-03. Saving provisions.

(a) The existence of corporations formed before the effective date of this Chapter, shall not be impaired by the enactment of this Chapter nor by any change made by this Chapter in the requirements for the formation of corporations nor by any amendment or repeal by this Chapter of the laws under which they were formed or created, and, except as otherwise expressly provided in this Chapter, the repeal of a prior act by this Chapter shall not affect any liability or penalty incurred, under the provisions of such act, prior to the repeal thereof.

(b) Any proceeding or corporate action commenced prior to the effective date of this Chapter, may be completed in accordance with the law then in effect. (1993, c. 398, s. 1.)

§ 55A-17-04. Severability.

If any provision of this Chapter or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions or applications of the Chapter that can be given effect without the invalid provision or application, and to this end the provisions of the Chapter are severable. (1993, c. 398, s. 1.)

§ 55A-17-05. Validation of amendments to corporate charters extending corporate existence; limitation of actions; intent.

(a) In every case where a corporation chartered under either the general or private laws of the State of North Carolina has continued or shall continue to act and conduct affairs as a corporation after the expiration of its period of existence as theretofore fixed in its charter and has thereafter filed in the office of the Secretary of State an amendment to its charter to extend or renew its corporate existence, such amendment is hereby validated and made effective for all intents and purposes to the same extent and with the same effect as if the amendment has been made within the period of such corporation's existence as theretofore fixed in its charter.

(b) No action or proceeding shall be brought or defense or counterclaim pleaded later than July 1, 1958, in which either the continued existence of the corporation or the validity of any of the contracts, acts, deeds, rights, privileges, powers, franchises, and titles of the corporation is attacked or otherwise questioned on the grounds that the amendment was not filed within the period of the corporation's existence as theretofore fixed in its charter.

(c) In no event shall the limitation provided in subsection (b) of this section bar any action, proceeding, defense, or counterclaim based upon grounds other than those mentioned in subsection (b) of this section, unless the grounds set out in subsection (b) of this section are an essential part thereof. (1957, c. 509; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section brings forward former G.S. 55A-89.1.

then such association shall be conclusively presumed to have been regularly organized and existing as a corporation under the laws of this State on January 1, 1954, and [illegible] on and after said date, if otherwise valid, are hereby declared to be valid corporate acts. (1955, c. 1230; 1993, c. 398, s. 1.)

NORTH CAROLINA COMMENTARY

This section brings forward former G.S. 55A-96.

§ 55A-17-03. Saving provisions.

(a) The existence of corporations formed before the effective date of this Chapter shall not be impaired by the enactment of this Chapter nor by any change made by this Chapter in the requirements for the formation of corporations nor by any amendment or repeal by this Chapter of the laws under which they were formed or created, and, except as otherwise expressly provided in this Chapter, the repeal of a prior act by this Chapter shall not affect any liability or penalty incurred under the provisions of such act, prior to the repeal thereof.

(b) Any proceeding or corporate action commenced prior to the effective date of this Chapter may be completed in accordance with the law then in effect. (1993, c. 398, s. 1.)

§ 55A-17-04. Severability.

If any provision of this Chapter or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions or applications of the Chapter that can be given effect without the invalid provision or application, and to this end the provisions of the Chapter are severable. (1993, c. 398, s. 1.)

§ 55A-17-05. Validation of amendments to corporate charters extending corporate existence; limitation of actions; intent.

(a) In every case where a corporation chartered under either the general or private laws of the State of North Carolina has continued or shall continue to act and conduct affairs as a corporation after the expiration of its period of existence as theretofore fixed in its charter and has thereafter filed in the office of the Secretary of State an amendment to its charter to extend or renew its corporate existence, such amendment is hereby validated and made effective for all intents and purposes to the same extent and with the same effect as if the amendment had been made within the period of such corporation's existence as theretofore fixed in its charter.

(b) No action or proceeding shall be brought or defense or counterclaim pleaded later than July 1, 1958, in which either the continued existence of the corporation or the validity of any of the contracts, acts, deeds, rights,

TABLES OF COMPARABLE SECTIONS FOR CHAPTER 55A

Former to Present

Editor's Note. — The following table shows G.S. sections from former Chapter 55A and their comparable, new Chapter 55A numbers. Where there is no comparable, new number, the term "None" has been inserted.

Former Section	Present Section
55A-1	55A-1-01
55A-2	55A-1-40
55A-3	55A-17-01
55A-4(a)	55A-1-20, 55A-1-25
55A-4(b)	55A-1-23
55A-5	55A-3-01
55A-6	55A-2-01
55A-7	55A-2-02
55A-8	55A-2-03
55A-8.1	55A-3-05
55A-9	55A-2-05
55A-10	55A-4-01, 55A-4-02, 55A-4-03, 55A-4-04
55A-11	55A-5-01
55A-12	55A-5-02, 55A-5-03
55A-13	55A-5-04
55A-14	55A-2-06, 55A-6-20, 55A-6-31, 55A-10-20, 55A-10-21
55A-15	55A-1-50, 55A-3-02
55A-16	55A-3-06
55A-17	55A-3-04
55A-17.1	55A-8-51 55A-8-53, 55A-8-57
55A-17.2	55A-8-51, 55A-8-52, 55A-8-54, 55A-8-55, 55A-8-56
55A-17.3	55A-8-52, 55A-8-54
55A-18	55A-8-32
55A-19	55A-8-01, 55A-8-02
55A-20	55A-7-26, 55A-8-03, 55A-8-04, 55A-8-05, 55A-8-06, 55A-8-08, 55A-8-09,

Former Section	Present Section
55A-21	55A-8-11
55A-22	55A-8-24
55A-23	55A-8-25
55A-24	55A-8-20, 55A-8-22, 55A-8-23
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55A-24.3	None
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55A-26.2	None
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55A-39	None
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55A-41	55A-11-04
55A-42	55A-11-05
55A-42.1	55A-11-06
55A-43	55A-12-01, 55A-12-02
55A-44	55A-14-01, 55A-14-02, 55A-14-07, 55A-14-08
55A-44.1	None
55A-45	55A-14-03
55A-46	55A-14-02
55A-47	55A-14-05
55A-48	55A-14-04
55A-49	55A-14-06
55A-50	55A-14-30
55A-51	None
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55A-67	55A-15-10
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55A-69	None
55A-70	None
55A-71	55A-15-04
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55A-86	None
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Editor's Note. — The following table shows G.S. sections of current Chapter 55A and their comparable, former Chapter 55A sections numbers. Where there is no comparable, former Chapter 55A number, the term "None" has been inserted.

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55A-1-25	55A-4(a)(5), 55A-82
55A-1-26	None
55A-1-27	55A-82
55A-1-28(a), (b)	None
55A-1-28(c)	55A-82
55A-1-29	55A-80(b)
55A-1-30	55A-81
55A-1-31	55A-79
55A-1-32	55A-80
55A-1-33	None
55A-1-40	55A-2
55A-1-41	None
55A-1-50	55A-15(c)
55A-1-60	None
55A-2-01	55A-6
55A-2-02	55A-7
55A-2-03	55A-8
55A-2-04	None
55A-2-05	55A-9
55A-2-06	55A-14
55A-2-07	None
55A-3-01	55A-5
55A-3-02	55A-15
55A-3-03	None
55A-3-04	55A-17
55A-3-05	55A-8.1
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55A-4-02	55A-10
55A-4-03	55A-10
55A-4-04	55A-10
55A-4-05	None
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55A-6-24	None
55A-6-30	None

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55A-7-04	55A-33.1
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55A-7-06	55A-85
55A-7-07	None
55A-7-08	55A-32(b)
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55A-7-21	55A-32
55A-7-22	55A-33
55A-7-23	55A-33
55A-7-24	55A-32(b)
55A-7-25	55A-32(c)
55A-7-26	55A-20(c)
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55A-7-30	None
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55A-8-05	55A-20(c)
55A-8-06	55A-20(d)
55A-8-07	None
55A-8-08	55A-20(f)
55A-8-09	55A-20(f)
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55A-10-02	55A-35
55A-10-03	55A-35
55A-10-04	None
55A-10-05	55A-36
55A-10-06	55A-37.1
55A-10-07	55A-37
55A-10-20	55A-14
55A-10-21	55A-14
55A-10-22	None
55A-10-30	None
55A-11-01	55A-38
55A-11-02	None
55A-11-03	55A-40
55A-11-04	55A-41
55A-11-05	55A-42
55A-11-06	55A-42.1
55A-11-07	None
55A-12-01	55A-43
55A-12-02	55A-43
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55A-14-08	55A-44(b)
55A-14-09	55A-28.1(h)
55A-14-20	None
55A-14-21	None
55A-14-22	None
55A-14-23	None
55A-14-24	None
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55A-15-09	None
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55A-15-30	55A-73
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55A-15-32	None
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55A-16-02	55A-27
55A-16-03	55A-27
55A-16-04	None
55A-16-05	None
55A-16-20	None
55A-16-21	None
55A-16-22	None
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